



FACULTY OF LAW
Lund University

Vandna Gogia

Efficiency of the Dublin IV Regulation Proposal

Compatibility of the Proposal with European
Union Law, International Refugee Law and Human
Rights Law Standards

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Amin Parsa

Semester of graduation: Spring semester 2017

“What is happening at the outer borders of the EU these days is testing the humanitarian spirit of Europe. Do we protect our outer borders or the life of the individual who tries to reach our shores? The answer to that question has an impact on our core values.”

Morten Kjaerum¹

¹ Morten Kjaerum, ‘Can the Drownings in the Mediterranean be Stopped?’ (Human Rights Forum, Lund, 30 April 2015) <<http://rwi.lu.se/2015/04/can-the-drownings-in-the-mediterranean-be-stopped/>> accessed 14 February 2017

Contents

1	INTRODUCTION	9
1.1	Background	9
1.1.1	<i>What is the Common European Asylum System and the Dublin system?</i>	9
1.1.2	<i>Situation on the ground – where has the Dublin III Regulation left us?</i>	10
1.1.3	<i>How does the situation on the ground compare with the foundations of the Dublin system?</i>	12
1.2	Aim of the study	13
1.3	Research question and delimitations	16
1.4	Material and previous research	18
1.5	Research method, theory and outline	20
2	DUBLIN III REGULATION: BACK TO BASICS	22
2.1	The Member State of first entry as the Member State responsible	22
2.2	The transfer system	23
2.3	Safe country concepts	25
3	DUBLIN IV REGULATION PROPOSAL: THE ASYLUM APPLICATION AND ADMISSIBILITY	27
3.1	The four grounds of the admissibility check and their consequences	27
3.2	Reasons for the proposed admissibility check	28
3.3	Safe country concepts	28
3.4	“Systemic deficiencies”	32
3.5	The role of family relations in the admissibility assessment	34
3.6	“Subsequent applications”	35
3.7	Cessation of responsibility	36
4	DUBLIN IV REGULATION PROPOSAL: FIRST COUNTRY OF ENTRY AND SANCTIONS	39
4.1	Sanctions	40
4.1.1	<i>Legal basis for the sanctions</i>	40
4.1.2	<i>The sanctions</i>	41
4.1.2.1	The right to information and the right to submit information	41
4.1.2.2	Withdrawal of reception conditions	43
4.1.2.3	Accelerated asylum procedures	45
4.1.2.4	The right to appeal	47

5	DUBLIN IV REGULATION PROPOSAL: THE TRANSFER APPARATUS	50
5.1	Requests become notifications	50
5.2	Shorter time limits and responsibility shift	52
5.3	Appealing a transfer decision	53
5.4	Transfers and externalisation	53
6	DUBLIN IV REGULATION PROPOSAL: THE “CORRECTIVE ALLOCATION MECHANISM”	56
6.1	The idea behind the “corrective allocation mechanism”	56
6.2	Legal basis for the “corrective allocation mechanism”	57
6.3	Inherent weaknesses of the “corrective allocation mechanism”	57
6.3.1	<i>Factors barring examination by the “Member State of allocation”</i>	57
6.3.2	<i>Cases in which responsibility remains with the “benefitting Member State” – admissibility, security concerns, family ties</i>	58
6.3.2.1	Admissibility and security concerns	59
6.3.2.2	Family unity	60
6.3.3	<i>The limits chosen for the buffer zone</i>	61
6.3.4	<i>In the focus: the Member State operating below 100 % capacity level and a quota system</i>	63
6.3.5	<i>The “buy-out”</i>	64
6.3.6	<i>Automatic register and review</i>	66
6.3.7	<i>Dublin transfers, relocation schemes and the “corrective allocation mechanism”</i>	67
6.4	Revisiting solidarity	68
7	RESUSCITATION, TRANSPLANT OR LAST RITES OF THE DUBLIN SYSTEM?	73
7.1	Consent	74
7.1.1	<i>Previous experiences</i>	75
7.1.2	<i>“Asylum shopping” or a matter of dignified life?</i>	76
7.1.3	<i>A “matching system”</i>	80
7.2	The role of the European Union – allocation, support and examination	81
7.3	The role of the European Union – compensation and financing	83
7.4	International solidarity	85
7.5	Repercussions for failing Member States	86
8	CONCLUSION	88
	BIBLIOGRAPHY	90

Summary

The European Commission's proposal for a new Dublin IV Regulation has been on the table since 4 May 2016, COM 2016 (270). With the help of this instrument, determination of the Member State responsible for examining an incoming application for international protection from third-country nationals and stateless persons to the European Union should be possible. The proposal's efficiency will be studied through its aims as well as compatibility with European Union law, international refugee law and human rights law standards. We will see that the proposal does not fulfil the aims that it sets out to achieve: fair and effective access to status determination procedures, curbing secondary movements and fairly distributing asylum applications among the Member State. This will be illustrated through an investigation into four main changes that the proposal brings about, namely admissibility procedures, sanctions, the transfer scheme and the "corrective allocation mechanism". The proposal seems to follow the footsteps of its predecessors. To break from the pattern, focusing on some key elements of the Dublin system are suggested in this study. These include putting the asylum seeker and his or her consent in the centre, revisiting concepts of solidarity as well as the role of the European Union and state accountability.

Sammanfattning

Europeiska kommissions förslag till en ny Dublin IV-förordning lades fram den 4 maj 2016, COM 2016 (270). Med hjälp av detta instrument ska det vara möjligt att fastställa vilken medlemsstat som är ansvarig för att granska en ansökan om internationellt skydd från tredjelandsmedborgare och statslösa personer som underställs Europeiska unionen. Förslagets effektivitet kommer att studeras genom dess mål och förenlighet med EU-lagstiftning, internationell flyktingrätt och människorättsnormer. Förslaget uppfyller inte de avsedda målen: rättvis och effektiv tillgång till förfaranden för fastställande av flyktingstatus, begränsning av sekundära förflyttningar och rättvis fördelning av asylansökningar mellan medlemsstaterna. Detta kommer att visas genom en undersökning av fyra huvudsakliga ändringar som förslaget tar upp, nämligen upptagande till sakprövning, sanktioner, överföringssystemet och "mekanismen för korrigerande tilldelning". Förslaget verkar följa sina föregångares fotspår. För att bryta mönstret, föreslås i denna studie att fokus läggs på vissa viktiga delar av Dublinsystemet. Det handlar bland annat om att sätta asylsökanden och hens samtycke i centrum, att se över solidaritetsbegreppet samt Europeiska unionens roll och staternas ansvarsskyldighet.

Acknowledgements

I am very grateful to my supervisor Amin Parsa for making me challenge the core of my legal understanding about the European Union and the concept of efficiency. The one thing that I will take with me from conversing with him is that the time has passed to shy away from addressing sensitive issues related to migration because in the end, it is human lives that we are dealing with. Solutions will not come from being apologetic or in denial about the shortcomings of the European asylum system, but rather by looking at the legal framework and its impact on the ground, and so the resulting fears and insecurities, straight in the eye. I would like to thank Amin for his unfettered and accurate critique, guidance and feedback.

My sincerest gratitude to professors Eleni Karageorgiou and Vladislava Stoyanova, who have always welcomed debate on the topic with immense eagerness. Eleni and Vladislava have helped me to understand the interrelationship between legal concepts of the Common European Asylum System and have led me to core materials for this work. I have tried to channel this knowledge accordingly into the thesis.

I am thankful to my opponent Lotten Berggren and examiner Eduardo Gill-Pedro who raised challenging questions during the defence and brought to my attention crucial areas of revision that were necessary before finalising this essay.

The one person who has enquired about the developments of this work every day without fail for the past four months is my mother, Nirmal, and so a massive thank you to her. A warm cup of chai was awaiting for the days it had gone less well. Thanks Chhabs! On many of these occasions, my brother Tarun was there to further defuse the situation and lift everyone's spirits and for this I am grateful. I am thankful to my sister Jyoti for being enthusiastic about discussing the legal aspects of the topic.

Any errors in fact or judgement are of course my own.

Abbreviations

Asylum Procedures Directive	Directive 2013/32/EU
Asylum Procedures Regulation Proposal	COM (2016) 467
Dublin Convention	Dublin (97/C 254/01)
Dublin III Regulation	Regulation (EU) 604/2013
Dublin IV Regulation Proposal	COM (2016) 270
European Asylum Support Office Regulation	Regulation (EU) 439/2010
ECHR	European Convention on Human Rights and Fundamental Freedoms (1950)
European Union Agency for Asylum Regulation Proposal	COM (2016) 271
ECRE	European Council on Refugees and Exiles
EU Charter	Charter of Fundamental Rights of the European Union
Family Reunification Directive	Directive 2003/86/EC
Long Term Residents Directive	Directive 2003/109/EC
Qualifications Directive	Directive 2011/95/EU
Reception Conditions Directive	Directive 2013/33/EU
Refugee Convention	Convention Relating to the Status of Refugees (1951)
Return Directive	Directive 2008/115/EC
Temporary Protection Directive	Directive 2011/55/EC
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	Office of the United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

1.1.1 What is the Common European Asylum System and the Dublin system?

The Common European Asylum System is the name of the minimum standard scheme pertaining to the asylum system in force in the European Union. The Dublin IV Regulation Proposal² and its predecessors form part of the Common European Asylum System and help to identify the Member State responsible for examination of an asylum application for international protection made by nationals of third countries or stateless persons, and facilitate their transfer accordingly. Other regulated areas forming part of the Common European Asylum System include reception conditions, asylum procedures and qualification procedures. An amendment of the Dublin III Regulation³ in force since 19 July 2013 was proposed on 4 May 2016. The set of proposals amending the different areas of the Common European Asylum System were initiated upon release of the European Commission's plan for a European Agenda for Migration, which was followed by the New York Declaration on Refugees and Migrants.⁴ The Dublin III Regulation and its proposal derive their legal legitimacy from the Treaty on the Functioning of the European Union⁵ (hereinafter TFEU) art. 78 para. 2 point (e), whereby measures for the determination of the Member State responsible in the Common European Asylum System can be adopted by the European Parliament and Council. Migration is a field of shared competence between the European Union and its Member States, TFEU art.

² European Commission, 'Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM (2016) 270 final

³ European Parliament and Council Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31

⁴ European Commission, 'A European Agenda on Migration' COM (2015) 240 final; New York Declaration for Refugees and Migrants' (adopted 19 September 2016) United Nations Resolution A/71/L.1

⁵ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326

4.2.j, which means that both the Member States individually and the European Union can legislate in the field of asylum.

1.1.2 Situation on the ground – where has the Dublin III Regulation left us?

It is widely held that the “current proposal preserves the original logic of the system”.⁶ To evaluate the potential changes and impacts that the Dublin IV Regulation Proposal will bring about for the Member States, but also individuals, it will be necessary to get to the heart of this “logic”. The Dublin IV Regulation Proposal must be studied against the backdrop of the current Dublin III Regulation and the prevailing migration situation in the European Union and so a short account of this will be provided here.

The influx of migrants in large numbers to the European Union started in 2014.⁷ In 2016, a total of 632,000 asylum applications were lodged in Europe.⁸ Migrants are arriving from a range of countries, there among more recently, displaced persons from internal conflicts after the Arab Spring in the Middle East. In the words of the Office of the United Nations High Commissioner for Refugees (hereinafter UNHCR), the Dublin III Regulation “has largely failed both asylum-seekers and Member States”.⁹ According to the European Commission the difference in levels of protection offered to the asylum seekers is an evident failure.¹⁰ This logic can be extended to the differing recognition rates, whereby nationals of certain countries are granted refugee status to a greater extent compared to

⁶ Churches' Commission for Migrants in Europe, 'Comments on the [Dublin IV Regulation Proposal]' (October 2016) 2

⁷ Steve Peers, 'The Organisation of EU asylum law: the latest EU asylum proposals' (EU Law Analysis, 6 May 2016) <<http://eulawanalysis.blogspot.se/2016/05/the-organisation-of-eu-asylum-law.html>> accessed 19 January 2017

⁸ Minos Mouzourakis, 'Admissibility, responsibility and safety in European asylum procedures', Asylum Information Database (September 2016) 11

⁹ UNHCR, 'Comments on the [Dublin IV Regulation Proposal]' (December 2016) 5

¹⁰ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM (2016) 270 p. 3.3; cf. Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin', European Parliament (July 2015) 48; cf. Susan Fratzke, 'Not adding up, The fading promise of Europe's Dublin system, EU Asylum: Towards 2020 Project', Migration Policy Institute Europe (March 2015) 16

nationals of other countries.¹¹ The European Commission also admits that the poor and differing levels of reception conditions and resulting secondary movements are a reality.¹² Secondary movements are characterized by the onward movement of the asylum seeker, after having already initiated an asylum application in one state or having been afforded international protection, but also by relocation within the European Union illegally without having initiated asylum procedures.¹³ These are often followed by the lodging of multiple applications.¹⁴

The examination procedure is complex, slow and usually characterized by intergovernmental lobbying so as to hamper effective and fair access to asylum procedures.¹⁵ On average, the examination of an asylum application from start to end takes as long as 11 months, of which 6 months are exhausted in the determination of which Member State is responsible.¹⁶ Countries that are located at the borders of the European Union such as Greece, Italy, Hungary and Turkey are facing exceptional challenges in the examination of asylum applications, which hints at an overall unfair distribution of responsibility for examining asylum applications. Put in numbers, the unequal distribution is also evident centrally in Europe, for example from the case of Germany that received nearly 400,000 asylum applications in the first half of 2016, which is nearly eightfold of the next largest recipient.¹⁷ Germany in turn requested the transfer of many of these applicants to Hungary, leading to Hungary becoming the number one recipient of requests to receive asylum seekers through the Dublin system.¹⁸

¹¹ Cathryn Costello, Elspeth Guild, Madeline Garlick, Minos Mouzourakis and Violeta Moreno-Lax, 'New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection', European Parliament (October 2014) 9

¹² European Commission (n 10) 3 f

¹³ UNHCR EXCOM Conclusion No 58 (XL) 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989)

¹⁴ European Commission (n 10) 4

¹⁵ Francesco Maiani, 'The Reform of the Dublin III Regulation', European Parliament (June 2016) 39 and 45; Joanne van Selm, Magdalena Kmak and Paul McDonough, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered', ECRE (March 2008) 4

¹⁶ Maiani (n 15) 14; Kmak, McDonough and van Selm (n 15) 5

¹⁷ Mouzourakis (n 8) 11

¹⁸ *ibid* 11

The Common European Asylum System has incurred substantial costs on the Member States and the European Union.¹⁹ It is not surprising then that Member States engage in defensive behaviour and try to find ways of deflecting responsibility, like not communicating information to authorities of other Member States, which would otherwise suffice to establish a link between them and the asylum seeker and hence render that Member State responsible.²⁰ This has led to that many asylum seekers are transferred endlessly and remain in “orbit”, without any Member State responsible to turn to, which is unfortunate, given that asylum seekers are identified as a vulnerable group and consequently require adequate levels of protection.²¹ The European Union grapples with these problems at a time when 86 % of de facto refugees are internally displaced within developing nations, outside of the European Union.²² These realities explain the situation on the ground and to complement this, an account of the underlying legal deficiencies of the Dublin III Regulation will be provided in *Chapter 2*.

