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Dublin in “crisis”

- investigating the Dublin regulation as a crisis management system

LAGM01 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

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Semester of graduation: Period 1, autumn semester 2015

Contents

Summary

During the year 2015 a large degree of attention was cast at the European asylum system, and especially the Dublin regulation, after an unusually large amount of asylum seekers managed to arrive to the EU. The Dublin regulation, which is the instrument that allocates responsibility for asylum seekers across the Member States in the EU, failed to uphold its own criteria and the asylum systems in certain Member State more or less collapsed.

The Dublin regulation was however not originally designed to handle crisis situations, and had instead expressly maintained that it did not have burden sharing as an objective. These objectives were instead supposed to be handled through other means, but as time went on and no such instruments were adopted or used. Instead the Dublin regulation was outfitted with a crisis management mechanism, the Early Warning Mechanism, that was itself a compromise between the Commission and the Council, and aimed at upholding the Dublin system through administrative and economical assistance to pressured Member States. When this was found to not be enough to handle the crisis emerging due to the large amount of arrivals of asylum seekers, the Council adopted an ad hoc decision to relocate a percentage of the asylum seekers across the EU according to a distribution key. This relocation type mechanism is now also proposed to be included in the Dublin regulation.

This thesis aims at examining and critically analyzing the Dublin system's evolution as a crisis management system, and how the crisis management function interplays with the Dublin regulation's original, primary objectives. The thesis main findings are that the Dublin allocation criteria may play a role in creating crisis situations, and that the EU legislators seems to have addressed this by imposing emergency relocation and support packages instead of addressing the systemic issues and root causes.

Sammanfattning

Under år 2015 riktades en hög grad av uppmärksamhet mot det europeiska asylsystemet, och i synnerhet Dublinförordningen, efter att en ovanligt stor mängd asylsökande lyckats nå fram till EU:s gränser. Dublinförordningen, som är det instrument som fördelar ansvaret för asylsökande mellan medlemsstaterna i EU, lyckades inter upprätthålla kriterier och asylsystem i vissa medlemsstater mer eller mindre kollapsade.

Dublinförordningen var dock inte ursprungligen tänkt att hantera krissituationer, och det hade tvärtemot uttryckligen hävdats att en solidarisk fördelning av ansvar inte var ett mål. Dessa mål var istället tänkta att hanteras genom andra instrument, men inga sådana instrument antogs eller användes. Istället blev Dublinförordningen utrustad med en krishanteringsmekanism, Mekanismen för tidig varning (the Early Warning Mechanism), som var en kompromiss mellan kommissionen och rådet, och som syftar till att upprätthålla Dublinsystemet genom administrativt och ekonomiskt stöd till pressade medlemsstater. När detta inte konstaterades vara tillräckligt för att hantera krisen som växte fram på grund av den stora mängden av ankommande asylsökande, antog rådet ett ad hoc-beslut att omfördela en procentandel av de asylsökande från vissa medlemsstater över hela EU enligt en fördelningsnyckel. En liknande omfördelingsmekanism föreslås nu också att inkorporeras i Dublinförordningen.

Denna uppsats syftar till att undersöka och kritiskt analysera Dublinsystemets evolution som ett krishanteringssystem, och hur denna roll samspelar med Dublinförordningens ursprungliga, primära mål. Uppsatsens viktigaste slutsatser är att fördelningskriterierna i Dublinförordningen kan spela en roll i skapandet av krissituationer, och att EU: s lagstiftare verkar ha hanterat kriser genom att införa akut omfördelning av asylsökande och stödpaket i stället för att ta itu med de systemfrågor och de bakomliggande orsaker som orsakat krisen.

Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Court of Human Rights
EU	European Union
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

During the year 2015, the European Union (EU) found itself having to handle a particularly strong debate about refugees, solidarity and legal avenues into the EU. The debate was sparked by unusually large arrivals of asylum seekers entering the Union's borders[1] and the tragic stories of refugees drowning in the Mediterranean while trying to reach the shores of Europe. The discussion was not necessarily a new one, but it reached new proportions and images of people trying to make their way to and through the EU made an impact on the political landscape. The EU legal framework regarding migration and asylum, and especially the Dublin system[2] was now being discussed and criticised outside the academia and the traditional political circuits, as being in crisis.

Alongside the general feeling of mass influx of asylum seekers into the EU was the difficult situation in the union's "frontline" states, especially Italy, Greece and Hungary. In a series of earlier rulings from both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) transfers according to the Dublin regulation were halted to Greece due to horrific conditions in the asylum system[3] and a transfer of a family to Italy was deemed to require specific assurances to not risk violating human rights[4]. In light of these events, it is not hard to see that something had to be done by the EU in order to be able to maintain the so called Common European Asylum System (CEAS) during times of large arrivals of asylum seekers, and in the beginning of 2015 the European Commission (hereafter the Commission) published the European Agenda on

[1] See for example Eurostat News release 10 December 2015, More than 410 000 first time asylum seekers registered in the third quarter of 2015, link: http://ec.europa.eu/eurostat/documents/2995521/7105334/3-10122015-AP-EN.pdf/04886524-58f2-40e9-995d-d97520e62a0e, retrieved 2015-12-19.

[2] The Dublin system is in this thesis used as a collective term for the regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (the Dublin III-regulation) **and** the Regulation (EU) no. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 (the Eurodac-regulation).

[3] Judgment in the joined cases *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865; *Case of M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

[4] *Case of Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014.

Migration[5]. The Agenda proposed mandatory relocation quotas for asylum seekers for the EU member states, both as a provisional emergency solution and as a permanent system to distribute responsibility for asylum seekers in times of unusually large arrivals of asylum seekers into the EU[6]. The provisional relocation quotas were later decided on by the Council[7], and are being implemented during the writing of this thesis.

These relocation quotas were implemented in order to handle the "refugee crisis" in the Member States responsible for the largest number of asylum applications, and to guarantee the functioning and further existence of the Dublin system on which the CEAS as a whole is built upon. Even though the Dublin system has been criticized both for its ineffectiveness and for its lack of solidarity, as will be seen later in the thesis, the EU legislators still consider it the undisputed "cornerstone" of the CEAS. In other words, even though Dublin is criticized for creating uneven burdens among Member States, it is also thought of as the tool to manage any crisis that it may help create.

1.2 Purpose and research question

The purpose of this graduate thesis is to explore the Dublin regulation's role as a crisis management system in times of extraordinary asylum pressure, and to which extent this secondary role interplays with the primary objectives of the regulation. Through an analysis of the Dublin regulation's evolution and the construction of the CEAS crisis management mechanisms, this thesis will offer a critical view of the Dublin regulation's place in the EU asylum system in regards to asylum crisis management.

To help fulfil this purpose I have chosen my main research question to be:

- Does the Dublin III regulation's role as an asylum crisis management system conflict with its primary objectives? If so, how?

In order to help answer this main research question I have also chosen these sub-questions:

- What are the primary objectives for the Dublin III regulation?
- What is the Dublin III regulation's role as an asylum crisis management system and how does it interact with other crisis management mechanisms?

[5] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, COM (2015) 240 final, 13 May 2015.
[6] Agenda on Migration, page 4.
[7] European Council, Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

1.3 Delimitation

This thesis will not present an in-depth analysis of the practical application of the Dublin regulation, nor will it provide a full description of how the different instruments that make up the CEAS are designed and applied. The goal of the thesis is not to in-depth explore the legal construction of crisis management mechanisms, but rather to place them in a larger context and system that is the Dublin system and the CEAS.

1.4 Method and material

This thesis will use a traditional legal method in examining the relevant sources of law and present the law as it is, in order to address a problem or find a conflict. The analysis in the thesis will be contextual and systemic, and aim at presenting the Dublin system's role in a larger system, the CEAS. In order to achieve this I will have to address the history and policy behind the system, while the exact legal application will be explained in a more summarised manner.

The material used will consist mostly of official EU documents, both sources of law such as treaties, regulations and directives, but also preparatory works and policy documents. I will also use academic articles and legal doctrine in order to present arguments to be explored.

1.5 Outline

This thesis will begin with *chapter 2* presenting the Dublin regulation, its history, objectives and evolution and its place within the Common European Asylum System. After that, *chapter 3* will examine the crisis mechanisms present in the Dublin regulation and the CEAS. In *chapter 4*, certain criticism of the Dublin system that is relevant to this thesis purpose will be explored, and after that *chapter 5* will contain the analysis part of the thesis. This part will examine the coherence of the crisis management system in regards to the CEAS as a whole and especially in regards to the Dublin regulation. The last part of the thesis, *chapter 6*, will consist of a conclusion of the findings and recommendations for further research.