1.1.3 How does the situation on the ground compare with the foundations of the Dublin system?

These circumstances draw a bleak picture when compared to how asylum examination procedures were intended to be. The basis is supposed to be one of “indivisible, universal values of human dignity, freedom, equality and solidarity” as expressed in the preamble of the Charter of Fundamental Rights of the European Union²³ (hereinafter EU Charter). Human dignity is also safeguarded in the Universal Declaration of Human Rights²⁴ art. 1. The idea is to give individuals “access to a fair and effective status determination

¹⁹ Fratzke (n 10) 15 f; Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 17; Kmak, McDonough and van Selm (n 15) 12

²⁰ Meijers Committee, ‘Comments on the [Dublin IV Regulation Proposal]’, CM 1609 (2016) 4; Evangelia Tsourdi and Philippe De Bruycker, ‘EU Asylum Policy: In Search of Solidarity and Access to Protection’, Migration Policy Centre (May 2015) 4

²¹ Meijers Committee (n 20) 4 f; Kmak, McDonough and van Selm (n 15) 14

²² UNHCR, ‘Better Protecting Refugees in the EU and Globally, UNHCR’s proposals to rebuild trust through better management, partnership and solidarity’ (December 2016) 5

²³ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

²⁴ Universal Declaration of Human Rights (adopted 10 December 1948 United Nations General Assembly Resolution 217 A(III))

procedure” on the basis of fair and objective criteria.²⁵ Asylum seekers are to be afforded equal treatment, which fulfils at least the minimum standards of protection.²⁶ TFEU art. 78.1 maps out the asylum policy of the European Union for granting international protection with respect to the principle of *non-refoulement* of the Refugee Convention of 1951²⁷ (hereinafter Refugee Convention), referring to article 33. This principle prohibits the return of an asylum seeker to a country where there is a real risk of persecution. The coordinated implementation of these principles is supposed to lead to a harmonised application of laws in the European Union.²⁸ These standards are largely an expression of the rule of law, but also human rights as found *inter alia* in the Treaty of the European Union²⁹ (hereinafter TEU) art. 2. An understanding of these elements of the Common European Asylum System will be necessary for the assessment of the Dublin IV Regulation Proposal and realisation of why the proposal falls short as regards adherence to the law of the European Union, international refugee law and human rights law standards.

1.2 Aim of the study

Efficiency is an overarching aim of the Dublin system,³⁰ yet the concept is not clearly defined in European Union law, international refugee law or human rights law standards. For the purposes of this study efficiency will firstly be taken to mean the relation of the aims set out for the Dublin IV

²⁵ Maiani (n 15) 58; Costello, Garlick, Guild and Moreno-Lax (n 10) 56; Dublin III Regulation recital 5; cf. EU Charter art. 18 on the right to asylum

²⁶ UNHCR (n 9) 2; Council of the European Union, ‘The Stockholm Programme – An open and secure Europe serving and protecting the citizens’, document 17024/09 (December 2009) para. 6.2; European Council, ‘26/27 June Conclusions’ EUCO 79/14 (June 2014) para. 7

²⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

²⁸ UNHCR (n 9) 2 and 26; Advisory Committee on Migration Affairs, ‘Sharing responsibility, A proposal for a European asylum system based on solidarity’ (December 2015) 31

²⁹ Consolidated Version of the Treaty on European Union [2012] OJ C 326

³⁰ European Commission, ‘Policy plan on asylum – an integrated approach to protection across the EU’ COM (2008) 360; Constantin Hruschka, ‘Dublin is dead! Long live Dublin!’ (EU Migration Law Blog, 4 May 2016) <<http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>> accessed 12 April 2017; Eleni Karageorgiou, ‘The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value’, 2016:14epa Swedish Institute for European Policy Studies (2016) 1; Elspeth Guild, Madeline Garlick, Steve Peers and Violeta Moreno-Lax, ‘The Dublin III Regulation’ in *EU Immigration and Asylum Law* (2 edn, Brill Nijhoff 2015) 347

Regulation Proposal compared to the expected effects.³¹ As it is the European Union legislators that will set out the aims of the Dublin IV Regulation, the conclusion will naturally be based on the standards of efficiency as set by the European Parliament and Council, but also the European Commission who is the author of the current proposal. It will be useful to recall that taken in its ordinary meaning, efficiency can refer to the workability of a system. Practical outcomes are often a good reflection of how well a system works and whether these outcomes conform to the law is also an aspect of the same workability assessment. Since the Dublin IV Regulation will not operate in a vacuum and with regard to the ordinary meaning of the term, it will secondly be necessary to, at all levels, investigate Dublin IV Regulation's compatibility with European Union law, international refugee law and human rights law standards. It follows from this context that compatibility will be reviewed as a part of the efficiency criterion. Any incompatibility casts doubt on the legality of the particular measure and raises the question of fairness, both for the individual and the state. As a preview for the reader, it might be interesting to note that legal texts and literature portray efficiency and fairness as being antagonistic.³² The Dublin III Regulation recital 9 presents the two aims separately, as it is stated that the aim is to further "the effectiveness of the Dublin system and the protection granted to applicants under the system". Finally, it should be clarified that although efficiency is being examined through the lens of the lawmakers and their intentions, the Member States and individuals are also affected by the Dublin system. Hence, a part of the study also deals with analysing efficiency outcomes that affect them.

Due to the aforementioned discussion, a deeper look into the aims of the Dublin IV Regulation Proposal and the previous Dublin systems becomes necessary. The Dublin setup has been somewhat successful in terms of achieving the aim of rendering one Member State responsible for an asylum

³¹ Cf. James C Hathaway, *The Rights of Refugees under International Law* (1 edn, CUP 2005) 55 who uses 'object and purpose' in relation to the term 'effectiveness', and Vienna Convention on the Law of Treaties (23 May 1969) art. 31.1

³² Helen O'Nions, *Asylum – A Right Denied, A Critical Analysis of European Asylum Policy* (1 edn, Ashgate 2014) 100; Garlick, Guild, Moreno-Lax and Peers (n 30) 347

application.³³ The hesitation as regards this conclusion is owing to comments such as “for too many refugees, it is the act of Dublin transfer that guarantees their applications will not be examined”³⁴. If an application is not examined, then there cannot be a Member State responsible because it is the task of the Member State responsible to examine the application. Moreover, before hailing the success of this particular aim and overestimating the Dublin system’s operability, it must be considered that the criterion of rendering one Member State responsible is a rather technical one and devoid of substantive evaluations.

For this reason, the focus of the thesis will rather be on three other aims. The first two aims pertain to how efficiently the Dublin IV Regulation Proposal regulates the aims of providing the asylum seeker with a fair and effective access to asylum procedures and curbing secondary movements.³⁵ This is also referred to as “streamlining” the Dublin procedure.³⁶ Screening incoming applications for *admissibility* and amendments to the current *transfer scheme* relate to the aim of speeding up the examination process and should therefore contribute to the attainment of the goal of “effective access”. Indeed both can also play a role in curbing secondary movements.³⁷ *Sanctions* upon failure to apply in the first country of entry directly relate to curbing secondary movements. A third aim that necessarily needs to be examined pertains to the question of an equal distribution of asylum applications among the Member States, which the Dublin IV Regulation Proposal explicitly addresses through the “*corrective allocation mechanism*”. Here it should be noted that it is purported that the Dublin system was not conceived with the objective of solidarity or responsibility

³³ European Commission, ‘The evaluation of the Dublin System’ COM (2007) 742; cf. Dublin III Regulation art. 1, recitals 4 – 5 and European Commission, ‘Green Paper on the future Common European Asylum System’ COM (2007) 301 p. 4

³⁴ Kmak, McDonough and van Selm (n 15) 15

³⁵ Cf. Dublin III Regulation and Dublin IV Regulation Proposal art. 3.1 and recital 5 and EU Charter art. 18; Council of the European Union, ‘Presidency Conclusions, Tampere European Council, 15-16 October 1999’ (October 1999); European Commission COM (2007) 301 (n 33) p. 4; Kmak, McDonough and van Selm (n 15) 4

³⁶ Hruschka (n 30)

³⁷ Christina Boswell, Eiko Thielemann and Richard Williams, ‘What system of burden-sharing between Member States for the reception of asylum seekers?’, European Parliament (January 2010)

sharing in mind, and that it is rather a consequence of the same system.³⁸ However, solidarity's importance for the Dublin system and the Common European Asylum System is widely acknowledged³⁹ and will be investigated in this thesis as well.

The final aim of the study is to try to identify what the next steps should be in relation to the Dublin IV Regulation Proposal. The section will include a commentary on the pieces that have been missing from the Dublin puzzle all this time, for example the consent of the asylum seeker, but also appropriate use of the European Union resources, international solidarity and accountability measures.

1.3 Research question and delimitations

With the aim of this study in mind the research question can be formulated as:

Efficiency of the Dublin IV Regulation Proposal

Compatibility of the Proposal with European Union Law, International Refugee Law and Human Rights Law Standards

In September 2015, a relocation scheme was adopted to alleviate pressures off the asylum systems of Greece and Italy, by facilitating the transfer of asylum seekers from Greece and Italy to other European Union Member States. Discussion on relocation schemes will not be the focus of this study. The reason for this is that relocation schemes are intended to address

³⁸ Kashetu Kyenge and Roberta Metsola, 'Draft Report on the situation in the Mediterranean and the need for a holistic EU approach to migration', European Parliament (2015/2095(INI)) (January 2016) para. 32; Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 36; European Commission COM (2007) 301 (n 33) p. 4

³⁹ UNHCR EXCOM Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981); European Commission, 'Enhanced intra-EU solidarity in the field of asylum, An EU agenda for better responsibility-sharing and more mutual trust' COM (2011) 835 p. 1 f; European Parliament, 'Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration' (2015/2095(INI)) (April 2016) para. 1; Mathias Herman, 'Council Regulation (EC) No 343/2003 of 18 February 2003' in Kay Hailbronner, *EU Immigration and Asylum Law Commentary* (1 edn, Hart 2010) 1380

temporary and geographically specific issues that complement the Dublin framework, but do not translate directly to the Dublin framework.

The current proposal for the European Union Agency for Asylum Regulation⁴⁰ is indeed a welcome change as regards the monitoring of Member States' obligations. Control apparatuses such as the European Union Agency for Asylum and European Asylum Support Office provide operational assistance to Member States.⁴¹ This work will take note of the two entities only briefly in the relevant areas. Similarly, the proposal for the Regulation on the identification of applicants, also known as the Eurodac Regulation Proposal,⁴² which constitutes a fingerprint database in the Dublin system and the European Border and Coast Guard Agency's role for the Schengen area, falls outside the immediate scope of this study.

For the purposes of a focused examination, I will not be able to discuss "safe country" concepts and the level of protection that is considered as being "sufficient" to be transferred to that country in great detail. They are nevertheless utmost relevant in the context of the European Union – Turkey deal of 18th March 2016, allowing for the transfer of applicants from Greece to Turkey, and the Asylum Procedures Regulation Proposal⁴³.

This thesis is not a complete investigation of solidarity or integration of asylum seekers or beneficiaries of international protection in the European Union. Other omissions include specific discussions of provisions relating to unaccompanied minors, in-depth analysis of the provisions relating to detainees and reception conditions, evidentiary procedures, registration and border control. Analysis of these elements will be omitted either because they are distinctive and voluminous areas of asylum law that cannot be

⁴⁰ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' COM (2016) 271 final

⁴¹ European Parliament and Council Regulation (EU) 439/2010 of 19 May 2010 establishing a European Asylum Support Office [2013] OJ L132/11 arts. 2.2 and 2.4

⁴² European Commission, 'Proposal for a [Eurodac Regulation]' COM (2016) 272 final

⁴³ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' COM (2016) 467

confined in the scope of this thesis, or because as in the case of unaccompanied minors and detainees, a number of procedural improvements are visible in the proposal, so not as many inefficiencies that otherwise are the focus of this essay.

1.4 Material and previous research

To understand the forethought behind the Dublin IV Regulation Proposal, a number of official European Union papers and preparatory works have been studied. These include publications by the European Commission, the European Parliament and the Council of the European Union. A study of the object and purpose of the proposal is vital for evaluating it.

The field of migration law that will be studied has been under the microscope of academics, doctoral candidates, professors and researchers for some time now and so there is a rich amount of books, online articles and research papers that can be made use of.

The UNHCR plays a crucial role in the field of migration law and its authority is well established. The agency's functions are given considerable recognition in the Refugee Convention art. 35.1, whereby co-operation from the Contracting States to facilitate UNHCR's proper functioning is required, in particular for the functions of supervision. Studies undertaken by them will therefore be referred to.

The European Council on Refugees and Exiles (hereinafter ECRE) is a group of 99 non-governmental organisations across 40 countries in the European Union that undertake to protect refugees.⁴⁴ They frequently publish detailed views on asylum developments. It is owing to ECRE's outreach and their non-political mandate that they will be cited frequently in this thesis.

⁴⁴ ECRE, 'Our Work' <<http://www.ecre.org/our-work/>> accessed 19 May 2017

Statistical analysis will often be based on the findings of the Asylum Information Database, an initiative of ECRE and Eurostat, which is a statistical bureau of the European Union. These sources have a longstanding reputation for containing relevant asylum information on different countries.

Further to this, in order to be able to reason in relation the second half of the research question pertaining to compatibility, which is encompassed in the first half of the research question, European Union and international laws will be resorted to. These include the EU Charter, European Convention on Human Rights⁴⁵ (hereinafter ECHR), TFEU, Treaty on the European Union (hereinafter TEU), Universal Declaration of Human Rights, EU directives and regulations, the Refugee Convention, International Covenant on Civil and Political Rights⁴⁶, International Covenant on Economic, Social and Cultural Rights⁴⁷ and case law from the European Court of Human Rights and the Court of Justice of the European Union. Despite the resonance of being purely European instruments, it should be noted that rights emanating from the EU Charter and ECHR carry universal value and apply to non-citizens as well, for example the EU Charter art. 1 as there is the mention of the “inviolab[ility]” of the rights. Reference will be made in the appropriate areas where the TFEU does not apply to non-citizens. The Refugee Convention will be used to symbolise international refugee law. The International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights can be grouped as symbolising human rights standards. It will be important to refer to these instruments contextually, as their scope is very distinct.

⁴⁵ European Convention on Human Rights and Fundamental Freedoms (1950)

⁴⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

⁴⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

1.5 Research method, theory and outline

In this work, the term “asylum seeker” refers to persons who initiate an asylum procedure or have an intention of initiating an asylum procedure in the European Union. On the one hand, the term “refugee” is constitutive meaning that the status is achieved as soon as all the elements of the refugee definition have formed. On the other hand, the “refugee” definition can also be of a declaratory nature, meaning that a declaration or granting of a refugee status and protection is required by the competent authority, pursuant to the Dublin framework and refugee definition contained in the Refugee Convention art. 1.a and the Qualification Directive⁴⁸ art. 2.d. It includes stateless persons and persons granted subsidiary protection or other related forms of international protection, for example humanitarian protection. An indication will be made as to whether the declaratory form or constitutive form of the refugee definition is intended. At occasions, the term “migrant” will be used and this term should be understood as meaning third-country nationals moving from one country to another in the European Union.

The efficiency of any given apparatus must be measured in relation to something. Apart from using European Union and international law instruments to assess efficiency, efficiency will also be measured against the current Dublin III Regulation. This forms *Chapter 2* of the thesis. Efficiency will be commented in relation to admissibility, sanctions, the transfer scheme and the “corrective allocation mechanism” in *Chapter 3 – 6*. These considerations lead to *Chapter 7* where it is discussed whether the Dublin IV Regulation Proposal is tenable and what amendments and alternatives are available. In *Chapter 8*, the findings will be summarised.

The analytical and thematic approach in this thesis is twofold. For example, while discussion on the sanctions that ensue if an asylum seeker does not

⁴⁸ 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 [2004] OJ L304/12

apply in the first country of entry in the European Union is rights-based, the section on the “corrective allocation mechanism” focusing on the distribution of asylum applications, takes grounding in inter-state relations. Hence, the twofold analysis encompasses a rights-based approach and an inter-state approach. Nonetheless, it should be noted that inter-state considerations can sometimes boil down to rights-based consequences for the individual, and these will be commented in the relevant areas.

2 Dublin III Regulation: Back to basics

2.1 The Member State of first entry as the Member State responsible

In this section, the idea of rendering the Member State of first entry as the Member State responsible, as is the case in the Dublin III Regulation, will be introduced. The Member State that is identified as the Member State responsible is responsible for examining the asylum application in substance, though it can have implications for the Member State even after the granting of protection, as will be taken up in *Chapter 7*. In the Dublin scheme, the country that has been most involved in the reception of an asylum seeker, in terms of for example facilitating entry, is rendered responsible for examining the asylum application.⁴⁹ More concretely, a reference list of indicators of a particular order must be consulted to derive the Member State responsible; the Member State where the asylum seeker's family members are present, the Member State that previously issued a visa or residence permit for the asylum seeker, the Member State of irregular entry, meaning illegal entry, and finally the Member State where the application was lodged. This is known as the examination hierarchy criteria, Dublin III Regulation arts. 3.2 and 7.

As per Dublin III Regulation art. 13, in the case of irregular entry, the Member State of first entry is responsible for examining the asylum application. Due to the fact that applicability of the criteria on family ties and visa and residence permit should be checked prior to the applicability of the criteria on the Member State of first of entry, it seems that the indicium of Member State of first entry is to be used with some degree of caution. As we will see, the intended restrictiveness of the provision is not upheld.

⁴⁹ Commission of the European Communities, 'Commission Staff Working Paper on the Evaluation of the Dublin Convention' SEC (2001) 756, ch II p. 1

The country that sees over the reception of an asylum seeker is 99 % of the time the country of first entry in the European Union and so to the same degree also the country identified as responsible for assessing the asylum application.⁵⁰ The consequence of this has been that the Member States located at the borders of the European Union have been pressured excessively, leading to an overall unfair distribution of responsibilities for examining asylum applications. One could also say that the geographical location of the Member State determines where the asylum application will be examined.⁵¹ It is clear that the Dublin III Regulation has not led to a fair allocation of responsibilities amongst the European Union Member States.⁵²

This method of allocating asylum applications is maintained in the Dublin IV Regulation Proposal. Dublin IV Regulation Proposal art. 4.1 requires applicants having entered the European Union irregularly to apply in the first country of entry. The change, however, is that the Dublin IV Regulation Proposal aims to enhance the effects of this obligation through individual sanctions.⁵³

2.2 The transfer system

The current transfer system in the European Union seems to have done little to alleviate the pressures experienced by Member States for examining asylum applications. The number of “take back requests”, which are outgoing requests for another Member State to receive an applicant, exceed almost entirely the number of “take charge requests”, which are requests to assume responsibility for the application.⁵⁴ This, apart from highlighting the clear discrepancy between states as regards their understanding of the

⁵⁰ Maiani (n 15) 14

⁵¹ Cf. European Commission COM (2007) 301 (n 33) p. 4; Maiani (n 15) 28

⁵² Council of Bars and Law Societies of Europe, ‘Comments on the [Dublin IV Regulation Proposal]’ (September 2016) 2

⁵³ Withdrawal of reception conditions – Dublin IV Regulation Proposal art. 5.3; accelerated asylum procedure – Dublin IV Regulation Proposal arts. 5.1 (failure to apply in country of first entry) and 20.3 (pursuant to transfer back) and APD art. 31.8; loss of right to appeal – Dublin IV Regulation Proposal art. 20.5

⁵⁴ European Commission (n 10) 10 and 12; Maiani (n 15) 14

common obligations, has in practice not led to any substantial transfers of asylum seekers, as few as 3 % of the total number of asylum seekers more exactly.⁵⁵ This has been identified as “the main problem for the efficient application of the Dublin system”.⁵⁶ Reduced numbers of transfers persist even when the sending state and the receiving state are in agreement regarding the transfer; below 40 % of such transfers are actually executed.⁵⁷ This goes to show that the Dublin III Regulation has not succeeded in putting in place a workable transfer scheme.

In the current transfer scheme of the Dublin III Regulation, a Member State’s failure to respond to a “take back request” leads to an actual shift of responsibility for examining the asylum application, to the supposed detriment of the Member State that does not respond. The receiving state becomes bound by passivity, while it remains unanswered how fair and effective for the asylum seeker and efficiency is attained. It is uncertain if the “take back request” is meant to undergo a thorough assessment based on substantive merits.

In this section, it is also worth remembering that only negative and not positive asylum decisions are enforceable in the European Union. Positive decisions are limited in scope territorially, as opposed to negative decisions that are enforceable throughout the territory of the European Union. The first implication of this is that an asylum seeker who has been granted a refugee status in one Member State will not be recognised as a refugee in another Member State. The second implication is that if the refugee decides to submit an application in another Member State than the one where s/he has been granted refugee status, for whatever reason, then the process for the determination of the Member State responsible can be initiated again, leading to many transfers. One reason to why the asylum seeker would

⁵⁵ Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 89

⁵⁶ Commission of the European Communities, ‘Commission staff working document accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system - Annex to the communication on the evaluation of the Dublin system’ SEC (2007) 742 p. 6

⁵⁷ Maiani (n 15) 15

submit a new application despite already having been granted international protection is because s/he would rather avail himself or herself better conditions in another country. Rendering positive decisions binding would essentially mean that the European Union Member States would be consistent in the application of Dublin's examination criteria and treat the same cases alike. Furthermore, this would bring the Dublin system into line with TFEU art. 78.2.a and reinforce the idea of a "uniform status of asylum" and "mutual recognition" of the Qualifications Directive.⁵⁸ Efficiency mandates that this inconsistency be put an end to, so as minimise unnecessary transfers. For the asylum seeker legal certainty could be attained.

2.3 Safe country concepts

In the current Dublin III Regulation, application of the concept of "safe countries" is optional. Nevertheless, for return, mere transit through a "safe country" or irregular entry may be deemed "sufficient".⁵⁹ It says of itself that this is a loosely held term. For European Union Member States, the guideline is broad: Member States are considered safe as long as they do not compromise the prohibition of *refoulement*, essentially meaning that asylum seekers can always be transferred to these Member States, even if other factors effectively render the country unsafe.⁶⁰ It is interesting to consider that since the only criterion for return to a European Union Member State is based on *non-refoulement*, as per ECHR art. 3, it is possible that a third-country is relatively safer. This is because in the case of the latter, more safety factors can suspend a transfer. An evident example of the dysfunctional transfers on the basis of safe country concepts in the European Union relates to the human rights situation in Hungary. Member States such as Austria, Finland, Germany, Luxembourg and Sweden do not transfer

⁵⁸ Cf. European Commission, 'An open and secure Europe: making it happen' COM (2014) 154 p. 3.1, ECRE, 'Discussion Paper, Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU' (November 2014) and Kyenge and Metsola (n 38) para. 36

⁵⁹ Dublin III Regulation art. 13; Mouzourakis (n 8) 20

⁶⁰ Dublin III Regulation recital 3

applicants to Hungary because of the poor levels of protection in Hungary, though a Court judgement in Sweden recently deemed the levels of protection in Hungary to be adequate.⁶¹

⁶¹ Martin Wagner et al., 'The Implementation of the Common European Asylum System', European Parliament (May 2016) 51 and Migration Court of Appeal, MIG 2016:16, Case number UM 1859-16, 1 July 2016

3 Dublin IV Regulation Proposal: The asylum application and admissibility

3.1 The four grounds of the admissibility check and their consequences

An examining Member State must, in the course of a maximum of ten days declare an asylum application inadmissible if the applicant has migrated from a “first country of asylum” or a “safe third country”, Dublin IV Regulation Proposal art. 3.3.a.⁶² The “first country of asylum” refers to a non-European Union Member State that has granted the asylum seeker a refugee status. The check is independent of “safe country of origin” and “security risk” assessments, which in turn are subject to accelerated procedures, Dublin IV Regulation Proposal arts. 3.3.b and 40. The “country of origin” refers to the country of nationality of the asylum seeker. The assessment grounds do not form part of the examination procedure laid out in the Dublin IV Regulation Proposal. Hence, it may be seen as a “pre-Dublin procedure”.⁶³ To summarise, examination of the asylum application will be preceded by an examination of:

1. first country of asylum
2. safe third country
3. safe country of origin
4. security risk

The Member State declaring the application inadmissible on the basis of any one of the four criteria will be responsible for the application and

⁶² Cf. European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 art. 33.1 on inadmissibility (hereinafter Asylum Procedures Directive)

⁶³ Churches’ Commission for Migrants in Europe (n 6) 2

subsequent related applications, Dublin IV Regulation Proposal arts. 3.4 – 3.5 and 20.4.

For starters two important points can be taken note of. First, it can be noted that the meaning of these four terms is far from clear. Second, conducting admissibility assessments are at present optional in the Member States. Two prominent recipients of asylum applications in the Dublin system, namely Sweden and Italy do not carry out admissibility checks.⁶⁴ This far into the chapter it is safe to speculate that making inadmissibility screenings mandatory can present a challenge to the discretionary powers and sovereignty of Member States.

3.2 Reasons for the proposed admissibility check

Just as in any other area of procedural law, an admissibility check is supposed to act as a filter to set aside those claims that would be inadequate for forming the basis of a decision, for example if it turns out that the asylum seeker is not in need of international protection or if the asylum seeker's claim cannot be examined because s/he poses a security risk to the Member State in which s/he is present. These types of applications are discarded at an early stage, so that unnecessary transfers and expected secondary movements do not ensue, Dublin IV Regulation Proposal recitals 17 and 25. At the other end of the spectrum, providing fair and effective access to asylum procedures, and hence efficiency, can also be identified as being the goal.

3.3 Safe country concepts

The current Dublin III Regulation allows for the dismissal of an asylum application if the asylum seeker can be deported to a “safe country” at the Member State's discretion, pursuant to Asylum Procedures Directive arts.

⁶⁴ Mouzourakis (n 8) 15

35 – 39. However, the application of this provision is made obligatory in the Dublin IV Regulation Proposal in article 3.3, and contrary to the Asylum Procedures Directive the new provision is not dependent on the attainment of refugee status of the applicant in the third country. This is problematic, in the sense that upon return to the “safe country” the asylum seeker would not be protected by any legal status and would in many cases need to seek asylum from scratch. Indeed, the applicant can appeal the decision on admissibility, which is based on “safe country” considerations, but initially it can be held that the chances of a successful appeal are slim owing to the heightened evidentiary requirements in the individual case.⁶⁵

Indeed, “safe country” concepts have bearing in Member States’ trust in one another’s asylum systems, with the expectation of adherence to the principle of *non-refoulement*, as found in the Refugee Convention art. 33, in reciprocity. It is an expression for the States’ legitimate expectations from one another. A “safe country” can be located inside or outside of the territory of the European Union, and in the case of the latter, it is classified as a “safe third country”. As Costello reminds, “safe country” concepts must fulfil the function of “effective protection”.⁶⁶ It is hard to imagine that this can be exercised for example where the sending state does not even inform the receiving “safe country” that no examination of the asylum seeker’s application in substance has been conducted by the sending state. It is also required of the country to extend a “fair” and “timely durable solution” as regards examination procedures.⁶⁷ The notion of durability is also advanced in UNHCR’s Executive Committee Conclusion 58 para. f (ii).⁶⁸

As regards countries located outside of the European Union, one could question the practical shortcomings of “safe third country” concepts, as found in the Dublin III Regulation art. 3.3. In the case of *Mirza*, the

⁶⁵ Asylum Procedures Regulation Proposal art. 44.3 for “first country of asylum” and art. 45.3 for “safe third country”

⁶⁶ Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (1 edn, OUP 2015) 254

⁶⁷ ECRE, ‘Guarding the Refugee Protection Standards in Regions of Origin’, *The Way Forward, Europe’s role in the global refugee protection system* (December 2005) 28

⁶⁸ UNHCR EXCOM Conclusion No 58 (XL) (n 13)

European Court of Justice found that any Member State could return an applicant to a “safe third country”, despite the uncertainties linked to the term, which meant that Hungary’s recognition of Serbia as a “safe third country” and the resulting return was found to be acceptable.⁶⁹ As regards countries located within the European Union, case law has illustrated that not all EU Member States are safe. In the *M.S.S. v. Belgium and Greece* case from the European Court of Human Rights, it was identified that Belgium’s transfer of the asylum seeker to Greece was contrary to the principle of *non-refoulement* of ECHR art. 3, as the asylum seeker was exposed to the risk of ill-treatment owing to poor reception conditions and insufficient procedural safeguards when under detention in Greece.⁷⁰ Dublin transfers to Greece have been suspended since 2011. Owing to similar considerations ECRE finds that respect of the principle of *non-refoulement* for the presumption of a “safe” Member State, as expressed in the Dublin IV Regulation Proposal recital 3 does not suffice.⁷¹

The complicity principle entails that the sending state has an obligation to investigate whether the receiving state could return the asylum seeker to a country where s/he would be at a risk of inhuman or degrading treatment, effectively in breach of the Refugee Convention.⁷² UNHCR’s conclusions help to illustrate some further conditions for when a country can be presumed to be unsafe. One conclusion points to that asylum seekers must not be returned to a country where their basic human rights would not be respected whereas another proposes that an asylum seeker must not be returned to a country with which s/he lacks a “sufficient connection”.⁷³

⁶⁹ C-695/15, *Mirza*, ECJ, ECLI:EU:C:2016:188, 17 March 2016, para. 53

⁷⁰ *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, paras. 263 f and 321 f

⁷¹ ECRE (n 67) 28

⁷² Stephen Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’, *International Journal of Refugee Law*, Vol. 15 No. 4, (1 edn, OUP 2013) 645

⁷³ UNHCR Ex. Com. Conclusion 58, para. f (ii) and UNHCR Ex. Com. Conclusion 15, para. h

Despite some acceptance, for example from the point of view of increased harmonisation,⁷⁴ having common lists for countries identified as “safe” for the Member States to apply in the European Union⁷⁵ can have a number of downsides. The most obvious drawback is about how a presumption of safety must not necessarily equate with de facto safety. Safety should not be accepted on face value given the irreversible effects that a faulty presumption can have on an individual, following return to persecution.⁷⁶ Further to this, the fact that a general list can be contrary to the requirement of assessing a case on its individual merits, as in the Asylum Procedures Directive art. 10.3.a is problematic. Legomsky opposes individual vulnerabilities being bypassed.⁷⁷ The sidestepping of individual considerations can be an indication of collective expulsions, which are prohibited by the *Hirsi v. Italy* case.⁷⁸

One final important contemporary development relating to “safe third country” concepts is the European Union – Turkey readmission agreement of 18th March 2016, whereby asylum applications originating in Turkey are rendered inadmissible and asylum seekers are transferred from Greece to Turkey in the view that Turkey is a “safe third country”. Even though Turkey is a signatory to the Refugee Convention and the ECHR, there are doubts as to the correctness of this presumption, as a correct implementation of the just named instruments has been lacking. The lack of adherence to *non-refoulement*, international human rights and access to asylum procedures put into question the safety presumption as regards Turkey. On this note, it is not so much the fact that Turkey is not bound by the current Asylum Procedures Directive art. 38, which prohibits return of asylum seekers to a third country where s/he is at risk of persecution, which renders Turkey unsafe, as it is its non-adherence to safety standards in international

⁷⁴ Kyenge and Metsola (n 38) para. 53

⁷⁵ Asylum Procedures Directive; Anita Orav and Joanna Apap, ‘Safe countries of origin: Proposed common EU list’, European Parliamentary Research Service PE 569.008 (February 2017)

⁷⁶ Fratzke (n 10) 10

⁷⁷ Stephen Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15/4 International Journal of Refugee Law 567, 657

⁷⁸ *Hirsi v. Italy*, ECtHR, Application No. 27765/09, Judgment of 23 February 2012

law. The other limitation of using the “safe third country” concept vis-à-vis Turkey relates to Turkey’s historical reservation on the recognition of refugees with origin from elsewhere than the European Union. These circumstances go to show that since *refoulement* is a possibility here, the basis for the agreement needs rethinking.