1.6 Terminology

The term *asylum application/application for asylum* will in this thesis mean any application for international protection, both applications following the Geneva Convention[8] and subsidiary protection under EU law, unless otherwise stated.

Asylum seeker will in this thesis mean any person filing an asylum application as defined above.

The term *crisis* will be used a lot in this thesis. Exactly what constitutes a crisis is not defined by the EU legislators, but I will use it to describe negative situations emerging from large arrivals of asylum seekers under a short time in unprepared asylum systems that may risk the collapse of said asylum system.

I will in this thesis use the name *European Union/EU* consistently, even when talking about the time when the union was called the *European Communities/EC*. This is due to the lack of importance of distinguishing the two for the goal of this thesis, and for the sake of clarity.

Relocation means the transfer of an asylum seeker from the Member State which would be responsible for the asylum seekers application if the Dublin allocation criteria was used as normal, to another Member State.

[8] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, signed in Geneva.

2 The history and objectives of the Dublin system

In this chapter I describe the history and original thought behind the Dublin system and how the allocation of responsibility for asylum application under the Dublin III regulation actually works.

2.1 The allocation of responsibility in Dublin III

In this part of the chapter I will present the material law of the Dublin III regulation that concern the allocation of responsibility for examining asylum applications. I will not go into great detail regarding these rules, but rather present a general picture of how the allocation of responsibility works.

The Dublin III regulation is designed around a list of hierarchical criteria for establishing which Member State is responsible for the examination of an asylum application. The regulation is, following its article 2(a), applicable to applicants for all sorts of international protection following from the Qualification Directive, both refugees according to the Geneva Convention and applicants for subsidiary protection.

Article 3(1) of the Dublin III regulation states that a single Member State shall be responsible for examining an asylum application, and that this responsible Member State shall be determined using the criteria in chapter 3 of the regulation. Article 7(1) states that the criteria shall be applied in the order they are listed in the regulation.

The first criterion for determining the Member State responsible for examining an asylum application is in article 8, and concerns unaccompanied minors. According the article an unaccompanied minor's application for asylum should be examined by the Member State where the minor has family members or relatives that can provide for the minor, if this is in the best interests of the minor. If no such family members or relatives are found the Member State responsible shall be the Member State where the application was lodged, if this is in the best interests of the minor. Worth noting is also the case of *MA and others*[9] where the European Court of Justice (CJEU) regarding the situation when an unaccompanied minor has lodged multiple asylum applications in different Member States, but does

[9] Judgment in the case of *MA (C-648/11) v Secretary of State for the Home Department*, EU:C:2013:367.

not have relatives legally present in any Member State. In these cases the Member State where the minor is present shall be responsible for examining the application for asylum.

The second through fourth criteria, in articles 9 to 11, concern preserving family unity. According to article 9 and 10, an application for asylum should be examined by the Member State where the applicant has family members who has already been granted, respectively applied for, asylum. Article 11 concern cases where several family members apply for asylum simultaneously in a Member State and the application of the criteria in the regulation would lead to their separation. In these cases all the family members applications shall be examined by the Member State responsible for the largest number of their applications. If this does not determine a single Member State, all the family members applications shall be examined the by Member State responsible for the application of the oldest family member.

The fifth criterion in article 12 concern responsibility for asylum applications following from issued visas or residence documents. Generally, the Member State which issued a visa or residence document to an applicant for asylum shall be responsible for the examination of the application according to article 12(1-2). According to article 12(3), if an applicant for asylum possesses more than one resident document or visa, the length of validity and expiry date of the documents will determine the Member State responsible. Article 12(4) states that responsibility for examining an asylum application can follow even from recently expired visas or residence documents, and article 12(5) regulates cases where the visas or residence documents were issued based on false information.

Article 13 contains the sixth criterion, which is based on the irregular entry into the Union or stay in a Member State. According to article 13(1) the Member State responsible is the Member State whose border an asylum seeker has irregularly crossed from a third country, as long as the crossing took place during the last 12 months. After these 12 months the Member State responsible shall be the Member State where the asylum seeker has most recently been living for a continuous period of at least 5 months before lodging the application, according to article 13(2).

The seventh criterion in article 14 states that if an asylum seeker enters a Member State, which has waived the need for a visa, then that Member State shall be responsible for examining the application for asylum.

The eight and last criterion in article 15 concerns the case when an asylum application is lodged in an international transit area of an airport. In this case the responsibility for examining the application falls on the Member State in whose territory the airport is located.

According to data from Eurostat, around 90% of all requests to take charge of an asylum seeker during 2008-2012 was based on the documentation and entry criteria, i.e. the last criteria in the hierarchical list.[10]

When no Member State can be designated as responsible for an asylum application by the criteria, article 3(2) states that the Member State in which the application was lodged shall be responsible.

If a Member State is found to be responsible for an asylum application they are obligated under article 18 to either *take back* or *take charge* of the asylum seeker after a request from another Member State where the asylum seeker is located. A Member State takes charge of an asylum seeker if the asylum seeker has lodged an application for asylum in another Member State that is not the responsible state, and takes back an asylum seeker who has already lodged an application in the state but after that moved on to another Member State.

After a request to take charge or take back an asylum seeker is made, the requested Member State have a certain time limit to respond set out in articles 22 and 25 respectively. If the requested state does not reply within this time limit the request shall be considered as accepted, according to articles 22(7) and 25(2).

There are also two ways of acquiring the responsibility for an asylum application without being the Member Stated determined by the criteria, both in article 17 of the Dublin III regulation. The first way is the *sovereignty clause*, which allows any Member State to choose to examine any application lodged within it. The second way is the *humanitarian clause*, which allows any Member State to request that another Member State take responsibility for an asylum seekers application for humanitarian reasons, such as family of cultural considerations, even if that other Member State is not responsible following the allocation criteria.

2.2 The objectives and history of the Dublin system

The objectives of the Dublin system have not always been the same as it is today, at least not expressly. This part of the chapter will therefore aim to follow the Dublin regulation's history and the different objectives it has been said to fulfil in order to conclude what its primary objectives are today.

[10] Eurostat, Dublin statistics on countries responsible for asylum application, http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application, retrieved 2015-11-30.

2.2.1 Step one: The Dublin Convention

The Dublin regulation of today has its roots in the Dublin Convention[11], which was created and signed in 1990 but first entered into force in 1997.[12] The Convention contained, just as the Dublin regulation of today, a set of hierarchal criteria establishing the state responsible for examining asylum applications. The Dublin Convention was however, following from the definitions in its article 1, only applicable to refugees seeking asylum under the Geneva Convention[13] and not to applicants for all forms of international protection as the current Dublin III regulation is.

According to the preamble of the Dublin Convention, its aim was to aid in the creation of a European area without internal frontiers, i.e. the Schengen area, while guaranteeing that asylum seekers would have their applications examined by one of the member states. The fear was the so-called phenomenon of "refugees in orbit", i.e. that asylum seekers would successively be sent from one member state to another without any member state taking the responsibility to examine their application, thereby making the asylum process longer and more uncertain. The preamble of the Convention also makes note of the objective set out in the 1989 Strasbourg Presidency Conclusions of harmonizing asylum policy across the member states, but does not further expand on how the Convention affects this process.[14] This objective is nevertheless one of the first seeds for the idea of a single European asylum system.

The Convention had less allocation criteria than the Dublin III regulation, but they were organised in the same way, i.e. in a hierarchical order of application. The first criterion in the Conventions article 4 was that if an asylum seeker had a family member that was already recognised as a refugee according to the Geneva Convention in another Member State, then that Member State should be responsible. The term family member was to be interpreted strictly and only as a spouse or unmarried minor child of the asylum seeker, or if the asylum seeker was an unmarried minor child, also his/her parents. The next criterion in article 5 stated that if a Member State had issued a residence permit or visa to an asylum seeker, then that Member State should be responsible, and in the article 6 criterion the Convention said that if an asylum seeker had entered a Member State irregularly then

[11] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01).
[12] Eur-lex, Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:41997A0819(01), retrieved 2015-10-30.
[13] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, signed in Geneva.
[14] European Council, Conclusions of the Presidency, Strasbourg, 8-9 December 1989, page 5.

that Member State would be responsible. Article 7 set out rules for which Member State that would be responsible for asylum applications lodged in transit zones in airports and where the asylum seekers visa had been waived, and finally article 8 stated that if no other Member State was found to be responsible, then the Member State in which the application for asylum was lodged would be responsible.