Aside from the purposes of avoiding more work and costs on the Member States’ asylum systems,⁷⁹ Costello presents one more reason for the inclination toward “safe country” concepts. She suggests that by applying “safe country” concepts, the European Union is effectively expanding its extraterritorial jurisdiction.⁸⁰ This statement relates to the cases in which the asylum seeker is returned to a state located outside of the European Union. In light of this statement, one really wonders if it is permissible for a Member State to make promises about adequate levels of safety in a third country, an aspect which the Member State has no effective control over. It reminds of an empty promise.

3.4 “Systemic deficiencies”

The suspension of transfers owing to “systemic flaws” in the receiving Member State is found in the Dublin IV Regulation Proposal art. 3.2. Case law has moved onward from the recognition of solely “systemic deficiencies” for the suspension of a transfer, as in the *N.S. and M.E.* case from the European Court of Justice and also from the restrictive interpretation of the right to dignity in the EU Charter art. 4, in that conditions giving rise to the principle of *non-refoulement* can exist independent of “systemic deficiencies”. In the *N.S. and M.E.* case the Court held that a transfer is not permitted where a Member State is aware of “systemic deficiencies” in the country of transfer, entailing a real risk of inhuman or degrading treatment. This would be in breach of ECHR art. 3

⁷⁹ Gregor Noll, Jens Vedsted-Hansen and Rosemary Byrne, ‘Western European Asylum Policies For Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics’ in *New Asylum Countries? – Migration Control and Refugee Protection in an Enlarged European Union* (1 edn, Kluwer Law International 2002) 19 and 22

⁸⁰ Costello (n 66) 277 f

and EU Charter art. 4.⁸¹ Moreover, the *C.K.* case has also contributed to the reduced importance and recognition given to solely “systemic deficiencies” for the infringement of the EU Charter art. 4, where a medical condition aggravated the infringement.⁸² From the *Tarakhel* case, a case from the European Court of Human Rights, it can be understood that the existence of “systemic deficiencies” is not an add-on criterion to ECHR art. 3.⁸³ It is seen as being inherent in ECHR art. 3. It is not a question of reading “systemic deficiencies” into ECHR art. 3 or the judgement of the European Court of Human Rights, it is rather a question of studying the judgement of the European Court of Justice and the European Court of Human Rights in parallel to understand what conclusions can be drawn about ECHR art. 3. In the *Tarakhel* case it was found that there would be a breach of ECHR art. 3 if individualised guarantees as to the reception conditions in Italy were not obtained. The prohibition on *refoulement* in ECHR art. 3 is absolute, meaning that no interest can outweigh the interest of not returning a person to torture, inhuman or degrading treatment. The focus can instead very well be the magnitude of the risk and violation at stake in the individual case.⁸⁴

As suggested earlier, it can even be a question of “operational deficiencies” that are so manifest as to amount to torture or inhuman or degrading treatment. A rights-based protection might need to be taken into account, as was done in the cases of *Tarakhel* and *Karim*, cases from the European Court of Human Rights and the European Court of Justice, respectively. Indeed, “systemic deficiencies” could not be assessed in the *Tarakhel* case, as it is not in the jurisdiction of the European Court of Human Rights to rule on it. However, in this case it was decided that the obligation lay upon Switzerland to obtain individualised assurances from Italy as to the reception conditions. Interestingly, Costello and Mouzourakis do not accept even this solution, as they believe that no guarantee can fill in for the

⁸¹ C-411/10 and C-493/10, *N.S. and M.E.*, ECJ, ECLI:EU:C:2011:865, 21 December 2011, paras. 94 and 106

⁸² C-578/16, *C.K. v. Slovenia*, ECJ, ECLI:EU:C:2017:127, 16 February 2017, para. 74

⁸³ *Tarakhel v. Switzerland*, ECtHR, Application No. 29217/12, Judgment of 4 November 2014, paras. 100 – 105; Cathryn Costello and Minos Mouzourakis, ‘Reflections on reading *Tarakhel*: Is ‘How Bas is Bad Enough’ Good Enough?’ (2014) A&MR 404

⁸⁴ *Tarakhel v. Switzerland*, ECtHR, Application No. 29217/12, Judgment of 4 November 2014, para. 104; C-155/15, *Karim v. Migrationsverket*, ECJ, ECLI:EU:C:2016:410, 7 June 2016

prevailing “systemic deficiencies” in a state.⁸⁵ Whereas the *Karim* case dealt with the Dublin III Regulation art. 19.2 and whether responsibility of Slovenia had ceased where the applicant had left the Member State for a period of more than three months, one question dealt with whether the right to an effective remedy could be limited to “systemic deficiencies” entailing risk for inhuman or degrading treatment of the EU Charter art. 4.⁸⁶ The question was answered in the negative.

It should be noted that unaccompanied minors are exempt from the transfers that result from parallel procedures not only if “systemic deficiencies” as to substantial grounds of ill treatment exist, but also where “operational” deficiencies have surfaced.⁸⁷ There might be reason for extending the protection to include other beneficiaries of protection as well.

3.5 The role of family relations in the admissibility assessment

Admissibility screening is independent of the assessment on family ties. The four criteria, namely “first country of asylum”, “safe third country”, “safe country of origin” and “security risk” take precedence. Family considerations become relevant first in the Dublin determination procedure for the Member State responsible. As family considerations are a frequently purported basis for asylum and thereby also one of the strongest factors that connect the Member State and asylum seeker,⁸⁸ there is strong reason to consider a shift in the order of examination, thereby having the assessment based on family ties forego the four admissibility criteria.⁸⁹

There is particular reason to be concerned about admissibility checks forgoing determination procedures when family ties are asserted. The

⁸⁵ Costello and Mouzourakis (n 83) 410

⁸⁶ *Karim v. Migrationsverket*, ECJ, ECLI:EU:C:2016:410, 7 June 2016, para. 13

⁸⁷ European Commission (n 10) 17; For “systemic deficiencies” – C-411/10 and C-493/10, N.S. and M.E., ECJ, ECLI:EU:C:2011:865, 21 December 2011, para. 94

⁸⁸ UNHCR (n 26) 6; Wagner (n 61) 93

⁸⁹ UNHCR (n 9) 16

Dublin IV Regulation Proposal addresses family unity in recital 16.⁹⁰ The weight given to the right to family life, in the meaning of ECHR art. 8, EU Charter art. 7, Universal Declaration of Human Rights art. 16.3 and the Family Reunification Directive⁹¹ risks being undermined. This comes at a time when the European Commission holds, at least as regards the rights of the EU Charter, that a “Zero Tolerance Policy” should be employed for a breach of the EU Charter.⁹² It can be argued that the obligation of a Member State to facilitate family reunification pertains to both a positive and negative obligation, meaning that Member States are in some cases legally bound to undertake a particular measure in respect of family reunification and in some cases legally bound not to undertake a particular measure that is contrary to the interests of family reunification.

Additionally, it would only be natural to prioritise the right to family reunification in light of the theory of “insider privilege” presented by Costello. She suggests that once refugees are part of the European Union community, the right to family reunification can be derived from the legal status of being a refugee.⁹³ The Council of Bars and Law Societies in Europe are more concerned that the proposed Dublin IV Regulation Proposal art. 3.3 will be the reason for a vast majority of appeals.⁹⁴ This will call for increased resources of the Member States to review such appeals and slow down the examination procedure in the long run.

3.6 “Subsequent applications”

There are problems with requiring the country that starts to carry out an admissibility check to have to continue to evaluate all “subsequent” claims that are linked even tenuously with the original claim, as per Dublin IV Regulation Proposal arts. 3.4 – 3.5 and 20.4. It could, for example, simply

⁹⁰ Family unity was the central feature of the Dublin Convention art. 4.1 as well

⁹¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12

⁹² European Commission, ‘Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme’ COM (2010) 171 p. 2

⁹³ Costello (n 66) 107

⁹⁴ Council of Bars and Law Societies of Europe (n 52) 5

be the case that the asylum seeker applied for asylum in a particular Member State a very long time ago and had no success, and now, because of a change of mind-set or a change of circumstances, the asylum seeker wishes to apply in another Member State. The proposal classifies this as a “subsequent application”, whereby the first Member State would be the Member State responsible for examining the new asylum application. To give one more example, the recognition of a Member State as responsible for an asylum application due to having deported an asylum seeker is an example of how tenuous the link with a Member State needs to be to render a Member State responsible. This policy can essentially aggravate the unequal distribution of responsibility, as there is no refuge for the Member State that once examined an application on its merits.⁹⁵ If it has examined one application, it will need to continue to examine all affiliated applications.

Moreover, it must be considered that there will be heightened evidentiary requirements as concerns “subsequent applications”. This places a disproportionate evidentiary burden on the applicant. The negative effects would play out even more for applicants that assert family ties, as this forms the basis of a vast majority of applications.⁹⁶ All the while, the European Parliament reminds that it is often the asylum agency’s failure to involve the asylum seeker in the process from the onset that is the root cause of “subsequent applications”.⁹⁷

3.7 Cessation of responsibility

In the current Dublin framework, the responsibility of the Member State of entry to examine the application of an asylum seeker ceases 12 months after the irregular entry, Dublin III Regulation art. 13.1. The responsibility period is reduced to three months if it can be established that the applicant has left the Member State for a period of at least three months, Dublin III

⁹⁵ Dublin IV Regulation Proposal conflicts with Dublin III Regulation art. 18.2

⁹⁶ UNHCR (n 22) 6; Wagner et al. (n 61) 93

⁹⁷ Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 91

Regulation art. 19.2. Dublin IV Regulation Proposal arts. 3.5 and 15 repeal the cessation of responsibility of the Member State for an unspecified period of time. Dublin IV Regulation Proposal art. 14 requires the continuation of a Member State's responsibility even when the applicant's residence and visa documents have expired. Based on these considerations, one could argue that the irregular entry criterion is reinforced, with the aim to combat secondary movements.⁹⁸ In effect, this means that the asylum seeker will always have to take recourse to the "first country of asylum" if a subsequent risk of persecution surfaced. This would be regardless of that there was a tenuous connection with that Member State. It seems that the new provision is not apt for circumstantial changes.

Apart from the responsibility to handle "subsequent applications" as discussed in *Chapter 3.6*, the Member State will have to bear the costs associated with the current application, for example for registration, examination, reception, accommodations and returning the applicant in the case of a negative asylum application. This adds pressure on the already overworked Member States located at the borders.

A statement in one of the Working Papers at the Refugees Studies Centre can be used to explain the rationale behind the dismissal of the cessation clauses. Mouzourakis makes the point that the Dublin system "signals a degree of fault on the part of the responsible Member State, for it comes as "a burden and a punishment for the Member State which permitted the individual to arrive in the Union".⁹⁹ Hence the Member State should be liable to oversee and handle the current asylum procedure, "subsequent applications" and subsistence of the asylum seeker as long as s/he is on the territory of the European Union.¹⁰⁰ The direct result of this policy that resonates of punishment will result in that Member States deflect

⁹⁸ Cf. Dublin III Regulation recital 25

⁹⁹ 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 Centre (December 2014) 11 and Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) *International Journal of Refugee Law* 630, 637

¹⁰⁰ Gregor Noll, *Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (1 edn, Martinus Nijhoff Publishers 2000) 188 ff

responsibility to avoid being identified as the Member State responsible and will lower protection standards. Academics identify this concept as a breeding ground for a “race to the bottom”, which would act as a disincentive for the applicants to seek asylum in the given Member State.¹⁰¹ This helps to set the tone for the next chapter, dealing largely with sanctions.

¹⁰¹ Boswell, Thielemann and Williams (n 37) 33

4 Dublin IV Regulation Proposal: First country of entry and sanctions

In the event of irregular entry, the Dublin IV Regulation Proposal obliges the asylum seeker to submit an application for asylum in the first country that s/he enters in the European Union and couples any failure to do so with sanctions, Dublin IV Regulation Proposal arts. 4.1 and 5. A failure is indicative of the act of *absconding*, meaning that the asylum seeker tries to avoid and escape from the asylum authorities of a particular country. If an asylum seeker is attributed this category once, then s/he cannot resort to another category since the examination criteria can only be applied once per applicant. ECRE calls this provision the “one shot” rule.¹⁰²

The obligation to apply in the first country of entry upon irregular entry was a feature even in the Dublin III Regulation art. 13, so the add-on really pertains to the sanctions. We can recall from *Chapter 3* that the proposed admissibility checks also maintain the element of “first country of asylum”. One could say that the obligation to apply in the first country of entry has been enhanced by the new proposal. Initially this can be regarded as equating with an enhanced responsibility for the Member States located at the borders of the European Union to examine applications. This form of externalisation will be revisited in full in *Chapter 5*. It is necessary to note that the provision is preceded by considerations of family unity and possession of a visa or residence permit in the examination hierarchy. Despite appearing late in the examination hierarchy and so being intended as a residue group of responsibility, the irregular entry criterion is applied to a greater extent than the criteria based on family relations and visa or residence permit cases.¹⁰³

¹⁰² ECRE, ‘Comments on the [Dublin IV Regulation Proposal]’ (October 2016) 10; cf. C-63/15, Ghezelbash, ECJ, ECLI:EU:C:2016:409, 7 June 2016

¹⁰³ Mouzourakis (n 99) 13

4.1 Sanctions

4.1.1 Legal basis for the sanctions

In 2010, 90 % of the irregular migrants that entered the European Union did so through Greece.¹⁰⁴ The Dublin system would have required those asylum seekers lacking family relations in the European Union or a visa or residence permit, to apply for asylum in Greece pursuant to the Dublin III Regulation art. 13. As it turns out, many asylum seekers could circumvent the legal obligation to apply in the first country of entry, by simply not registering there and so continuing the onward journey to other Member States. Efficiency seemed to be dwindling, so to remedy the situation the Commission found it necessary to intensify the consequences of not applying in the first country of entry. In the present proposal, it justifies sanctioning the act of *absconding* through “appropriate and proportionate procedural consequences” in Dublin IV Regulation Proposal recital 22. Other actors have also expressed acceptance of a sanction scheme. In a study for the Committee on Civil Liberties, Justice and Home Affairs, which was delegated by the European Parliament, for instance, we find the statement that the “penalty itself is not legally problematic, provided that basic guarantees are respected as required by Art. 31(8) APD”.¹⁰⁵

A short discussion on the implications of sanctions can be useful here. Sanctions entail an element of coercion and are prohibited by the Refugee Convention art. 31. Meanwhile, it seems that no obligation to apply for asylum in a particular state can be derived from international law.¹⁰⁶ These pointers serve as a starting point for consideration of whether the proposed measures really are “appropriate and proportionate”, and whether they can be justified at all. This section can be ended with the critical note that there must be a strong drive for the asylum seekers to engage in secondary movements because as ECRE points out, “[i]rregular status harms refugees

¹⁰⁴ Evangelia Tsurdi and Paul McDonough, ‘Putting solidarity to the test: assessing Europe’s response to the asylum crisis in Greece’, UNHCR (January 2012) 3

¹⁰⁵ Maiani (n 15) 42

¹⁰⁶ Lisbon Expert Roundtable, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’ (9-10 December 2002) para. 11

even more than states, as it can leave them vulnerable to trafficking and other forms of exploitation”¹⁰⁷ and yet they continue to engage in onward movement. The concept of coercion will be revisited in full in *Chapter 7*.

4.1.2 The sanctions

The sanctions that ensue if the asylum seeker fails to apply in the first country of entry, as per Dublin IV Regulation Proposal art. 4.1, include the forfeiture of the right to information, the right to submit information, withdrawal of reception conditions rights, subjection to accelerated asylum procedures and loss of the right to appeal.¹⁰⁸

4.1.2.1 The right to information and the right to submit information

In this section, the right to information will be commented. Indeed, the Dublin IV Regulation Proposal aims to facilitate more thorough interviews with the applicant.¹⁰⁹ Similarly, border authorities are supposed to provide the asylum seeker with detailed information about his or her obligations and the sanctions that may ensue as a result of a failure to fulfil these.¹¹⁰ However, the nature of the information does not pertain to communicating information about procedural rights. Furthermore, the Dublin IV Regulation Proposal recital 23 and art. 7.1 expressly circumscribe the right if the applicant is found absconding. This comes at a time when ECRE identifies that providing as much clear and concise information to the asylum seeker increases the chances of his or her cooperation with the authorities so as to discourage onward movement.¹¹¹

As regards the right to submit information it should be considered that the personal interview is not entertained if the prevalence of “sufficient”

¹⁰⁷ Kmak, McDonough and van Selm (n 15) 16

¹⁰⁸ Right to information and the right to submit information – Dublin IV Regulation Proposal arts. 7.1, 6.1 and 4.2; accelerated asylum procedure – Dublin IV Regulation Proposal arts. 5.1 and 20.3; withdrawal of reception conditions – Dublin IV Regulation Proposal art. 5.3; loss of right to appeal a negative decision – Dublin IV Regulation Proposal art. 20.5

¹⁰⁹ Dublin IV Regulation Proposal arts. 7.1 and 6.1

¹¹⁰ Dublin IV Regulation Proposal arts. 4 and 6

¹¹¹ ECRE, ‘Memorandum to the European Council Meeting 17-18 March 2016, Time to Save the Right to Asylum’ (March 2016) 6; Kmak, McDonough and van Selm (n 15) 22

information can be established. At the same time the applicant can only submit information prior to the interview, as opposed to until the point of transfer in the Dublin III Regulation.¹¹² This means that the applicant is not allowed to substantiate his or her claim, in writing or verbally. The applicant loses the opportunity to submit late evidence in relation to his or her claim where s/he “unjustifiably” asserts the evidence with delay.¹¹³ This has negative implications for the broadened family definition, which now includes siblings and family members that are made after migrating from the home country, but before arrival in the country where asylum is sought.¹¹⁴ Even if the broadened family definition is a positive development in the Dublin IV Regulation, it does not stand a fair chance of being realised when the only relevant circumstances to take into account are those at the time of the first application.¹¹⁵ It is relevant to note that the protection has not yet been extended to adult children or the parents of an applicant. It does not either cover dependents or partners as drafted in the Family Reunification Directive arts. 4.2 – 3.

In the above context it is crucial to consider that the applicant is very often in a state of shock post flight and so prescribing the invocation of evidence to the very first instance can pose serious practical difficulties for presenting the sort of information required in the Dublin IV Regulation Proposal art. 4.2 on submission of information and cooperation on the whole and art. 6.1.d on family ties. These restrictions may water down the meaning and purpose of these legal provisions and in all likelihood contrary to the EU Charter art. 41 on the right to good administration. A more balanced approach would rather be to have the authorities, in the capacity of examiners, share the applicant’s burden of investigating the case based on the individual circumstances, as suggested in the UNHCR Handbook.¹¹⁶ Relaxing the threshold for the evidence required from the applicant and

¹¹² Dublin III Regulation art. 5.3

¹¹³ European Commission (n 10) 15

¹¹⁴ Dublin IV Regulation Proposal art. 2.g

¹¹⁵ Cf. European Commission (n 10) 16

¹¹⁶ UNHCR ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status’ (Geneva 2011) para. 196

thereby achieving reasonableness is even the starting point in the Qualifications Directive art. 4.5. This is all the more important where applicants are deprived of legal assistance and interpretation services, having limited or no tools to respond adequately to the authorities.¹¹⁷

The final consideration on the right to submit information is that Member States' criminal units are often interested in extracting information from the asylum seeker that could help them prosecute traffickers and smugglers who have facilitated the asylum seeker's irregular entry. Having regard to the requirements of criminal procedure and leeway given to this in the Trafficking Convention¹¹⁸ art. 14, it should not go unnoticed that the right to privacy, which Legomsky identifies as an important component of the right to a fair status determination procedure,¹¹⁹ is at risk of being infringed. The right to confidentiality is contained in the Asylum Procedures Directive art. 15.2. Asylum seekers might be fearful of a threat to their own security, arrest and conviction, and therefore might end up concealing information. This means that they cannot make use their right to submit information to the fullest.

4.1.2.2 Withdrawal of reception conditions

In this section, reception conditions will be taken to encompass shelter, food, daily amenities, healthcare and other rights granted to the applicant in the meaning of the Reception Conditions Directive¹²⁰, arts. 2.f – g and 19. The Dublin IV Regulation Proposal art. 5.3 extends reception conditions only to applicants that are present in the Member State that they are required to be present, with the exception of emergency health care. This is a limitation when compared to contemporary related legislation, for example the Reception Conditions Directive art. 17, which sets the general standards for reception. As regards health care, the Reception Conditions Directive

¹¹⁷ McDonough and Tsourdi (n 104) 37

¹¹⁸ Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005 entered into force 1 February 2008) CETS 167

¹¹⁹ Legomsky (n 77) 567, 656

¹²⁰ European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96

arts. 19.1 – 2 give way for essential treatment of illness and special vulnerabilities and so have a broader scope, unlike the proposed provision.

It is seldom clear for the authorities where the applicant is required to be present, let alone for the applicant, and so imposing this sort of a condition upon the granting of reception conditions seems ill suited. The asylum seeker could have found accommodations close by on his or her own, with better living conditions compared to the reception facility. In this instance the asylum seeker would be labelled as not being present at the reception facility. This begs the question, is the right to an adequate standard of living legally justifiable?

As was taken up in *Chapter 3* with regard to safe country concepts, the *M.S.S. v. Belgium and Greece* case has shown that reception conditions can be so poor as to amount to risk of ill treatment. This is prohibited by the ECHR art. 3. In the same case, the Court acknowledged that it is precisely the differing levels of reception conditions, for example in terms of basic necessities as “food, hygiene and a place to live”, that generate secondary movements.¹²¹ The case *Saciri and Cimade and GISTI* remind of how the right to dignity, as found in the EU Charter art. 1 and Reception Conditions Directive recital 35, is inherent in the enjoyment of reception conditions.¹²² Meanwhile, a recent study in the Asylum Information Database has revealed how beneficial “decentralised accommodations” can be in terms of making room in reception facilities, but also for the individual who can reside in better living conditions elsewhere.¹²³

The final remark in this section pertains to a pertinent message from a research group of the European Parliament, namely that good reception conditions are a prerequisite for a good examination procedure, including the determination of the Member State responsible for examination

¹²¹ *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, para. 254

¹²² *C-79/13, Saciri and Others*, ECJ, ECLI:EU:C:2014:103, 27 February 2014, para. 35, C-179/11,

Cimade and Gisti v. Ministre de l'Intérieur, ECJ, ECLI:EU:C:2012:594, 27 September 2012, para. 56

¹²³ Mouzourakis (n 8) 31

procedures.¹²⁴ This lets us realise the interrelationship between the Dublin Regulation and reception conditions.

4.1.2.3 Accelerated asylum procedures

Owing to the absence for justification of accelerated asylum procedures in the Dublin IV Regulation Proposal, the explanation must be derived from the Asylum Procedures Directive recital 20. Here, accelerated procedures are applied to eliminate “unfounded” and “serious national security or public order concerns”. The Asylum Procedures Directive art. 31.8 contains a list of cases in which accelerated procedures are permissible and art. 31.3 prescribes that the asylum procedure should not last longer than 6 months.

Accelerated asylum procedures can result during different stages of the examination procedure. For one, the applicant will be subject to accelerated procedures when, after irregular entry, s/he is transferred back to the Member State of first entry, Dublin IV Regulation Proposal art. 20.3. Secondly, acceleration ensues when the asylum seeker can be identified as coming from a “safe country of origin” and where security concerns surface. The aim is to eliminate “manifestly well-founded or unfounded claims”.¹²⁵ “Manifestly unfounded claims” were taken up in an UNHCR Executive Committee Conclusion and described as targeting “clearly fraudulent” claims or claims with no link to the refugee status.¹²⁶

It is often voiced that accelerated processes do not necessarily entail a risk for the right to asylum, if effective access to status determination procedures can be secured. In fact, the UNHCR has even expressed approval of speeding up processes and retaining “simplified procedures” for asylum processes.¹²⁷ After all, an accelerated process can equate with effective access to asylum procedures, which is one of the goals of the Dublin system. What is more, the substance of appeals that are subject to accelerated

¹²⁴ Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 82

¹²⁵ UNHCR (n 9) 1; cf. Asylum Procedures Regulation Proposal art. 36.5

¹²⁶ UNHCR EXCOM Conclusion No 30 (XXXIV) ‘The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum’ (1983) para. d

¹²⁷ UNHCR (n 9) 19; UNHCR (n 22) 10

procedures constitute family unity (Dublin IV Regulation Proposal arts. 10 – 13 and 18), the risk of inhuman or degrading treatment (Dublin IV Regulation Proposal art. 3.2) and dependency relations (Dublin IV Regulation Proposal art. 18) as per Dublin IV Regulation Proposal art. 28.4 and recital 24. Due to the importance accrued to these areas in the Dublin system, applying accelerated procedures in relation to them gives the impression that accelerated procedures must be something positive.

Now, speeding up asylum procedures in the case of “manifestly well-founded claims” is somewhat understandable, where it is sufficiently clear that the asylum seeker’s claim would lead to a positive outcome and so where a decision could be communicated without delay. Since a negative decision can have irreversible effects¹²⁸ for the asylum seeker and because one is delving into the substance of the case, as opposed to pure procedure, there might be reason to rebut UNHCR’s assertion that also “manifestly unfounded claims” should be subject to accelerated procedures. Acknowledgement of the gravity of the irreversible effects has led to the conclusion that accelerated procedures should be avoided even if deliberate circumvention of the laws or dishonest behaviour of the asylum seeker seem apparent.¹²⁹

The procedural deficiencies of accelerated processes become more apparent when studied against the Refugee Convention art. 31.¹³⁰ This article prohibits the use of sanctions against the asylum seeker. Building on the argument of irreversible effects for the asylum seeker from the previous section, it can be argued that accelerated procedures constitute a sort of sanction. If due time is not designated to the examination of an asylum application, then can the right to seek asylum of the EU Charter art. 18 and Universal Declaration of Human Rights art. 14.1 be effective? The right to be heard enshrined in the EU Charter art. 41 and the right to a fair trial as in

¹²⁸ M.S.S. v. Belgium and Greece, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, para. 293

¹²⁹ UNHCR (n 22) 13

¹³⁰ These questions were raised in C-481/13, Qurbani, ECJ, ECLI:EU:C:2014:2101, 17 July 2014, but the Court could not take up the case due to lack of jurisdiction

ECHR art. 6.1 can be subject to the same question. Moreover, the procedure is not apt for consideration of special vulnerabilities, as required by the Asylum Procedures Directive art. 24.3, which is one more shortcoming of accelerated procedures. Finally, failure to apply in the first country of entry will affect the asylum procedure. This is precisely what a research group concluded should not be the outcome.¹³¹

4.1.2.4 The right to appeal

If an asylum seeker who has entered the European Union irregularly does not apply for asylum in the first country of entry, then upon return to this country s/he will be deprived of the right to appeal the asylum decision, Dublin IV Regulation Proposal art. 20.5. In essence, this means that the applicant cannot require a review of the decision by a second instance.

Being allowed to have the asylum decision reviewed at second instance is an element of the Dublin IV Regulation Proposal art. 28. The right to an effective remedy appears in several legal texts, inter alia, the ECHR art. 13, EU Charter art. 47 and TEU art. 19.1. It reappears in the Asylum Procedures Directive art. 46, the UNHCR Handbook¹³² and finally in the International Covenant on Civil and Political Rights art. 2.3. The *Conka* case, exemplifies further the importance of access to an effective remedy.¹³³ It is owing to such reasons that the UNHCR calls upon the deletion of Dublin IV Regulation Proposal art. 20.5.¹³⁴

The scope of the right to an effective remedy lost some bearing owing to the poor legal standing of the individual vis-à-vis the Dublin III Regulation, as only Member States in the capacity of addressees were considered to be able to invoke the right and obligations therein, in the *Abdullahi* case from the European Court of Justice. In the same case it was concluded that only “systemic deficiencies” could be appealed. EU Charter art. 4 on the

¹³¹ Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 11

¹³² UNHCR (n 116) 31

¹³³ *Conka v. Belgium*, ECtHR, Application no. 51564/99, Judgment of 5 February 2002, para. 46

¹³⁴ UNHCR (n 9) 12

prohibition of ill treatment and the sovereignty clause of Dublin III Regulation art. 17 were interpreted restrictively. Nevertheless, the *Ghezelbash* case, from the European Court of Justice downplayed the findings of the *Abdullahi* case.¹³⁵ *Ghezelbash* helped to extend the scope to include appeals on the use of the examination hierarchy criteria.¹³⁶

Generally, the lodging of an appeal leads to a suspension of transfer and deportation proceedings, Dublin IV Regulation Proposal art. 28.3. This is known as the *suspensive effect* of an appeal and applies upon the assertion of family ties.¹³⁷ The suspensive effect is not upheld in relation to admissibility screenings, for example on the basis of “first country of asylum” and “subsequent applications”.¹³⁸ This means that the automatic suspensive effect of an appeal is no longer guaranteed and so the asylum seeker can be deported while appeal procedures have been initiated. This differentiates between the admissibility grounds and different types of applications, and without proper basis this comes across as being arbitrary. Further to this, as the *Conka* and *M.S.S. v. Belgium and Greece* case established, this sort of a limitation, effectively barring the right to appeal, is not in line with ECHR art. 3 on the prohibition of torture and art. 13 on the right to an effective remedy.¹³⁹ Similarly, Legomsky is of the view that not entertaining appeals is in breach of the principle of *non-refoulement*.¹⁴⁰ These circumstances prevail at a time when the applicants are already chronically deprived of legal assistance and interpretation services.¹⁴¹ This is why it is quite surprising that the UNHCR does not oppose withdrawal of the suspensive effect as regards appeals.¹⁴²

¹³⁵ C-63/15, *Ghezelbash*, ECJ, ECLI:EU:C:2016:409, 7 June 2016; C-394/12, *Abdullahi*, ECJ, ECLI:EU:C:2013:813, 10 December 2013; cf. *Costello and Mouzourakis* (n 83) 411

¹³⁶ C-63/15, *Ghezelbash*, ECJ, ECLI:EU:C:2016:409, 7 June 2016, para. 61

¹³⁷ European Commission (n 10) 16 f

¹³⁸ Cf. Asylum Procedures Directive 46.6.b

¹³⁹ *Conka v. Belgium*, ECtHR, Application no. 51564/99, Judgment of 5 February 2002, para. 46; *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, para. 393

¹⁴⁰ Legomsky (n 77) 567, 672

¹⁴¹ McDonough and Tsourdi (n 104) 37

¹⁴² UNHCR, ‘Annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’ (February 2003) 27

If a transfer decision is pending, leading to that no transfer decision is taken, in conjunction with that a family member of the asylum seeker is residing in another Member State, the asylum seeker may appeal the pending transfer decision pursuant to the Dublin IV Regulation Proposal art. 28.5. This is motivated by the objective of entertaining speedy asylum procedures. It constitutes a broadened right to appeal for the individual, and so can be viewed as an improvement in the Dublin system.

5 Dublin IV Regulation Proposal: The transfer apparatus

This chapter will commence with discussions on the technical aspects pertaining to the mandatory transfer notification system and shortened time limits proposed for the Dublin IV Regulation Proposal. As a starting point, it can be mentioned that in the literature it has been expressed that “the transfer of applicants should only be a tool towards the rapid processing of their claim rather than the system’s aim *per se*”.¹⁴³ The chapter will continue with discussion on the concept of externalisation, which forms part of the theory of the transfer scheme.