It is worth noting that the preamble to the Dublin Convention does not mention controlling entry into the territory of the member states or allocating responsibilities fairly as its objectives. In this regard the Convention claims to solely protect the rights of the asylum seekers. However, this must be seen in the context of the Dublin convention as a precondition for the Schengen agreement of free movement between Member States, and the benefits this would bring to the economies of the participating states. The claims of protecting individual rights regarding a fast and guaranteed examination of asylum applications may be true, but the fact remains that the adoption of the Schengen system benefited the border Member States by giving their citizens access to the EU, while the Dublin conventions responsibility allocation "protected" the rest of the Union from asylum seekers arriving through these Member States.

To sum up this part of the chapter, the objectives of the Dublin Convention were, at least originally, to put an end to the phenomenon of "refugees in orbit" and to speed up the asylum process, while at the same time allow for a EU without internal borders.

2.2.2 Step two: The Dublin II regulation (343/2003)

In the years 2000 and 2001 the Commission authored two different working papers on the topic of the Dublin Convention and its future development. These working papers were written in light of the recent entry into force of the Treaty of Amsterdam[15], which mandated the creation of a EU instrument for allocating responsibility for examining asylum applications, and this instrument would become the Dublin II regulation. Another large factor to consider in the reform of the Dublin Convention into a EU instrument was the recent Tampere Conclusions, where the European Council called for the creation of the CEAS and the inclusion of a mechanism for allocating responsibility for asylum applications.[16]

[15] Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.
[16] European Council, Conclusions of the Presidency, Tampere, 15-16 October 1999, page 3.

In these working papers, the Commission admit that the general opinion is that the Dublin Convention had not worked as well as expected[17], and that the Conventions role as a tool to complement the freedom of movement of people is limited due to the Conventions low usage[18]. The Commission also make note of the expressed objectives of the Dublin Convention, as described above, but after that say that *"many interested parties consider that the Dublin Convention either has or should have certain other objectives"*, and lists seven "possible objectives". These objectives are:

1. a quick asylum procedure,
2. resolving the problem of "refugees in orbit",
3. preventing asylum seekers from filing multiple applications for asylum,
4. creating a direct link between the success or failure of member states to control its borders and immigration and the allocating of responsibility for asylum applications, i.e. "punishing" states lacking in border control,
5. preventing asylum seekers from choosing the member state in which they file their application for asylum, i.e. preventing "asylum shopping",
6. maintaining family unity and reuniting separated families, and
7. to ensure equitable distribution of asylum seekers between member states in proportion to their capacity.[19]

The Commission does make clear that these are only possible objectives, and that some of them may be incompatible with others or simply inappropriate or unrealistic. After examining the possible objectives, the Commission conclude that they consider the objectives 1, 2, 3, and 6 appropriate and realistic objectives for a new regulation regarding the allocation of responsibility for asylum applications. [20]

Regarding the objective 4, "punishing" member states lack of border control, the Commission first claims that this objective is based on a "political choice", and that the signatories of the Dublin Convention chose to link responsibility for asylum applications to the control of migration into the area of free movement. The Commission does however question the workability and effectiveness of such an objective because of the inherent problems of proof and evidence regarding irregular border crossings.[21] The Commission also mentions that a certain *"geographical determinism"* comes into play regarding the number of asylum seekers entering different member states, and that some factors, such as diaspora communities,

[17] Commission of the European Communities, SEC (2000) 522, Commission Staff Working Paper, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, page 1.
[18] Commission of the European Communities, SEC (2001) 756, Commission Staff Working Paper, Evaluation of the Dublin Convention, page 3.
[19] SEC (2000) 522, page 5-6.
[20] SEC (2000) 522, page 6-11.
[21] SEC (2000) 522, page 9.

language and job opportunities, influences asylum seekers destination more than the effectiveness of the member states border control.[22]

This objective 4 is also referred to as *deflection objective* in academic texts regarding the Dublin regulation. In a working paper for the Refugee Studies Center the argument is made that the Dublin regulation's main objective is to deflect asylum seekers to the Member States at the EU:s external borders and further on to states outside of the EU. The author further argues that the Member States on the EU:s border have accepted this order due to being promised compensation in the form of financial support from the European Refugee Fund, administrative assistance from the EASO and FRONTEX and access to the free movement of the Schengen area for its citizens. By designing of the Dublin regulation around allocating responsibility for asylum applications on the basis of which Member State is to "blame" for the asylum seekers entry (i.e. the entry/stay criterion, see above in 2.1), the regulation may act as an encouragement for Member States on the external border to implement stricter border control and immigration policies. The argument has however also been made that this system has damaged the intra-EU solidarity by incentivising border Member States to not effectively enforce the regulation while also crippling the asylum systems in these Member States.[23]

When it comes to objective 5, preventing "asylum shopping", the Commission notes that it is quite controversial whether this even constitutes a problem that needs addressing, and say that the inclusion of this objective in a tool to allocate responsibility for asylum applications will *"remain a matter of opinion"*. In addition to this, the Commission seems confident that the harmonisation of asylum procedures and the approximation of recognition rates under the CEAS will remove at least some incentives for asylum seekers to choose a specific member state in which to lodge their applications.[24]

The Commission dismisses objective 7, i.e. the equitable distribution of asylum seekers between member states, all together. The Commission claims that the Dublin system is *"incompatible with an approach under which each Member State would take responsibility for a fixed proportion of the total number of asylum applicants in the European Union"*. While taking note of the goal to promote "a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons" in article 63(2)b of the, at the time, newly adopted Amsterdam treaty, the Commission nevertheless does not consider this to be a necessary concern for the Dublin regulation. The Commission justify this lack of burden-sharing mechanisms in the Dublin regulation by pointing to the financial assistance benefiting Member States from the European

[22] SEC (2001) 756, page 18.
[23] Minos Mouzourakis, 'We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Refugee Studies Center, University of Oxford, December 2014, page 9-12.
[24] SEC (2000) 522, page 9-10.

Refugee fund, and that the issue of burden-sharing will be addressed further with the adoption of the Temporary Protection Directive. As a third and last argument for not including burden-sharing as a primary objective for the Dublin regulation, the Commission puts its hope to that the harmonization following the gradual implementation of the CEAS will remove incentives for asylum seekers to choose certain Member States over others when applying for asylum, thereby evening out the distribution between the Member States. The discussion in the preparatory works end on a more pragmatic note, with the Commission stating that political discussions regarding physical burden sharing, i.e. relocation, based on proportional distribution according to reception capacity has failed to generate agreement and results.[25]

The Commission also claim that due to the relatively few transfers carried out according to the Dublin convention it cannot be said to put an excessive burden on any Member State.[26] In the proposal for the new Dublin regulation, the Commission does however claim that the Dublin convention had *"made it possible to mitigate the negative aspects of the unequal direction of the flows of asylum seekers"*[27], which implies that the Commission actually did think of the convention as a tool to more equally distribute asylum seekers. This part of the preamble was removed in the adopted Dublin II regulation, which makes no claim of aiming to distribute asylum seekers in a fair or equal manner across the member states.

In the end, the adopted Dublin II regulation's preamble sets out the same objectives as the Dublin convention, i.e. quick processing of asylum applications and guaranteeing access to an examination in one member state.[28] The preservation of family unity is however more strongly pronounced than in the Convention.[29] The preamble also talks about the necessity to *"strike a balance between responsibility criteria in a spirit of solidarity"*, but does not continue to flesh out the meaning of this statement.[30] Here the Commission seems to contradict itself, as it has previously stated that the purpose of the regulation is not to equalize the number of asylum seekers across to member state in proportion to capacity, but rather to incentivise member states to control the external borders.

The Dublin II regulation was also the first part of the CEAS that was envisaged in the Tampere Conclusions. The short term goals set out in the

[25] SEC (2000) 522, page 11-12.
[26] SEC (2000) 522, page 11-12.
[27] Commission of the European Communities, COM (2001) 447 final, Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, preamble (5).
[28] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II), preamble (4).
[29] Dublin II regulation, preamble (6) and (7).
[30] Dublin II regulation, preamble (8).

Tampere Conclusions regarding the CEAS was creating a clear and workable system for allocating responsibility for asylum seekers, and approximating the rules regarding reception, procedure and status determination. The long-term goal was even more ambitious, and called for the creation of a common asylum procedure leading to a uniform asylum status valid throughout the Union.[31] The short-term goals have in a sense been achieved through the creation of directives regarding reception[32], procedure[33] and status determination[34], while the long term goal still can be considered well out of reach even though it has been expressly included in article 78 of the Treaty on the Functioning of the European Union (TFEU).

2.2.3 Step three: The Dublin III regulation (604/2013)

In 2008 the Commission adopted a proposal for a recast of the Dublin regulation.[35] The proposal was a part in a process of recasting all the directives that make up the CEAS following the Policy Plan on Asylum[36] in order to further harmonisation and set better standards in the field of asylum.

The Policy Plan on Asylum also makes note of the objectives of the CEAS. One of these objectives is said to be to create *"genuine solidarity mechanisms"*, both between Member States and between the EU and third

[31] European Council, Conclusions of the Presidency, Tampere, 15-16 October 1999, page 3.
[32] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, which was later recast as Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.
[33] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which was later recast as Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
[34] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, which was later recast as Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.
[35] Commission of the European Communities, COM (2008) 820 final, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast).
[36] Commission of the European Communities, COM (2008) 360 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum - An integrated approach to protection across the EU.

countries, in conjunction with the system for allocating responsibility for asylum seekers.[37] The following discussion on solidarity in the Policy Plan on Asylum focus on the Member States that are particularly exposed to migrant flows due to their geographical location, and the Commission state that they do not believe that a new system above the Dublin system is the way to achieve greater solidarity. Instead, they propose joint processing, Dublin suspension mechanisms, expert support through the European Asylum Support Office (EASO) or intra-EU re-allocation of asylum seekers as possible mechanisms for handling situations where a Member State faces exceptional asylum pressure.[38]

A system for suspending Dublin transfers to Member States where the asylum system is under particular pressure was also included in the original proposal for the Dublin III regulation[39], but was removed and replaced with an Early Warning Mechanism in the final proposal and the adopted Dublin III regulation. This was due to remarks from the Council that such a suspension mechanism could create a pull factor for irregular migration and encourage Member States to disrespect obligations under EU law.[40] The Early Warning Mechanism is supposed to hinder the collapse of a Member States asylum system during times of extraordinary asylum pressure by providing aid from the EASO to the Member State in question, and thereby preserving a feeling of trust and solidarity between Member States.[41]

In the Green Paper on the future of the CEAS the Commission once again notes that the Dublin system is not designed as a "burden sharing instrument", but that maybe such an instrument would be necessary. The Commission here favours the idea of a corrective mechanism for re-locating people who have already been granted protection in a Member State to another Member State. Even if implemented, such a mechanism would however not in my mind aid in easing the pressure on a Member States asylum system, since the re-location would take place first after a completed asylum process. The Commission does not address this issue, but does in a later part of the Green Paper suggest increasing the effectiveness of the European Refugee Fund (ERF).[42] This may indicate that the Commission at the time believed that the best way to establish some sort of solidarity and fair sharing in the field of asylum was through financial means.

The final proposal for a new Dublin regulation was based on the idea that Dublin II regulation was, in most concerns, well-functioning, even though it

[37] COM (2008) 360 final, page 3.
[38] COM (2008) 360 final, page 8-9.
[39] COM (2008) 820 final, article 31.
[40] European Commission, COM (2013) 416 final, Position of the Council on the adoption of a proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, page 3.
[41] Dublin III regulation, preamble 22.
[42] European Commission, COM (2007) 301 final, Green Paper on the future of the Common European Asylum System, page 10-12.

had not fully created the "level playing field" it was supposed to create. The changes proposed for the Dublin III regulation were primarily about increasing the effectiveness of the Dublin system by imposing stricter deadlines on procedures and transfers.

As can be seen above, the goal of the Dublin system has never been to equalise the number of asylum seekers across the Member. Instead the policy makers of the EU have always been on the clear with the fact that the Dublin system would create higher asylum pressure on certain Member States than other. This imbalance has even sometimes been justified by arguing that the Member States that receive the most asylum seekers are the Member States that fail to protect the EU:s external borders, as seen in the objectives argued for in the preparatory works for the Dublin II regulation.

2.2.4 Conclusive remarks

To conclude, the officially expressed main objectives of the Dublin regulation according to its creators are:

- to prevent "asylum shopping", i.e. asylum applicants choosing which Member State to seek asylum in,
- to solve the problem with "refugees in orbit", i.e. asylum applicant for whom no state takes responsibility, and
- to encourage Member States to control the Unions external borders, and therefore control the "flow" of immigrants.

As seen above, the allocation criteria has not drastically changed from the Dublin Convention to the Dublin III regulation, with the only large changes being that the Dublin III regulation has more focus on preserving family unity and the best interests of minors. Another difference is also that application both of the Convention as a whole, and in regards to the allocation criteria, has been made independent from the refugee status following from the Geneva Convention. Whereas, for example, in the Dublin Convention an asylum seeker should have a family member that was recognised as a *refugee* in a Member State for that Member State to be responsible, in the Dublin III regulation the asylum seeker shall have family members that are beneficiaries or applicants for any form of *international protection* in another Member State for that state to be responsible.

Solidarity concerns, at least if defined as a more even sharing of responsibility for examining asylum applications, have not been considered to be most effectively addressed through the Dublin allocation system, but rather through corrective mechanisms and financial support. Discussions regarding different forms of corrective mechanisms for equalising the pressure on Member States asylum system have been discussed, but nothing as drastic as mandatory relocation quotas for asylum seekers has been

seriously considered previously. The EU legislators have, as seen above, put a lot of faith to the CEAS to harmonize asylum law and reception conditions throughout the Union, and that this harmonization would remove incentives for asylum seekers to choose specific Member States to lodge their applications in. However, the argument can be made both that this harmonization has failed to create the "level playing field" envisioned, and that even if it would succeed it would not aid the most pressured Member States on the Unions external borders since the application of the responsibility allocation criteria still puts them in a different position than other Member States.

These primary objectives have proved difficult to achieve during times of large asylum pressure, especially in Member States situated on the Unions external border. In order to be able to maintain the Dublin system even under this kind of situation, crisis management mechanisms have been deemed necessary. In the current Dublin III regulation this crisis management mechanism is the Early Warning Mechanism. During the year 2015, the Commission has also proposed a new crisis management mechanism in the Agenda on Migration[43] and the proposal for an amendment to the Dublin regulation[44], based on relocation of asylum seekers within the Union. Both these mechanisms will be discussed later in this thesis.

To sum up the evolution of the Dublin system, it was created as a tool to aid in the creation of an area without internal borders with the Schengen agreement, and became the "cornerstone" of a common supra-national asylum system, the CEAS. While the original Dublin convention was supposed to address specific issues emerging from a union without internal borders, the Dublin III regulation is in its own preamble presented as the cornerstone on which to build the CEAS.[45] This change of scope and objective for the system did come without any great re-evaluation of the system itself, as seen above.

[43] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, COM (2015) 240 final.
[44] European Commission, COM (2015) 450 final, Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person.
[45] Dublin III regulation, preamble 7.

3 Crisis management mechanisms in the CEAS

This chapter will present the mechanisms for asylum crisis management in the Dublin regulation and how these interplay with the primary allocation objectives presented in the earlier chapter of this thesis. It will also discuss some other asylum crisis management mechanisms and compare them to the ones in the Dublin regulation.

3.1 The Early Warning Mechanism

Article 33 in the Dublin III regulation contains the so called "Mechanism for early warning, preparedness and crisis management" (the Early Warning Mechanism). The mechanism was, as described above, a compromise between the Commission, which originally wanted a transfer suspension mechanism, and the Council, which feared that such a mechanism would create a pull factor for irregular migration and encourage Member States to disregard EU law. Worth noting is that article 3(2) of Dublin III contains a provision to stop transfers to a Member State where the transferred asylum seeker risks inhuman or degrading treatment due to systemic flaws in the Member States asylum system. This provision does however not aim at supporting a pressured Member States asylum system, but rather to protect asylum seekers basic human rights.

The Early Warning Mechanism is designed to work in three steps: recommendations from the Commission, a preventive action plan and a crisis management action plan. The process is supposed to be initiated by the Commission on the basis of information gathered by EASO when the application of the Dublin regulation *"may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system of a Member State"*.

The first step when the mechanism is initiated is that the Commission in cooperation with EASO gives recommendations to the affected Member State, and invites the Member State to compose a preventive action plan. The Member State shall inform the Council and the Commission whether it decides to compose this preventive action plan or not.

If the Member State decides to create a preventive action plan it may call for the assistance of the Commission, other Member States and relevant EU agencies such as EASO to handle the problems or deficiencies in its asylum

system. The Member State shall then undertake all appropriate measures to address any problems in its asylum system or deal with the asylum pressure in order to avoid a crisis, under the monitoring of the Commission and Council.

If the preventive action plan fails to address the deficiencies in the Member States asylum system or when there is a serious risk that the situation nevertheless develops into a crisis the Commission may request that the Member State within three months composes a crisis management action plan. This plan shall *"ensure, throughout the entire process, compliance with the asylum acquis of the Union, in particular with the fundamental rights of applicants for international protection"*, and its implementation will be monitored by the Commission.