5.1 Requests become notifications

As argued by the Commission, another way to make the “take back requests” more efficient is to change their scope to “simple take back notifications” in the Dublin IV Regulation Proposal art. 26.1. Take back procedures will allow for a Member State to notify another Member State to take back an asylum application. This is indicative of a mandatory notification system. This must be studied parallel to the limitation placed on the discretionary clause, including the humanitarian and sovereignty elements (Dublin IV Regulation Proposal art. 19 and recital 21). Until now, a Member State could, following a similar procedure as the take back procedure, call upon another Member State to assume responsibility on a broader set of humanitarian grounds. Similarly, a Member State could decide to take charge of an asylum application itself on a broader set of sovereignty grounds (cf. Dublin IV Regulation Proposal art. 24.1). These voluntary mechanisms have been circumscribed. To illustrate, the humanitarian clause will mainly pertain to considerations of family unity. Until now, serious health concerns also rendered the humanitarian clause

¹⁴³ Mouzourakis (n 99) 18

applicable.¹⁴⁴ Finally, sovereignty and humanitarian related interests can only be invoked prior to the determination of a responsible Member State.

As it stands, humanitarian grounds account for as little as 0.5 % of the total number of applications examined under the Dublin system, so it is questionable whether delimiting the scope even more would make the article practically inapplicable.¹⁴⁵ In the explanatory memorandum of the Dublin IV Regulation Proposal no legitimate reason for the restriction can be delineated. A lack of justification is among one of the reasons for why the European Economic and Social Committee opposes the new provision limiting the Member State's discretion.¹⁴⁶

There are more reasons to be critical of the proposed notification setup. First of all, as there is no requirement to motivate the notifications, there runs the risk that the requesting state will arbitrarily lodge a number of notifications to the responding state, and thereby increase the workload of the latter.¹⁴⁷ This reminds of a first come first serve basis mechanism. The authorities of the state receiving the notification will struggle to understand why the authorities of the notification sending state deem them as the Member State responsible. Decisions must be motivated, as stipulated by the EU Charter art. 41.2 third indent, but it is unclear whether notifications can be regarded as decisions, but also whether the provision refers to Member States and their authorities as addressees.

Additionally, the obligatory nature of the notification can be regarded as a means of coercion, and does not coincide with the perception of the states' sovereignty. At the same time, it can hold back the capacity and will of those states that wish to contribute voluntarily to the examination of asylum applications. For instance, Germany's voluntary examination of asylum applications has been exemplary. It seems natural to let a Member State

¹⁴⁴ Dublin III Regulation art. 17.2

¹⁴⁵ Mouzourakis (n 99) 13

¹⁴⁶ Moreno Diaz, 'Opinion, the [Dublin IV Regulation Proposal]', European Economic and Social Committee, C 34/144 (October 2016) para. 4.3.1

¹⁴⁷ Meijers Committee (n 20) 3

match the factual circumstances with grounds for applying the discretionary clause and then decide if it wants to examine an asylum claim or not. The *N.S. and M.E.* cases, following the line held in *M.S.S. v. Belgium and Greece*, though from the European Court of Justice and the European Court of Human Rights, respectively, took a course in this direction, where it was clarified that discretionary clauses form “an integral part of the Common European Asylum System”.¹⁴⁸ This is also the turning point judgment that resulted in the suspension of transfers of asylum seekers to Greece till date.

5.2 Shorter time limits and responsibility shift

The suggested time limit for completing the transfer proceedings is four weeks, Dublin IV Regulation Proposal art. 30.¹⁴⁹ Shorter time limits are supposed to create an incentive for the receiving Member State to respond to the request and ultimately lead to efficiency. A responsibility shift will, unlike before, not ensue if the receiving state does not respond within the required timeframe. The transfer is not incumbent on the response of the receiving Member State within a specified time limit.¹⁵⁰ The intention is to make the transfer system more efficient. In the study for the Committee on Civil Liberties, Justice and Home Affairs it is suggested that the “time limit will be frequently missed”.¹⁵¹ Asylum seekers that used to be able to wait out these time limits and then have their asylum applications examined in the desired Member State will not be able to continue to make use of this action plan.

¹⁴⁸ C-411/10 and C-493/10 *N.S. and M.E.*, ECJ, ECLI:EU:C:2011:865, 21 December 2011, para. 65; *M.S.S. v. Belgium and Greece*, ECtHR, Application no. 30696/09, Judgment of 21 January 2011, paras. 340 and 352

¹⁴⁹ Dublin IV Regulation Proposal recital 26; ECRE (n 102) 27 on arts. 24, 25, 26 and 30 about specific time considerations

¹⁵⁰ Cf. Dublin IV Regulation Proposal art. 46.5 on information sharing

¹⁵¹ Maiani (n 15) 37

5.3 Appealing a transfer decision

The right to appeal described in *Chapter 4* is different from the right to appeal which will be discussed here, because in the previous section the limitation was explicitly intended as a sanction for those asylum seekers that had entered the European Union irregularly. In the present section, the limitation on the right to appeal applies to all asylum seekers.

The time limit to lodge an appeal against the transfer decision has been more than halved, Dublin IV Regulation Proposal art. 28.2 and its scope now pertains only to concerns of family unity (Dublin IV Regulation Proposal arts. 10 – 13 and 18) and the risk of inhuman or degrading treatment (Dublin IV Regulation Proposal art. 3.2), as per Dublin IV Regulation Proposal art. 28.4 and recital 24. Case law has established that a 15-day time limit to appeal a decision can be assumed to be “proportionate”.¹⁵² Indeed this is a measure intended to speed up the process, but it should not go unnoticed how this affects the individual. A reasonable timeframe is particularly important for the asylum seeker to be able to avail himself or herself adequate and effective assistance from legal professionals.¹⁵³ Measures should not make the right to appeal “impossible or excessively difficult”.¹⁵⁴ These developments have implications for the asylum seeker’s right to an effective remedy, as discussed in *Chapter 4*.

5.4 Transfers and externalisation

In conjunction with illustrating the situation on the ground *Chapter 1*, it was commented that very few transfers actually take place owing to the Dublin system.¹⁵⁵ First off, Fratzke completely eliminates the possibility of absconding as being the reason behind low transfer rates.¹⁵⁶ Low transfer

¹⁵² C-69/10, *Brahim Samba Diouf v. Ministre du Travail*, ECJ, ECLI:EU:C:2011:524, 28 July 2011, para. 67

¹⁵³ Cf. UNHCR (n 116) para. 192 (vi)

¹⁵⁴ C-432/05, *Unibet*, ECJ, ECLI:EU:C:2007:163, 13 March 2007, para. 83

¹⁵⁵ *Costello, Garlick, Guild, Moreno-Lax and Mouzourakis* (n 11) 89

¹⁵⁶ *Fratzke* (n 10) 12

rates can have to do with the costs related to transfers¹⁵⁷ and the resulting reluctance of Member States to invest excessively in the system thereof.

Meanwhile, the critic could take low transfer rates to mean that the countries located at the borders of the European Union cannot be experiencing heightened pressures for examining asylum applications when asylum seekers are transferred to them. Here, it must be made clear that how a border state is affected by an incoming transfer cannot be reduced to a matter of numbers. Looking at the actual capacity of the Member State at the border to examine asylum applications would be much more useful.

Transferring asylum seekers to the first country of entry or enhancing the obligations to apply in the first country of entry can be identified as measures aimed at externalising the examination of asylum applications. Externalisation can refer to the shift of responsibilities from countries within the European Union to countries outside of the European Union,¹⁵⁸ but in the present context it refers to a responsibility shift in this regard to countries located at the borders of the European Union. Williams argues that externalisation is about control or the state trying to show the masses that the state is in control of who enters the Member State territory.¹⁵⁹ Boswell adds that this attribute is a “structural feature of the liberal welfare state”¹⁶⁰ and Noll would label the same theory as “nationalist protectionism”.¹⁶¹ Also conflicting with the original claim is Stern’s argument at the other end of the spectrum that Member States have historically aimed at portraying themselves as refugee friendly and “humanitarian” and have accepted a number of asylum seekers only to this effect.¹⁶² Both strategies resonate of Member States trying to establish a sense of self based on public opinion

¹⁵⁷ *ibid* 25; Boswell, Thielemann and Williams (n 37) 146

¹⁵⁸ Cf. Garlick, Guild, Moreno-Lax and Peers (n 30) 617 ff

¹⁵⁹ Richard Williams, ‘Beyond Dublin’, The Greens/EFA in the European Parliament (March 2015) 12. This is what Costello calls the “statist approach” in Costello (n 66) 317

¹⁶⁰ Christina Boswell, ‘The Politics of Irregular Migration’ in Karin de Vries and Loic Azoulai, *EU Migration Law: Legal Complexities and Political Rationales* (1 edn, OUP 2014) 42 and 48 f

¹⁶¹ Gregor Noll, ‘Why the EU gets in the way of refugee solidarity’ (open Democracy, 22 September 2015) <<https://www.opendemocracy.net/can-europe-make-it/gregor-noll/why-eu-gets-in-way-of-refugee-solidarity>> accessed 1 April 2017

¹⁶² Rebecca Stern, ‘Responses to the “refugee crises”: What is the role of self-image among EU countries?’, 2016:10epa Swedish Institute for European Policy Studies 12

and does not seem an adequate strategy when compared to what European Union and international asylum law prescribe. An adequate strategy would have been for centrally located states in the European Union to act in solidarity with externally located states of the European Union. As it currently stands, the Dublin Regulation seems to be “about shifting responsibilities between Member States rather than sharing these”.¹⁶³ The idea of solidarity will be revisited in *Chapter 6*.

¹⁶³ Boswell, Thielemann and Williams (n 37) 166

6 Dublin IV Regulation Proposal: The “corrective allocation mechanism”

6.1 The idea behind the “corrective allocation mechanism”

In 2016, three Member States, namely Germany, Italy and Greece received more than 75 % of the asylum applications that were lodged in Europe.¹⁶⁴ This would indicate that asylum applications are not fairly distributed in Europe. The “corrective allocation mechanism” is the explicitly expressed tool that aims at combatting the unequal distribution between the European Union Member States for examining asylum applications, Dublin IV Regulation Proposal art. 34.1. More concretely, the mechanism entails the transfer of asylum seekers from a Member State that is examining asylum applications at 150 % above its capacity level, i.e. the “benefitting Member State”, to a Member State that is operating below 150 % capacity level, i.e. the “Member State of allocation”, Dublin IV Regulation Proposal art. 36.2. Once a Member State is operating above 150 % of its capacity level, also called the “reference key” and “distribution key”, responsibility for examining further asylum claims ceases.¹⁶⁵ Capacity will be calculated with equal consideration to the country’s population and Gross Domestic Product. It is supposed to give an accurate estimation of how many asylum seekers a Member State has “effectively resettled”.¹⁶⁶ An automated register is consulted for these reference readings. The “benefitting Member State” will continue to be responsible for admissibility checks, Dublin IV Regulation Proposal art. 36.3. In the second stage the “Member State of

¹⁶⁴ Eurostat News Release, ‘Asylum in the EU Member States’ (March 2017) 2

¹⁶⁵ Dublin IV Regulation Proposal art. 35 for “reference key” and Dublin IV Regulation Proposal art. 34.2 for the percentage allocation of “150 %”

¹⁶⁶ Dublin IV Regulation Proposal recital 32. GDP, population and territorial size are often termed “objective criteria”, even if a wider array of criteria accommodating for the different realities of the Member States of the EU has been recommended cf. Albert Kraler and Martin Wagner, ‘An Effective Asylum Responsibility-Sharing Mechanism’, International Centre for Migration Policy Development (October 2014) 29 and 32

allocation” will investigate which Member State is responsible for examining the application, pursuant to the examination procedure in the Dublin IV Regulation Proposal.

6.2 Legal basis for the “corrective allocation mechanism”

The proposed system for allocation is intended to be a safe harbour for those Member States that examine asylum applications at a rate exceeding their capacity. This is precisely the essence of some of the recitals in the Dublin IV Regulation Proposal that mention disproportionate burdens.¹⁶⁷ TFEU art. 80 on Member States’ obligations for solidarity and fair sharing of responsibility is the legal basis for this reform. This reminds of the early warning, preparedness and crisis management mechanism of the Dublin III Regulation art. 33 and the relocation scheme of September 2015, the latter allowing for the transfer of asylum seekers from Greece and Italy to European Union Member States. Understanding the basic structure of the proposed mechanism is key to assessing its potential legal impacts, which as we will see, have the effect of casting doubt on the real purpose of the measure.

6.3 Inherent weaknesses of the “corrective allocation mechanism”

6.3.1 Factors barring examination by the “Member State of allocation”

One factor barring the initiation of the second stage during which the “Member State of allocation” would identify the Member State responsible for examining the asylum application, flows from the Dublin IV Regulation Proposal art. 39.d. If an asylum seeker has family in another Member State than the “Member State of allocation”, or if another Member State has at

¹⁶⁷ Dublin IV Regulation Proposal recitals 10, 31 and 32

some point issued a visa or residence permit to the asylum seeker or if irregular entry can be established, then the “Member State of allocation” will not be responsible for examining the asylum application. Initially, this means that the “Member State of allocation” will seldom be the final stop for the asylum seeker. Rather, after having been transferred from the “benefitting Member State”, the asylum seeker will now once again be transferred, this time from the “Member State of allocation”. Apart from family considerations, it is uncertain to what extent the rest of the criteria can represent a sufficient link with the asylum seeker. The asylum seeker’s right to seek asylum as found in the EU Charter art. 18 may be rendered ineffective through repeated transfers and delays before s/he is in the responsible Member State.¹⁶⁸ This sort of a situation, where a refugee remains without a Member State responsible for a long period of time, is often termed a “protracted” refugee situation.¹⁶⁹ In the “protracted” situation the asylum seeker would be left in a state of legal limbo, unable to foster legal expectations.

6.3.2 Cases in which responsibility remains with the “benefitting Member State” – admissibility, security concerns, family ties

The “benefitting Member State” will continue to be responsible for conducting admissibility checks, Dublin IV Regulation art. 36.3. For an in-depth discussion on admissibility screenings please refer to *Chapter 3*. The transfer proceedings flowing from the “corrective allocation mechanism” can be stayed if the applicant poses a security risk to the receiving country, Dublin IV Regulation Proposal art. 40. The application in question would be examined by the “benefitting Member State” in an accelerated procedure and potentially without recourse to procedural safeguards for the applicant such as the right to information. Detention and the related deficiencies of the process might not be too distant. The “benefitting Member State” cannot

¹⁶⁸ Cf. C-648/11, M.A. and Others, ECJ, ECLI:EU:C:2013:367, 6 June 2013

¹⁶⁹ UNHCR EXCOM Conclusion No 109 (LXI) ‘Conclusion on Protracted Refugee Situations’ (2009)

transfer applicants where family ties exist, Dublin IV Regulation Proposal arts. 38.a and. 41.2. These provisions call for the “benefitting Member State” to examine the application itself with recourse to the Dublin examination procedure.

6.3.2.1 Admissibility and security concerns

The implication of accruing responsibility to the “benefitting Member State” in these cases is that there is no guarantee that the “benefitting Member State” will be alleviated of pressure at the intended threshold of operating capacity at 150 %. On the contrary, the workload of the “benefitting Member State” is increased because it is also responsible for returning those applicants with inadmissible claims and those that pose a security risk to their country of origin pursuant to the Return Directive¹⁷⁰. The procedural deficiencies that ensue as a result of acceleration, detention and admissibility screenings are a threat to a rights-based approach to the asylum procedure. Meanwhile, in the European Commission’s document on the Stockholm Programme, the recommendation has been to not “treat security, justice and fundamental rights in isolation from one another”.¹⁷¹ It seems that the interests are not only being applied in isolation, contrary to the recommendation, but also that justice and rights-based interests are being overridden by security and admissibility interests. On the whole, there is a risk of fragmentation of procedures in the European Union, as applications will be treated differently depending on the capacities of the Member States, but also because it is not foreseeable which applications will be left with the “benefitting Member State”, which will be referred on to the “Member State of allocation” and if the Member State responsible is not one of these, then which applications will end up with the Member State responsible.