During this whole process the Council shall monitor the situation and provide the necessary guidance, and together with the European Parliament the Council shall discuss and provide guidance on appropriate solidarity measures.

As seen above, the Early Warning Mechanism is mostly about providing assistance to a troubled Member State in order for it to itself repair the deficiencies in its asylum system and to defuse a possible crisis. It is also a preventive mechanism designed around stopping a crisis from developing, while not setting up any specific provisions on how to handle a crisis if it does develop anyway.

In the first proposal for a crisis management mechanism the Dublin III regulation the Commission had proposed, as described above, a mechanism for suspending transfers to Member States with asylum systems under pressure or whose asylum systems did not live up to the standards of the CEAS.[46] The Council did however not support such a mechanism since it feared that it could create a pull factor for irregular migration and incentivise Member States to ignore their obligations under EU law. In other words, their fears are that Member States would be incentivised to maintain asylum systems not living up to the CEAS standard in order to escape responsibility for asylum seekers otherwise transferred to them, and for asylum seekers present in those Member States would leave to other Member States knowing that they would not be transferred back.[47]

The Early Warning Mechanism was the resulting compromise that the Council suggested, and which was adopted. It is however worth noting that if a Member States asylum system shows "systemic flaws" serious enough to risk inhuman or degrading treatment according to article 4 of the EU Charter of Fundamental Rights for asylum seekers, then transfers to that Member State need to be halted. This follows both from the international law principle of non-refoulement (i.e. the prohibition of sending a person to

[46] COM (2008) 820 final, article 31.
[47] COM (2013) 416 final, page 3.

a state where the person risks inhuman or degrading treatment) and from article 3(2) p. 2 of the Dublin III regulation.

The Early Warning System differ from the other crisis management mechanisms since it does not aim to more evenly distribute responsibility for examining asylum applications across the Union, even in times of crisis. The system is more of a combined "support package" from the EU to a pressured Member State, conditioned on the improvement and cooperation of said Member State.

3.2 Article 78(3) TFEU provisional measures

Article 77-80 of the TFEU deal with border checks, immigration and asylum, and sets out the EU: s goals and visions of its common asylum system. Article 78 specifically deals with questions of asylum and the creation of the CEAS, with article 78(1) states that common asylum policy shall be developed and article 78(2) declaring what parts this common asylum system shall consist of. Article 78(3) however is not a policy or visionary statement, but rather a concrete mandate for the EU to act in certain situations.

Article 78(3) TFEU states that *"in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned"*. The article thereby allows for temporary emergency responses to an asylum crisis situation in the Union or any of its Member States. As seen, the article also doesn't limit its scope to situations jeopardizing the application of the Dublin regulation or any other specific legal system, as the Early Warning Mechanism does, but rather applies whenever an emergency situation emerges due to sudden asylum pressure. The article also allows for a very non-specified range of measures, with the only criteria being "provisional" and "for the benefit of the Member State(s) concerned", thereby not only allowing decisions about relocation of asylum seekers.

This article is however the basis for the provisional relocation mechanism adopted by the Council during 2015.[48] Originally, this provisional relocation mechanism was planned to relocate asylum seekers from Italy, Greece and Hungary, which all have had difficulties operating a functioning asylum system due to increased arrivals of asylum seekers. Hungary did however

[48] European Council, Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

not want to take part in the relocation, and therefore only Italy and Greece were included as beneficiaries in the adopted decision.

The decision calls for a relocation of totally 120 000 asylum seekers from Italy and Greece to other Member States in the union, distributed in accordance to a distribution key. The purpose of this relocation is to relieve Italy and Greece, two Member States on the external border with pressured and/or failing asylum systems. According to FRONTEX data cited in the decision, around 116 000 asylum seekers entered Italy from the start of 2015 to the adoption of the decision in late September the same year, while the number of asylum seekers who entered Greece during this same time was around 211 000.[49]

Only asylum seekers belonging to a nationality where the average proportion of granted applications for asylum at first instance in the EU is 75% or higher shall qualify for relocation according to the decision. The Council justifies this by arguing that asylum applicants who are, *prima facie*, in clear need of asylum would receive full protection, swiftly in the Member State to which they were relocated. Asylum seekers who are unlikely to receive asylum should on the other hand not have their stay in the Union "unduly prolonged" by being relocated to another Member State.[50]

The relocation decision does however, in its article 8, also place certain obligations on the benefiting Member States, Italy and Greece. The Member States shall present a roadmap including measures to improve reception conditions, reception capacity, and the efficiency and quality of their asylum systems. Failure to comply with these obligations may lead to suspension of the decision with regard to that Member State.

In the preamble of the decision it is made clear that integration concerns should play a role in deciding where to relocate a specific asylum seeker. The decision lists family, cultural and social ties as important factors to consider, but does not delve deeper into how this can be achieved while still allocating a fixed amount of asylum seekers to each Member State.[51] Some Member States will most likely have more asylum seekers fitting their "integration profile" than they have been allocated responsibility for according to the distribution key.

[49] Council Decision 2015/1601, p. 13.
[50] Council Decision 2015/1601, p. 25.
[51] Council Decision 2015/1601, preamble 34.

3.3 A permanent crisis relocation mechanism in the Dublin regulation?

In 2015 the Commission proposed a new crisis management mechanism to be implemented into the Dublin III regulation[52]. The proposal is still not decided on, but I will nevertheless discuss it here since I believe it is an indication of the direction that crisis management in the Dublin system is heading. In the proposal the Commission calls for a permanent mechanism for intra-EU relocation of asylum seekers following the provisional emergency measures to relocate asylum seekers adopted under article 78(3).

The mechanism proposed is supposed to be triggered by the Commission in the case of a *"crisis situation jeopardizing the application of [the Dublin] Regulation due to extreme pressure characterised by a large and disproportionate inflow of third-country nationals or stateless persons, which places significant demands on its asylum system"*. Once the mechanism is triggered a number of asylum seekers shall be relocated from the affected Member State to other Member States according to a distribution key. This distribution key[53] is based on several criteria, such as gross domestic product, unemployment and population.

Relocation shall only be applied to those asylum seekers who belong to a group where the EU-wide percentage of granted asylum at first instance is 75% or higher, for the same reasons as cited above regarding the provisional relocation decision, and the number of relocated asylum seekers shall not exceed 40% of the affected Member States total received asylum applications in the six months preceding the implementation of the mechanism. These relocated asylum seekers shall then have their asylum applications examined by the Member State to which they were relocated. The proposed crisis relocation mechanism also lifts the preamble concern for integration considerations when relocating asylum seekers directly from the Council decision based on article 78(3), thereby also marking that family, cultural or social ties shall be considered when deciding where to relocate.

This proposed crisis relocation mechanism was envisioned in the Agenda for Migration as the lasting, permanent solution following the provisional emergency relocation under article 78(3), as said above. In the Agenda for Migration, the Commission states that the EU needs an automatically triggered, permanent system for sharing responsibility for large numbers of asylum applicants in clear need of protection in the case of a mass influx.[54] The proposed relocation mechanism is however not automatically triggered, as it needs to be triggered by the Commission.

[52] COM (2015) 450 final.
[53] COM (2015) 450 final, Annex 1.
[54] Agenda on Migration, page 4.

The crisis relocation mechanism is, as seen above, a corrective mechanism that spreads the asylum pressure that certain Member States experience across the Union as a whole. It does however not provide a total equalization due to the percentage caps on the number of relocated asylum seekers, nor does it aim to in itself improve the reception capacity of the most pressured Member States. It also does nothing to prevent a crisis situation, but is simply a corrective, emergency instrument.

3.4 Temporary protection directive

In 2001, the Temporary Protection Directive[55] was adopted in the EU as a tool for handling situations of "mass influx" of asylum seekers into the Union. The directive is still in force as of 2015 although it has never been put to use.

The preparatory works for the directive define the term "mass influx" as an intensified flow of asylum seekers from a specific country or geographical area that becomes too massive for national asylum systems to absorb. The Commission does state that the number of asylum seekers must be "substantial", but that it is impossible to more exactly set a number that constitutes a "mass influx" before it happens.[56]

The Temporary Protection Directive is built around harmonizing the European practice of giving out temporary protection status to displaced people during the wars in Yugoslavia.[57] The system is designed to temporarily grant protection to whole groups of displaced people originating from the same geographical area or country in the case of a "mass influx" from this area or country. This group of displaced people shall then be granted temporary residence permits and certain other benefits by the Member States without the need for lodging an application for asylum. This is thought to ease the pressure on that Member States asylum system during the "mass influx", thereby preventing a collapse of the asylum system which would be detrimental both to the Member State and other groups of asylum seekers not affected by the Temporary Protection Directives scope.[58]

[55] 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.
[56] European Commission, COM (2000) 303 final, Proposal for a Council Directive 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, comment on article 2(d).
[57] COM (2000) 303 final, Explanatory Memorandum, 2.1-2.5.
[58] COM (2000) 303 final, Explanatory Memorandum, 1.4.

Member States must however allow all displaced persons who wish to lodge an application of asylum to do so, but the Member States can choose to make the temporary protection and the status of asylum seeker exclusive. If the Member State chooses to do so, any displaced person who also applies for asylum loses the rights following from the temporary protection until the application has been decided on. According to the preparatory works for the Temporary Protection Directive, this system is thought to make the temporary protection more attractive than seeking asylum, in order to ease the burden on the asylum systems of the Member States who chose to use it.[59] The responsibility for examining any asylum applications made by beneficiaries of temporary protection is also not determined using the Dublin regulation's criteria. Instead, according to the Temporary Protection Directives article 18, the Member State responsible shall be the Member State that has accepted the transfer of the asylum seeker into its territory.

The implementation of the directive is triggered by a decision by the Council adopted by a qualified majority, following a proposal from the Commission. Once the directive has been triggered the temporary protection mechanism will last for two years unless aborted by another qualified Council decision. The Council may decide, also by a qualified majority, to extend the duration by another year, but after this time has passed the temporary protection mechanism must cease, and the general asylum laws shall apply again.

There is a sort of solidarity mechanism built into the Temporary Protection Directive, based on assigning displaced people eligible for temporary protection to Member States in a "spirit of Community solidarity" with regard to the Member States reception capacity. There is also a possibility for Member States to voluntarily transfer beneficiaries of temporary protection between each other, and another provision explicitly setting out that measures under the directive shall benefit from support from the European Refugee Fund.

The Temporary Protection Directive has as of this date never been triggered, not even during the later parts of the wars in Yugoslavia and Kosovo, which was the context for its creation. In the current debate of 2015 the directive has not been lifted officially as an alternative way to handle the asylum situation. The exact reason for this aversion to using the already existing directive as a tool to handle the current asylum situation is hard to determine. A possible explanation is that the political landscape can make a qualified Council decision difficult to achieve, especially since the implementation of the directive requires Member States less likely to be affected by asylum pressure in the first place to "share the burden" with Member States on the external borders. Another reason for the directives lack of implementation may be the fear of creating a pull factor for asylum seekers belonging to the group affected. True or not, this fear of attracting

[59] COM (2000) 303 final, Explanatory Memorandum, 5.7.

more asylum seekers to the EU seem to have been a major concern for the Member States.[60]

The crisis management mechanisms in the Temporary Protection directive is designed to streamline the procedure for granting protection in times of extreme asylum pressure, in order to protect the Member States asylum systems to collapse. Unlike the Early Warning Mechanism in the Dublin III regulation, the Temporary Protection Directive does not try to repair or strengthen Member States asylum system in order for it to be capable of handling asylum pressure, but rather provides a way to sidestep it completely in times of crisis. The directive does however have similarities to the proposed relocation mechanism in that it aims to somewhat even out asylum pressure on Member States in proportion to reception capacity in times of larger asylum pressure.

3.5 Conclusive remarks

As seen above, all crisis management mechanisms except the Early Warning Mechanism, which focuses on supporting and repairing deficient asylum systems, consist of some form of relocation of asylum seekers from especially pressured Member States.

All crisis management mechanisms presented in this chapter ties its application to different terms regarding the level of asylum pressure. In the Early Warning Mechanism the term used is *"particular pressure",* in article 78(3) it is *"sudden inflow"*, in the Temporary Protection Directive it is *"mass influx"* and in the newly proposed Dublin relocation mechanism the term used is *"large and disproportionate inflow"*. None of these terms are defined in any detail, which raises the question if there is a difference between them, and if that is the case, what the difference is. A rather cynical reading of the divergence of terms used is that it provides the EU lawmakers a way to only apply the crisis management mechanism it sees fit with the argument that the current situation only corresponds to, for example, a "particular pressure" and not a "large and disproportionate inflow" or a "mass influx".

A noteworthy comparison can be made between the Temporary Protection Directive and the relocation mechanism; both the provisional mechanism based on article 78(3) and the proposed addition to the Dublin regulation. Both mechanisms are corrective and "exceptional" in nature, and aim at handling a crisis rather than preventing it. While a simplified temporary

[60] *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean'* in C. Bauloz, M. Ineli-Ciger, S. Singer, V. Stoyanova (eds), Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common Asylum System (Brill/ Martinus Nijhoff Publishers 2015), page 233-236.

protection procedure and/or relocation may be necessary if the number of arriving asylum seekers become to much for Member States to handle, it does not solve the systemic issue of placing disproportionate burdens on certain Member States in the first place.

4 Problems and criticism of the Dublin system

In this part of the thesis some of the criticism of the Dublin system will be presented. The chapter will specifically present criticism that it relevant to the question of whether the Dublin regulation is suitable as a, or even *the*, crisis management tool in the CEAS.

4.1 Solidarity concerns and misapplication

As has been described above, the Dublin III regulation was not designed as a burden-sharing instrument. However, article 80 TFEU sets out that all policy and implementation acts in the field of asylum shall be governed by the principle of solidarity and fair sharing of responsibilities. According to the Agenda on Migration, five Member States were responsible for 72% of all asylum application lodged in the EU during the year of 2014[61], which clearly shows a misbalance of responsibilities.

The Dublin regulation, as the main tool for allocating responsibility for asylum seekers, of course plays a role in creating and maintaining this misbalance.

One common criticism against the Dublin regulation is that it puts an unfair burden on the Member States at the Unions external border. As described above, around 90% of requests to take charge of an asylum seeker were based on the last criteria in the Dublin regulation concerning documentation and entry. This large focus on the application of especially the entry criterion has been criticized as it creates a situation where usually only the Member States on the external border can be determined to be responsible for asylum applications, at least if the asylum seekers entry into the Union was documented in any way. Another criticism of the current application is that Member States apply much higher evidence thresholds for the family unity criteria than the entry criterion, and that Member States fail to or refuses to take information of family members in the EU into account if presented at any later stage of the Dublin procedure.[62] This misapplication of the hierarchical criteria leads to a situation where the only really useable, effective ground for transferring responsibility for an asylum seekers application, from a Member States perspective, becomes the entry and

[61] Agenda on Migration, page 13.
[62] Mouzourakis, page 12-13.

documentation criteria, at least as long as the entry was documented in any way.

A risk associated with this state of affairs when the entry criterion is the most commonly used, "default", criterion for allocation responsibility for asylum applications is that it can incentivise Member States on the external border to not document asylum seekers entering its territory. If a Member States feels as if the Dublin system does not act fairly or in solidarity towards it, then why should that Member State give up on its own interests in order to protect the system or the rest of the Union? This is a large problem with the Dublin system of today: that it relies on the Member States it is most disadvantageous for in order to function.

4.2 Ineffectiveness and costs

Another regular criticism of the Dublin regulation is that it is ineffective and expensive to maintain. In a discussion paper made for the Greens/EFA in the European Parliament, the argument is made that the Dublin regulation fails to prevent asylum shopping and multiple applications since the actual transfer rate of asylum seekers to the determined responsible Member State is very low.[63] According to statistics from EASO, covering 2008-2012, the number of accepted transfers under the Dublin regulation amount to about 12% of the total amount of asylum seekers, while the number of completed transfers only amount to about 3% of the total amount of asylum seekers.[64]

Even when transfers are actually carried out the effectiveness of the Dublin system can be doubted. In the Greens discussion paper the author shows, based on statistics from EUROSTAT, that transfers between Member States are often "cancelled out" due to Member States transferring roughly the same number of asylum seekers between them, for example Germany transferred 281 asylum seekers to Sweden, while Sweden transferred 289 asylum seekers to Germany during 2013. This leads to a very small "net balance" of transferred responsibility for asylum application, but with a much larger economical and humanitarian cost following from often coercive transfers and more lengthy procedures. The discussion paper even makes the argument that the Dublin procedure has become so unwieldy and ineffective that Member States increasingly choose to not try to determine the responsible Member State according to Dublin, especially when the application is straightforward and likely to be refused. In these situations it may simply be faster and cheaper to examine the application in its entirety

[63] Richard Williams, Beyond Dublin – A discussion paper for the Greens/EFA in the European Parliament, 18 March 2015, page 9.
[64] EASO, Annual Report: Situation of Asylum in Europe 2013, July 2014, page 30.

and send the asylum seeker back to the country of origin if the application is refused.[65]

Another side of the ineffectiveness of the Dublin system is the financial costs of operating this additional procedure, with its often supervised transfers and detention of asylum seekers. This cost is however impossible to evaluate, due to a lack of precise data from the Member States.[66] Even if it is understandable that it may be difficult to separate the specific costs of the Dublin procedure from the general asylum procedure, it still presents a large problem of democratic nature. The inability to compare the costs to the benefits of the Dublin system makes it hard to improve or rethink.