¹⁷⁰ European Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98

¹⁷¹ European Commission (n 92) p. 1

6.3.2.2 Family unity

The way in which the “corrective allocation mechanism” treats the concept of family unity should be commented briefly. The “Member State of allocation” is responsible for investigating family relations, unless the asylum seeker has family present in the “benefitting Member State” in which case the “benefitting Member State” is deemed responsible.

Regarding family considerations, ECRE is concerned about the fact that the “benefitting Member State” can end up delving into the substance of the application, pursuant to Dublin IV Regulation Proposal art. 38.a. Without rebutting this assertion, and realising that this is a potential weakness of the system, partly because it differentiates the concept of family unity from other rights of the asylum seeker, and partly because it may lead to the duplication of efforts in the “Member State of allocation”, it should be considered that having the “benefitting Member State” examine family ties is not necessarily a weakness. The number of applications that concern family ties¹⁷² and the significance accredited to them as a result of the ECHR art. 8 and the EU Charter art. 7 on the right to family life might just justify the early determination of family relations. Aspects pertaining to the importance of prioritising family relations can be found in *Chapter 3*. If the “benefitting Member State” finds that family ties are not eminent in the present case then reconsideration in the “Member State of allocation” can even have the effect of a second review. This increases the chances of getting the asylum decision right, albeit on second instance. Harmonious interpretation and application of the criterion of family ties would increase legal certainty for the applicant.

In this light, we could go a step further to suggest that the “benefitting Member State” should be responsible for examining all applications asserting family ties and not only the ones where family members are

¹⁷² UNHCR (n 22) 6; Wagner et al. (n 61) 93

present on their own territory. How to assist this Member State, for example by increasing the available resources, could be made the focus, instead of diverting the asylum seeker onwards. Supporting the Member State with the actual examination and compensation as a means of increasing available resources will be studied in *Chapter 7*.

6.3.3 The limits chosen for the buffer zone

The “corrective allocation mechanism” is not initiated before 150 % of the capacity level is reached, Dublin IV Regulation Proposal art. 34.2. As long as a Member State’s capacity pursuant to the “reference key” is below 150 %, but above 100 % the Member State is considered to be operating at the normal level.¹⁷³ We can call this the buffer zone. The buffer zone deserves some scrutiny. For starters, it can seem peculiar that operation at 50 % above the full capacity level has, without sufficient legal back-up, been considered as the norm. This seems to presuppose that unless Member States examine asylum applications above their actual capacity, migratory flows cannot be dealt with. For starters, it can be detrimental for a given country’s asylum system to be examining applications at this high a threshold. In this sense, the proposed system does not take into account the individual capacities of the Member States.

The mechanism entails that any Member State operating in the buffer zone will not be will not be assisted, despite doing more than what is required by the legal instruments. This can have the effect of decreasing the incentives of the assisting Member States in examining further applications. Hence, one way of looking at the same facts is that solidarity considerations, for example those stipulated in TFEU art. 80, only become relevant when countries are dealing with emergency situations and not before that. This action plan appears in a number of European Union instruments, extending

¹⁷³ Dublin IV Regulation Proposal art. 43 regarding cessation of the “corrective allocation mechanism”

help only to countries under “particular pressures”.¹⁷⁴ This puzzle will be revisited in full in *Chapter 6.4*.

As a general comment for these sorts of circumstances, a study undertaken within the European Parliament helps to highlight one important deficiency of the Dublin IV Regulation Proposal, namely that it is “reactive” instead of being “proactive”.¹⁷⁵ Furthermore, whether this sort of coincidental responsibility sharing was the object and purpose of TFEU art. 80 is questionable. In interpreting the contents of TFEU art. 80, Karageorgiou opts for an “obligatoriness” attribute of the article over an “added value” attribute, meaning that Member States are legally bound to act in solidarity rather than this course being optional.¹⁷⁶ For reasons like these, the UNHCR and ECRE are of the opinion that the “corrective allocation mechanism” should be triggered as soon as a Member State starts to operate above its “reference key”, so above 100 % of its capacity level.¹⁷⁷ This would bring theoretical capacity at par with practical capacity. The concept of solidarity will be explored further in the final section of this chapter. This section can be ended with a reflection about the true rationale behind the proposed article. Some researchers have held that the intention behind such measures is to punish those Member States that have facilitated the entry of the asylum seeker into the European Union.¹⁷⁸ This starting point, if it were to be true, is certainly problematic.

¹⁷⁴ Council of the European Union (n 26) para. 6.2.2; European Asylum Support Office Regulation art. 8; title of the Dublin IV Regulation Proposal

¹⁷⁵ Wagner et al. (n 61) 45 and 51

¹⁷⁶ Karageorgiou (n 30) 6

¹⁷⁷ UNHCR (n 22) 14 and ECRE, ‘The Road out of Dublin: Reform of the Dublin Regulation’, Policy Note No 2 (2016) 4

¹⁷⁸ Mouzourakis (n 99) 11

6.3.4 In the focus: the Member State operating below 100 % capacity level and a quota system

Having studied the legal implications of the buffer zone, one suggestion would be to shift the focus to the capacities of those Member States that are operating below 100 % of their capacity level. Building up those Member States' capacities that have residue examination space, but are for some reason not operating at full capacity level could be a starting point. It could for example be about improving reception conditions, maximising the use of available resources or training personnel on how to apply the Dublin criteria correctly. Eventually transfers to these Member States would be possible, which would mean that transfers would not be contingent upon the Member States operating in or above the buffer zone. All the while, the Member States where transfers could now be conducted would have benefitted from structural improvements. Furthermore, it seems that increasing Member States' capacities to examine asylum applications can have the effect of decreasing unit costs.¹⁷⁹ As was discussed in *Chapter 1*, saving costs is one expression of efficiency. These considerations also form the basis of the Advisory Committee on Migration Affairs' proposal of a permanent distribution mechanism.¹⁸⁰

A related, yet perhaps reverse suggestion pertains to a quota system. This is a distinct and thoroughly investigated solution pertaining to the distribution of asylum applications, so it would be unjust to try to confine its discussion within the scope of this thesis. So much can be said that this system would allow for one state to buy asylum space from another state for the transfer of asylum seekers to the latter state, within a predetermined quota.¹⁸¹ It could be justifiable from the point of view of the "comparative advantage theory", effectively facilitating trade of quotas pursuant to specialised

¹⁷⁹ Boswell, Thielemann and Williams (n 37) 18

¹⁸⁰ Advisory Committee on Migration Affairs (n 28) 47

¹⁸¹ Eiko Thielemann, 'Burden Sharing: The International Politics of Refugee Protection', *The Center for Comparative Immigration Studies* (March 2006) 23; Peter Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1991) *Yale Journal of International Law* 22

competences.¹⁸² Applying this theory to our example could mean that the determination procedure would lead to the transfer of the asylum seeker to the country where his or her imminent need could be accommodated for in the best way. In other words, a transfer could be contingent upon the country that could conduct a particular part of the determination procedure most effectively, for example registration, evidence assessment or review of appeal. One apparent weakness of the quota system in general is that it would not instigate Member States to improve their asylum systems in areas where improvement is needed. Basically, it could turn out to mean that Member States could buy out of inadequacies of their own asylum system. In the end, it could be completely permissible that a given Member State cannot independently secure adequate protection for the asylum seeker. The other inherent weakness of the quota system is that it reduces the asylum system to a mere transaction system, devoid of considerations for and consent of the individual. Lack of consent can easily be equated with coercion and arbitrariness, which will be revisited in *Chapter 7*. Costello concludes that any system of distribution that is based on coercion is bound to be inefficient.¹⁸³

6.3.5 The “buy-out”

One interesting feature of the allocation mechanism is that Member States can opt out from their responsibility to allocate asylum seekers pursuant to the “corrective allocation mechanism” for 12 months. In return, the Member State, which otherwise would have been the “Member State of allocation” must provide 250,000 euros per rejected application to the Member State that assumes its responsibilities, Dublin IV Regulation Proposal arts. 37.1 – 3.¹⁸⁴ This is commonly referred to as the “solidarity contribution”.

¹⁸² Eiko Thielemann, ‘The Future of the Common European Asylum System – In Need of a More Comprehensive Burden-Sharing Approach’, 2008:1 Swedish Institute for European Policy Studies (2008) 7

¹⁸³ Costello (n 66) 278

¹⁸⁴ Dublin IV Regulation Proposal recital 35

When compared with the purported idea behind the predecessors of the Dublin IV Regulation Proposal and the proposal itself, namely the limitation of discretionary powers of the Member States so as to lead to harmonious application of laws in the European Union, doubt is cast upon whether this object and purpose is met.¹⁸⁵ After all, the possibility of opting out can increase the differences in the application of the Dublin IV Regulation Proposal in the Member States. Furthermore, as recent developments have shown, a couple of days may suffice for serious violations of the applicants' rights to start to surface. With each Member State on a timeout, that too repeatedly for a period of 12 months, Member States' chances of protecting individuals' rights and fulfilling European and international legal obligations are slim.

ECRE classifies the proposed measure as a possibility for Member States to “buy-out” from their migration responsibilities.¹⁸⁶ Gammeltoft-Hansen would perhaps describe it as the “commercialisation of sovereignty”.¹⁸⁷ Indeed, the ransom money is set high, but a given Member State may naturally view this as a price worth paying. Accordingly, Peers refers to this as a “fantasy on top of a fantasy”.¹⁸⁸ The hidden message behind this possibility is quite clear – if a Member State is wealthy enough, then buying itself out of European Union solidarity is legitimate. Peers conjures up an interesting scenario by suggesting that the solidarity contribution might really only be a means to save the Greek economy and thereby stabilising the economy of the European Union on the whole, because for every rejected applicant by a Member State, present in Greece, there would arise a monetary claim by Greece against that Member State.¹⁸⁹ The same facts can be used to argue that the measure is a means of externalising asylum applications in the sense that was discussed in *Chapter 5*. These are merely

¹⁸⁵ E-contrario Dublin IV Regulation Proposal art. 19.1 on Member States' discretion regarding family unity cases: “and only as long as no Member State has been determined as responsible”, together with art. 3

¹⁸⁶ ECRE (n 102) 37

¹⁸⁷ Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control* (1 edn, OUP 2011) 31

¹⁸⁸ Peers (n 7)

¹⁸⁹ *ibid*

theories, and for our study the implications of the proposed measure for responsibility sharing and efficiency in the European Union are all the more interesting.

6.3.6 Automatic register and review

The proposed automatic register and review of the “corrective allocation mechanism” require our attention. The automated system indicating reference readings, whereupon asylum seekers are transferred to a country operating below 150 % of its capacity seems arbitrary. It does not take into account qualitative assessments as regards the capacities of potential “Member States of allocation” and considerations of family unity which it arguably ought to. The suggestion would be to combine the reference readings with human assessment and discretion of the Member States. Whether the buffer zone should exist at all, which is the primary sphere that the reference readings pertain to, and therefore the necessity of reference readings for this particular function, continues to be in debate as discussed in the previous section of this chapter. Perhaps a better way to make use of the reference readings would be to use them to assess the efficiency of the transfers occurring under the Dublin IV Regulation Proposal and evaluate other aspects of the Dublin system.

The operability of the “corrective allocation mechanism” will be reviewed by the European Commission one and a half years subsequent to the entry into force of the Dublin IV Regulation Proposal and annually by the European Union Agency for Asylum.¹⁹⁰ Weekly controls to assess efficiency will also take place.¹⁹¹ This will act as an indication as to whether asylum applications need to be distributed differently across Europe. ECRE has raised concerns in this regard. Although it identifies monitoring as the main driver of the “Marshall Plan” to save the Dublin system, it expresses concern over that checks at so short intervals would be too sudden and hamper the migration authorities’ ability to stay well up-to-date with the

¹⁹⁰ Dublin IV Regulation Proposal art. 58 and 37.5 for long term checks

¹⁹¹ Dublin IV Regulation Proposal arts. 34.4 – 5 for weekly updates; ECRE (n 102) 34; EU-LISA is the name of the automated monitoring system, Dublin IV Regulation Proposal art. 44

latest figures, also leading to confusion and inconsistency in work approaches of the authorities.¹⁹² Perhaps a midway solution would be to consult the weekly database, but not render it the sole determinant for the transfer of applicants.

6.3.7 Dublin transfers, relocation schemes and the “corrective allocation mechanism”

Dublin transfers and the relocation schemes currently in force will operate alongside the “corrective allocation mechanism”.¹⁹³ This means that states will run examination procedures, transfer and relocate applicants as per the Dublin IV Regulation Proposal and the relocation schemes, during the time that the “corrective allocation mechanism” would be in force.

In a study run on the Asylum Information Database this has been recognised as a “fundamental contradiction at the heart of the Commission’s approach”.¹⁹⁴ Fratzke expresses the same concern, albeit about the Dublin III Regulation art. 33, which has a similar function to the “corrective allocation mechanism”.¹⁹⁵ For the “benefitting Member State” this will entail that the intended effect of alleviated pressure of the “corrective allocation mechanism” will not be experienced, as there would be no net decrease in the volume of applications that the “benefitting Member State” would have to examine. The effect of the “corrective allocation mechanism” will be watered down. In the same way, the “Member State of allocation” and the Member State responsible will also experience the mixed effects of coexistence of the systems, and so for example, might end up not examining applications pursuant to the “corrective allocation mechanism”, as the Dublin transfer and relocation scheme would allow for the asylum seeker’s onward transfer or relocation out of the country. To stifle these inconsistencies, ECRE recommends the suspension of the Dublin transfers

¹⁹² ECRE (n 177) 4; ECRE (n 111) 7

¹⁹³ Cf. European Commission, ‘Back to Schengen – A Roadmap’ COM (2016) 120 final

¹⁹⁴ Mouzourakis (n 8) 27

¹⁹⁵ Fratzke (n 10) 22

and the relocation scheme vis-à-vis the “corrective allocation mechanism”, most notably for the case of Greece.¹⁹⁶

Perhaps we do not have to look further than the fate of the relocation scheme of September 2015 to conclude that the “corrective allocation mechanism” is bound to fail in this context.¹⁹⁷ Under this scheme, asylum seekers are relocated from Greece and Italy to other European Union Member States. This too runs parallel to the Dublin transfers and to date the relocation mechanism has contributed to the relocation of asylum seekers to merely 3 % of the goal of a subtotal of 160,000 asylum seekers.¹⁹⁸

6.4 Revisiting solidarity

The ill adherence to solidarity in the European Union has drawn criticism from scholars and drafters of European Union texts for some time. Karageorgiou expresses that the Dublin system’s “very foundation counteracts solidarity” and the same idea is put forward in the Green Paper.¹⁹⁹ Noll’s finding resonates of the same message, though about the predecessor to the Dublin Regulations:

“the Dublin Convention stabilizes an inequitable distribution of protection seekers between contracting States.”²⁰⁰

What could possibly have gone wrong? The Common European Asylum System as envisioned in TFEU art. 78.1 in respect of the principle of *non-refoulement* is supposed to be based on the notion of solidarity as found in TFEU art. 80. Several interpretations flow from the solidarity provision and

¹⁹⁶ ECRE (n 177) 4; ECRE (n 111) 3

¹⁹⁷ Meijers Committee (n 20) 2; Advisory Committee on Migration Affairs (n 28) 9

¹⁹⁸ Elspeth Guild and Sergio Carrera, ‘Rethinking asylum distribution in the EU, Shall we start with the facts?’, Centre for European Policy Studies, (June 2016) 7

¹⁹⁹ Eleni Karageorgiou, ‘Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees’, European Politics and Society (January 2016) 10 and European Commission COM (2007) 301 (n 33) p. 4

²⁰⁰ Noll (n 100) 348

a quick look at these help to come to terms with why the Dublin system is failing.