The costs of the Dublin system is however not only economical, but also humanitarian. By determining the Member State responsible for examining the asylum application, the Dublin regulation also determines where the asylum seeker will have to live, at least until granted freedom of movement, under certain conditions, from the Long Term Resident directive[67] after up to five years. Asylum seekers who are not happy with their Member State of residence may engage in irregular movement, which makes hiding from the authorities and staying irregular necessary in order to avoid being transferred back to the Member State responsible for the asylum application. Asylum seekers also risk detention and other coercive measures as Member States try to identify the Member State responsible and prevent any secondary movements in the Union.[68] This also ties in to the efficiency of the Dublin regulation as a whole, where processing of asylum applications risk becoming lengthy due to Dublin procedures and transfers of asylum seekers who may try to remain hidden. Thereby the Dublin system risks creating even more "refugees in orbit", although in an orbit they have chosen themselves.

This ineffectiveness and costliness of the Dublin system may also affect the implementation of crisis management mechanisms built upon this system. Fixing ineffective asylum systems is difficult, especially if there are no solid numbers on the costs and benefits of said system, and a slow working ineffective system risks triggering a crisis by itself.

[65] Beyond Dublin, page 9.
[66] Beyond Dublin, page 10.
[67] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
[68] Beyond Dublin, page 10-11.

4.3 Conclusive remarks

The Dublin system is rightfully criticised for its lack of burden sharing and solidarity measures. Even tough these concerns were never considered primary objectives for the Dublin regulation, the fact that no other mechanism has been created in the CEAS to more equally allocate asylum seekers across the Union has forced certain Member States to take disproportionate large responsibility. The question has to be asked why the EU legislators have chosen not to include any real burden sharing mechanisms in the CEAS until the corrective relocation mechanism.

As long as the Dublin regulation is considered to be the "cornerstone" of the CEAS and act as the foundation on which to build crisis management mechanisms, any lack of solidarity of ineffectiveness in the Dublin system risks "contaminating" those mechanisms. If the foundation of a system is unstable, as the Dublin regulation must be said to be, then anything built upon that foundation also risks the same fate.

5 Analysis

In this analysis chapter the questions of the Dublin system's role as a crisis management mechanism and, the relationship between the system's primary objectives and crisis management, will be addressed. The first part of the chapter will discuss the Dublin regulation's importance and role in the crisis management system of the CEAS, and the second part will explore the conflicts and interplay between the Dublin system's primary objectives and the crisis management mechanisms.

5.1 Dublin as a crisis management system in the CEAS

This part of the chapter will discuss and analyse the role of the Dublin system as a crisis management mechanism in the larger system that is the CEAS.

Firstly it has to be said that the idea of the Dublin regulation containing its own crisis management mechanisms is a pretty new one, with the *Early Warning System* first being incorporated in the Dublin III regulation during 2013. During the time before this, the major crisis management mechanisms were the unused *Temporary Protection Directive* and article 78(3) TFEU. These other crisis management mechanisms and the Early Warning System does not have that much in common, with the Early Warning System designed to protect and aid the application of the Dublin regulation, the Temporary Protection Directive to rapidly ensure protection during times of unusually large arrivals and article 78(3) to handle other unforeseen emergencies. This lack of "overlapping" systems is fundamentally a good thing, since it gives each instrument its own focus and role that does not encroach on each other.

However, the fact that these crisis management mechanisms operate by either protecting the Dublin system itself, i.e. the Early Warning System, or by providing exceptions to the allocation criteria in Dublin by relocating asylum seekers in a spirit of solidarity, as in the Temporary Protection Directive and the relocation mechanisms, show that the Dublin system itself is unable to handle unusually large arrivals of asylum seekers. The crisis management mechanisms exist to correct the uneven burden and extended ineffective procedure that the Dublin system creates for certain Member States, especially on the external borders. The Dublin system allocates larger responsibility for asylum seekers to certain Member States due to *"geographical determinism"*, as the Commission puts it. It also gives

asylum seekers incentives to avoid detection and registration if not satisfied with the reception conditions or other aspects of the Member State that would be responsible for the examination of their application otherwise.

The EU legislators seem to be content with providing ad hoc corrective solutions in times of crisis, rather than to reform or rethink the Dublin system in its entirety. This ad hoc approach and focus on the Dublin regulation has also influenced the other crisis management mechanisms. Instead of triggering the Temporary Protection Directive, the EU chose to adopt a provisional relocation decision under article 78(3) TFEU, which gives around the same result, a relocation of asylum seekers from Member States on the external border to other Member States, however without the simplified procedure of the Temporary Protection Directive. The proposal to incorporate a "copy" of the relocation decision as a permanent crisis management mechanism in the Dublin regulation also seems to spell out the definitive death of the Temporary Protection Directive, and the beginning of the Dublin regulation as the main tool for crisis management.

Another question is also whether the proposed incorporated relocation mechanism will get used even if it is adopted. The mechanisms scope is clearly already covered by the measures allowed under article 78(3), since the mechanisms is nearly a copy of the relocation decision, and its triggering still requires the Commission to "establish" that a crisis is jeopardizing the application of the Dublin regulation. It does of course provide for a possibility of shorter response times since the framework is already built and the distribution key is already constructed, but maybe this will also mean that Member States will be less willing to accept its triggering since they have not had the opportunity to negotiate or affect its scope at the time of the "crisis". As seen with the Temporary Protection Directives lack of application and attention during the present "crisis" of 2015, and the EU legislators choice to instead adopt an ad hoc relocation scheme, established framework may always be what is asked for.

The Dublin system was originally designed as a tool to facilitate free movement, in the case of the Dublin convention, and as a foundation on which to build the CEAS, as in the Dublin II regulation. However, the harmonisation of the Member States asylum systems, that the EU legislators relied upon for the Dublin regulation to work as a fair allocation mechanism, has not moved along as quickly as what was imagined. The Member States asylum systems still differ enough to create incentives for asylum seekers to choose one Member State over another when applying for asylum, and the corrective mechanisms that was said to be the solution for the unfair burden sharing has only just now been addressed via the relocation mechanisms, although only after crisis is a fact.

5.2 Conflict of objectives

In this part of the thesis the Dublin system's role as both a crisis management mechanism and a tool for allocating responsibility for asylum applications will be analysed. The question to be answered is whether the crisis management mechanisms in Dublin III, the Early Warning Mechanism, aids or conflict with the regulation's primary objectives, i.e. if the system is internally coherent. The proposed implementation of a relocation mechanism into the Dublin regulation will also be discussed in this same context.

As seen above in chapter 2, the expressed primary objectives for the Dublin III regulation is to *prevent "asylum shopping"*, *solve the problem of "refugees in orbit"*, and to *encourage external border control and control of "migrant flows"*. These objectives will, one by one, be analysed together with the crisis management mechanisms as the thesis tries to answer if they are aided or hindered by the mechanisms.

5.2.1 Preventing "asylum shopping"

The first objective to be discussed is the goal to prevent "asylum shopping", i.e. the ability for asylum seekers to pick and choose where to lodge their application for asylum. As seen above in this thesis, it is not uncontroversial whether the phenomenon of "asylum shopping" constitutes a problem or not, and the Commission has reduced the question to "being a matter of opinion". It is however one of the expressed objectives of the Dublin system.

"Asylum shopping" is, of course, tightly linked to secondary movement in the Union, since the notion of choosing to lodge an asylum application in a different Member State than the one designated to you requires the applicant to move from that Member State to another. However, it is not always easy to determine what constitutes "asylum shopping", and thereby what the Dublin regulation is supposed to prevent. Can, for example, an asylum seeker choosing to leave a Member State in order to apply for asylum in another Member State due to bad reception conditions or extremely lengthy procedure really be considered "asylum shopping" or an unjustifiable ability to "pick and choose" where to apply for asylum? The Dublin regulation does however make the answer to this question irrelevant for its application by simply hindering all further movement from the responsible Member State except in cases of "systemic flaws" risking serious human rights violations[69], regardless of whether it can be considered "asylum shopping" or not.

[69] As in Dublin III regulation, article 3(2) mom. 2

The *Early Warning Mechanism* does contain certain tools to aid in preventing "asylum shopping". It gives assistance through EASO and FRONTEX to Member States to register asylum seekers, thereby "locking" them to that Member State, while also somewhat removing incentives for asylum seekers to leave for another Member State by trying to repair asylum systems that do not meet the standards of the CEAS. It also somewhat address the issue of *why* an asylum seeker would prefer one Member State over another when it comes to asylum, at least if considering reception conditions as a factor when deciding where to lodge an application for asylum. Other considerations that asylum seekers may have, such as integration concerns like culture, friends and employment are however not addressed by the Early Warning Mechanism.

The *relocation mechanisms*, both the provisional Council decision under article 78(3) and the proposed addition to the Dublin regulation doesn't really help prevent "asylum shopping". Quite on the contrary they make the family, cultural and social concerns a factor when deciding where to relocate an asylum seeker under the assumption that these factors will ease the integration in the Member State of relocation. Why these integration concerns are not considered important enough to warrant a place in the allocation of asylum seekers under normal conditions through the Dublin allocation criteria is hard to answer. One part of an answer may however be that the integration concerns cited in the relocation mechanisms are not included to benefit the asylum seekers, but rather to make Member States "forced" to accept them during the relocation more willing to accept them. An easily integrated asylum seeker, that for example already speaks the dominant language or has a social base in the Member State, will be able to enter the economy faster and thereby benefit the Member State itself.

5.2.2 Solving the problem of "refugees in orbit"

The problem with "refugees in orbit", i.e. asylum seekers for whom no Member State takes responsibility, is less controversial than the issue of "asylum shopping". In the end, some Member State must take responsibility for examining the asylum application of asylum seekers entering the EU, and asylum seekers falling outside the system and becoming more or less permanently irregular may create very negative consequences both for themselves and the Member States. This makes clearly designating responsibility to a single Member State necessary in a EU context.

There is however also a definition problem to be discussed when it comes to "refugees in orbit". The most basic definition for a "refugee in orbit" is an asylum seeker for whom no Member State takes responsibility for, while declaring that "some other" Member State should take responsibility. The definition issue however arises when considering an asylum seeker that has

a Member State clearly designated to be responsible for its application for asylum, but when this Member State fails to live up to this responsibility. A relevant example could be an asylum seeker in a Member State with a faulty or overburdened asylum system that fails to properly examine the application for asylum. Under the current Dublin regulation this asylum seeker could not leave for another Member State to lodge another application without risking transfer back to the first, faulty Member State, at least as long as that Member States asylum system has "systemic flaws" risking certain human rights violations. There is an argument to be made that this asylum seeker is just as much "in orbit" as the base example, since the designated Member State fails to take its responsibility and the other Member States can refuse to take responsibility.

The *Early Warning Mechanism* does at its core help prevent "refugees in orbit" since it aims to fix and assist Member States faulty asylum systems, thereby making the Member State able to take responsibility for asylum seekers who have been allocated to it. This process does however take time, and during that time the an asylum seekers application may be the responsibility of a Member State failing to properly complete an asylum procedure, while not allowing the asylum seeker a reliable option to make another Member State take responsibility.

The *relocation mechanisms* also aids in preventing "refugees in orbit" in times of large asylum pressure by allowing for other Member States to obtain the responsibility of asylum seekers that the originally responsible Member State can not take care of properly. It does however, just as with the problem of "asylum shopping", not address the root causes of the problem.

5.2.3 Encouraging border control and controlling "migrant flows"

The Dublin regulation is built around the Member State considered most responsible for an asylum seekers entry into the Union also being the Member State responsible for examining that asylum seekers application, with the exception of responsibility following from close familial ties to another Member State. This does in itself strongly encourage Member States on the external borders to control this border and try to deflect migrant flows, since the Member State otherwise may become responsible for any and all entering asylum seekers.

While this "blame-based" allocation of responsibility may make Member States more prone to controlling the entry of possible asylum seekers into the Union, it may also create distrust for the Union as a whole in Member States of the external border, for which it may be impossible to fully control entry. These external border Member States will under this system receive a

disproportionally large share of the responsibility for examining asylum applications in the EU, since they are in practice the only Member States that *can* fail in controlling the external border. This may, as discussed above in this thesis, also result in overburdened asylum systems in these Member States, which in turn risks creating an asylum crisis.

The *Early Warning Mechanism* does uphold the objective of encouraging border control and controlling "migrant flows" by assisting any troubled Member States while still applying the Dublin allocation criteria. In a Member State on the external border, the successful application of the Early Warning Mechanism may very well lead to increased numbers of asylum applications for which the Member State is responsible for, since the financial and administrative assistance can improve the border control and registration capacity. As the Early Warning Mechanism aims to stabilise and restore the application of the Dublin regulation's allocation criteria, it may however put the affected Member State in a permanent state of crisis, where it relies upon the assistance from the Union to maintain an asylum system capable of handling the responsibility for its allocated asylum seekers.

The *relocation mechanisms* do in this context aim to lift some of the burden from the shoulders of the pressured Member States by sharing it across the Union. While this may seem to at least partially lessen the incentive to controlling the entry of possible asylum seekers, it is important to remember that the relocation only affects a capped number of asylum seekers, and that the registration of these asylum seekers still is the responsibility for the original, benefiting Member State. Since the relocation mechanisms also call for the implementing of capacity raising measures from the Member State benefiting from relocation, with the threat of possible suspension of all relocations if not followed, the relocation mechanisms may still largely "protect" the rest of the EU from strong asylum pressure. As the EU as a whole accepts to take responsibility for a share of a more strongly pressured Member States asylum applications in exchange for this Member State increasing its efforts to raise its capacity, a sort of status quo is created where the pressured Member States must adopt to the Dublin regulation's allocation criteria, and not the other way around.

5.2.4 Conclusive remarks

What can be seen regarding the crisis management mechanisms relation to the each of the Dublin regulation's objectives is that the mechanisms very well may assist in upholding the objectives during times of crisis, but that they do not really address the circumstances that created the crisis in the first place.

While the Early Warning Mechanism at least attempts to strengthen pressured asylum systems, and while the relocation mechanism diverts some

of the pressure to other Member States, the base allocation of responsibility for asylum seekers is still a factor to cause the crisis. As long as the Dublin regulation emphasises the entry/stay criterion so strongly the Member States on the Unions external borders will receive an unfairly large portion of responsibility for examining asylum applications, which risk leading both to system collapse and distrust between Member States.

This problem can be described as the Dublin system only acting in a "spirit of solidarity" towards pressured Member States when this pressure risks spreading to the rest of the EU and hinder the application of the Dublin criteria. During times of "non-crisis", the Dublin regulation does not, and is not intended to, pre-empt possible asylum system collapses in Member States by sharing the responsibility for asylum seekers entering the EU across the Union as a whole. The "solidarity" in Dublin only emerges when pressured Member States troubles risk spreading to the rest of the Union. In this way the design of the Dublin regulation's allocation criteria can be said to create the need for corrective emergency measures, as the criteria do not accomplish "passive" equalisation of responsibility and pressure.

6 Conclusion

To conclude this thesis the research questions chosen will once again be shortly answered here. Recommendations for further research in the area of this thesis will also be made.

As seen above in this thesis, the primary objectives for the Dublin system is to prevent "asylum shopping", to solve the problem with "refugees in orbit" and to encourage effective border control by linking responsibility for asylum applications to the asylum seekers entry into the Union. Burden sharing, although considered important, has not been seen as an objective for the Dublin system, but rather as something that should be addressed by corrective mechanisms and financial support.

The Dublin system's role in the crisis management system of the CEAS is hard to ascertain, since it is unsure whether such a system really exist. As the Temporary Protection Directive seems to have been considered unusable, there are only really the crisis management mechanisms built into Dublin, i.e. the Early Warning Mechanism, and the allowance for emergency, ad hoc, decisions under article 78(3) TFEU. Dublin has become the only predictable framework for handling asylum crisis in the EU, but it has done this without adapting its normal application in any way. The criteria for allocation responsibility for asylum applications are very similar in the Dublin III regulation and the original Dublin convention, with the only notable exception being the family reunification criteria.

While the implementation of the crisis management mechanisms may assist in upholding the Dublin system's objectives in certain cases, there is still the issue of that the root causes of asylum crisis are not fixed. The overreliance on slow paced harmonisation of Member States asylum systems to fix issues of "asylum shopping" and secondary movement, and the lack of solidarity and effectiveness in the application of the Dublin system leads to the conclusion that the Dublin system was, and is, not prepared to prevent crisis situations from arising. The Dublin system has more or less become the goal in itself, and instead of adapting the Dublin regulation to the situation where especially Member States on the external border are taking a disproportionately large responsibility, crisis management mechanisms are being used to somewhat lessen the effect of the responsibility allocation.

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