The first question that arises pertains to who the addressee of the provision is. Ordinary meaning gives that the Member States and institutions of the European Union are the subjects of TFEU art. 80, as there is the mention of the provision applying “between Member States” and measures adopted by the “Union”, respectively. Noll explains that TFEU art. 80 requiring a contract between the interest holders is precisely what is wrong with the article.²⁰¹ He also identifies, in the alternative, solidarity’s historical portrayal as a “social organism” as being flawed.²⁰² Based on similar concerns, Mitsilegas labels solidarity as “state-centric” and “exclusionary”.²⁰³ This begs the question; does the solidarity article entirely exclude individuals from its scope?

Garlick is opposed to the idea of TFEU art. 80 being read as meaning to exclude individuals from its application.²⁰⁴ As Karageorgiou has identified, solidarity has a “state-refugee dimension”, which calls for Member States to adequately protect asylum seekers.²⁰⁵ Similarly, Tsourdi is of the view that a “duty to protect” emanates from the solidarity provision, referring to the protection of individuals.²⁰⁶

Having presented the discrepancies in interpretation regarding the addressee of TFEU art. 80, there is reason to consider how the substantive contents of the article adds to confusion on the ground. This section re-establishes the problem briefly presented in the section about the buffer zone, on the notion

²⁰¹ Gregor Noll, ‘Failure by Design? On the Constitution of EU Solidarity’ in ‘Searching for Solidarity in EU Asylum and Border Policies’, Odysseus Network’s First Annual Policy Conference, (February 2016) 3 f

²⁰² *ibid*

²⁰³ Valsamis Mitsilegas, ‘Solidarity and Trust in the Common European Asylum System’, 2/2 *Comparative Migration Studies* (June 2014) 187

²⁰⁴ Madeline Garlick, ‘The Dublin System, Solidarity and Individual Rights’ in Francesco Maiani, Philippe De Bruycker and Vincent Chetail, *Reforming the Common European Asylum System* (1 edn, Brill Nijhoff 2016) 166

²⁰⁵ Karageorgiou (n 199) 4

²⁰⁶ Evangelia Tsourdi, ‘Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance “crisis”?’ in ‘Searching for Solidarity in EU Asylum and Border Policies’, Odysseus Network’s First Annual Policy Conference (February 2016) 8

of the “corrective allocation mechanism” being a tool reserved for emergencies. In the provision it is stated that solidarity should be applied “whenever this is necessary”. It seems then, that solidarity is not the cardinal rule, rather it is more of an exception. For any application of solidarity to be justified, it must pass the test of proportionality (TEU art. 5.4) and subsidiarity (TEU art. 5.3). Proportionality and subsidiarity are two founding principles of European Union law, requiring that the means used must not be disproportionate to the goal and that the European Union institutions can only act in a field of Member State competence once the efforts of the Member States to act in the field have been exhausted. As a study for the UNHCR rightly remarks, it seems peculiar to place so many hurdles in the way of responsibility sharing, given that solidarity is a prime interest of the European Union.²⁰⁷ Karageorgiou is also in favour of a more extensive or “normative” interpretation of the article.²⁰⁸

Another interesting question for the purposes of our study pertains to when solidarity is supposed to be applied. We know that the Common European Asylum System is the intended subject area for solidarity measures, but what are the forms of solidarity exactly? Noll suggests that people, money and norms can be shared.²⁰⁹ The Dublin Regulations and the previous Dublin Convention are expressly titled to cater for the distribution of applications for international protection. It is particularly interesting to note that in this context it can be argued that Member States’ failed attempts at solidarity, so failed attempts at sharing people, money and norms, is not something that the asylum seekers should be expected to bear the burden of. Solidarity is a matter for the state to resolve and the asylum seeker’s right to not be *refouled* should not be affected by the difficulties that the Member States are facing in sharing responsibility. In sum, Member States cannot hide behind the shield of solidarity considerations to the detriment of the individual and of his or her right to a fair and effective access to an asylum procedure.

²⁰⁷ McDonough and Tsourdi (n 104) 33

²⁰⁸ Karageorgiou (n 30) 7

²⁰⁹ Noll (n 100) 263

If the legal motivations for acting in solidarity are not convincing enough for Member States, some scholars have devised a practical theory to try to win them over. The “insurance based logic” of solidarity entails the preparedness of Member States in the present to avoid excessive costs deriving from the asylum system in the future.²¹⁰ Thielemann accredits this sort of a system to the approximation of laws and the existence of common norms.²¹¹ This could simultaneously solve the “free-riding” problem, as small contributions from all the Member States in the present, could fend off large costs arising in a critical situation in the future, where ordinarily only a handful of Member States would pull out the chequebook.²¹² In essence one would be able to prevent one or more Member States benefitting at the expense of another or other Member States’ efforts. Apart from the free will of the states, the success of this method is incumbent on a legal framework that incorporates an “insurance based logic”. Fairness as regards the distribution costs needs to start in the Dublin Regulation. As Ross points out, it is hard to expect any sort of solidarity in practice if legal texts are not framed in terms of such solidarity.²¹³ There must be solidarity in law. The support of the Member States could be secured if the system was made more transparent, for example by making it clear to them how their premium is broken down. In the long-run, one could expect an “insurance based logic” system to be key to a stable asylum system. The Temporary Protection Directive²¹⁴ is a good example of incorporation of solidarity into law, but it has not been implemented till date.

Here, it is important to point out that solidarity should not be interpreted to mean that individual efforts of Member States to improve their asylum

²¹⁰ Boswell, Thielemann and Williams (n 37) 15 and 160

²¹¹ Eiko Thielemann, ‘Between Interests and Norms: Explaining Burden-Sharing in the European Union’ (2003) 16/3 *Journal of Refugee Studies* 268

²¹² Boswell, Thielemann and Williams (n 37) 154

²¹³ Malcolm Ross, ‘Solidarity – A New Constitutional Paradigm for the EU?’ in Malcolm Ross and Yuri-Borgmann-Prebil, *Promoting Solidarity in the European Union* (1 edn, OUP 2010) 46

²¹⁴ Council Directive 2011/55/EC of July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12

determination procedures should be left on the backburner. Member States have a legal obligation to act in loyal cooperation with one another, pursuant to TEU art. 4.3, in order to fulfil obligations deriving from European Union instruments, which in this case, can be identified as the obligation to share fairly the responsibility of examining asylum applications.²¹⁵

²¹⁵ Cf. Council of the European Union, ‘Council Conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows’ (March 2012) 2 where the notion of “Solidarity through Responsibility and Mutual Trust” is promoted

7 Resuscitation, transplant or last rites of the Dublin system?

Opinions regarding the Dublin Convention, Dublin Regulations and now the Dublin IV Regulation Proposal are largely divided. There are those who purport that it is time to replace the Dublin system altogether and introduce new methods of responsibility allocation.²¹⁶ This is the premise for the title of a popular article on the Dublin system, namely “Dublin is dead! Long live Dublin!”.²¹⁷ ECRE deems the insufficient regard to solidarity considerations in the Dublin Regulations as a solid reason for putting an end to the system altogether.²¹⁸ Di Filippo recognises the shortcomings of the Dublin system and the resulting negative connotation that the term has developed over the years, and therefore suggests a name change from the “Dublin Regulation” to the “Athens Regulation”, as a first step toward a more “[h]olistic approach”.²¹⁹ At the other far end, there are those who purport that Member States lobbying for the Member State responsible would be the only alternative to the Dublin system, which is worse than letting the Dublin system live on.²²⁰ In the same spirit of not putting the Dublin system to rest just yet, the Advisory Committee on Migration Affairs suggests that a significantly fairer distribution of asylum applications would already result if the Member States started to apply the examination criteria correctly.²²¹ As illustrated earlier, Member States’ deflection is one reason to why the criteria are not applied correctly.

Before undertaking the drastic measure of taking out the Dublin system altogether, it might be in place to check if it can be resuscitated or

²¹⁶ Council of Bars and Law Societies of Europe (n 52) 2; Kmak, McDonough and van Selm (n 15) 6

²¹⁷ Hruschka (n 30)

²¹⁸ ECRE, ‘Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System’ (January 2013) 9

²¹⁹ Marcello Di Filippo, ‘From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures’, *International Institute of Humanitarian Law* (January 2016) 9

²²⁰ Cf. Fratzke (n 10) 6

²²¹ Advisory Committee on Migration Affairs (n 28) 37; fair and objective application of the criteria are mandated even by the Dublin III Regulation recitals 4 – 5

substituted. These considerations may even serve to mirror points of improvement for how a new system for the determination of a Member State responsible can look like. Any suggestions must be linked to the purpose of the Dublin system in the Common European Asylum System. As mentioned in *Chapter 1*, “access to fair and effective status determination procedures”, reduction of secondary movements and a fairer distribution of asylum applications are among the main objectives.²²²

Deletion of the examination criteria on first country of entry, the country that issued a visa or residence permit and the country in which the asylum seeker is present are among the suggested changes, and form part of a proposed system called the “Dublin minus” system.²²³ After these reductions, the sum would be of how the current Dublin III Regulation art. 3.2 is formulated, facilitating examination where the asylum seeker chooses to lodge the application. At the core of this discussion lies the role of consent of the asylum seeker. Other areas that can be reviewed relate to the role of the European Union, international solidarity and repercussions for failing Member States.

7.1 Consent

At present, neither the choice of country to lodge an asylum application, nor the choice of country for transfer is left to the discretion of the asylum seeker. At the same time, it must be considered that consent is not mandated by European Union law, international refugee law or human rights law standards, in either of these two situations. It is only held that the wishes of the applicant to seek asylum in a given Member State “should as far as possible be taken into account”.²²⁴ The fact seems then that asylum seekers lack consent in these matters and that Member States have the final say. As a result, asylum seekers end up in unsuitable environments, separated from

²²² Costello, Garlick, Guild and Moreno-Lax (n 10) 56

²²³ Maiani (n 15) 7; Marion Jaillard et al., ‘Setting up a Common European Asylum System’, European Parliament (August 2010) 470

²²⁴ UNHCR EXCOM Conclusion No 15 (XXX) ‘Refugees Without an Asylum Country’ (1979) paras. h and i

family and/or in poor living conditions and a number of them end up engaging in secondary movements and lodging multiple applications. Secondary movements are the root cause behind the unequal distribution of asylum applications among the Member States. It does not seem that sanctions calling for cooperation, however severe, can hold back the asylum seekers in their attempt to reunite with family members. These circumstances have been recognised as amounting to coercion and being costly.²²⁵ Cumulatively, these circumstances can have negative implications for the fair and effective access to asylum procedures for the applicants.

7.1.1 Previous experiences

The Humanitarian Evacuation Programme in Kosovo of March 1999, resembling and preceding the drafting of the Temporary Protection Directive, illustrates that a consent-based approach can lead to a fairer distribution of refugees among the Member States. Apart from consent of the asylum seeker, consent of the Member State was also required prior to relocation and so this approach was termed the “double voluntariness” approach.²²⁶ Since the number of expected relocations was clear, this increased foreseeability and transparency for the authorities and it became easier for them to manage the applications. The transfer system was still in place, mainly for security purposes, but it could still not overhaul the criteria based on family ties. Applied to the current situation, it can be hypothesised that in a consent-based system, the asylum seekers, once having entered the European Union, would be likely to register and lodge their application at the earliest possibility if they knew that their preference as to the country to seek asylum would be taken account of.

The consent-based approach was less successful in the relocation projects of EUREMA I and II of 2011 – 2012 in Malta. However, it has been suggested that it was owing to poor information about relocation possibilities that

²²⁵ Christina Boswell, ‘Burden-Sharing in the European Union: Lessons learned from the German and UK Experience’ (2003) 16/3 *Journal of Refugee Studies* 331; Boswell, Thielemann and Williams (n 37) 146; Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 18 f

²²⁶ Thielemann (n 182) 4

refugees consented to transfers to a lesser extent.²²⁷ In view of this justification, we can maintain that the advantages of a consent-based system stand unaffected.

The same conclusion can be derived from the distribution of asylum seekers internally within Germany and the United Kingdom. The idea was to alleviate pressures experienced by regions that were struggling to finance and make available space for asylum seekers.²²⁸ This was done without the asylum seekers' and refugees' consent and was unsuccessful.²²⁹ To contrast, in Sweden consent must be obtained for relocation of asylum seekers, but the results thereof are scarce.²³⁰ Of course, these developments took place at a national level, but there seems little reason to assume that the breakthrough of consent would have any different effect at the European level.

7.1.2 “Asylum shopping” or a matter of dignified life?

Although the risk of multiple applications may be eliminated to some extent through the introduction of a consent-based system, critics will identify “asylum shopping” as a continued problem.²³¹ This is usually considered as constituting an asylum seeker lodging an application for asylum in a Member State where s/he will be able to reap maximum advantages, such as economic, social and political benefits. Asylum systems are the doorway to these advantages. For starters, there is reason to be critical of this classification as it presupposes an economic, social or political motive behind the asylum seeker's flight. Several sources point to that the asylum seeker has “the vaguest impression of their destination, let alone an understanding of the asylum system”.²³² This casts doubt on the “asylum shopping” scenario. Nonetheless, why should an economic motive or any

²²⁷ Williams (n 159) 17; Garlick (n 204) 192

²²⁸ Boswell (n 225) 326

²²⁹ *ibid*

²³⁰ Boswell, Thielemann and Williams (n 37) 53

²³¹ Mouzourakis (n 99) 20

²³² Williams (n 159) 7; McDonough and Tsourdi (n 104) 37

other reason being a corollary of the actual reason of flight – usually risk of ill treatment, or in other words “a matter of survival”,²³³ be a reason for demeanour? Neither should it go unnoticed that if the standard of reception conditions and treatment of asylum seekers were equivalent in all the Member States, then the often referred to “pull factors”²³⁴ causing secondary movements would not be so imminent. To illustrate, the UNHCR’s findings sum up well the thought process before onward movement, namely that many asylum seekers feel “impelled to leave”.²³⁵

The asylum seeker will probably wish to seek asylum in a country where s/he has a family, a decent standard of living and a fair chance of earning a living. It seems to be a question of finding a route to a dignified life. Alongside this, it is suggested that the elements of consent can pertain to areas of “stay in a Member State, study, work, or concrete employment possibilities”.²³⁶ These factors very often correlate with the civil, political, economic and social rights found in international human rights instruments.²³⁷ From the perspective of family unity, the UNHCR holds that “[t]here is a direct link between family reunification, mental health and successful integration.”²³⁸ Measures need to be in line with securing the “best interest and integration prospects” of asylum seekers as expressed in the European Parliament’s resolution²³⁹, not least because integration can in some countries be a precursory to other rights.²⁴⁰ These factors contribute to the overarching aim of integration set out in TFEU art. 79.4 and ring true to

²³³ Churches’ Commission for Migrants in Europe (n 6) 8

²³⁴ Boswell, Thielemann and Williams (n 37) 154

²³⁵ UNHCR EXCOM Conclusion No 58 (XL) (n 13) para. b

²³⁶ UNHCR (n 9) 44; for a detailed proposal for list of factors to be taken into account in hierarchical cf. Di Filippo (n 219) 11 – 14

²³⁷ On family unity please refer to the International Covenant on Civil and Political Rights art. 23.1, for economic, social and cultural rights please refer to the Universal Declaration of Human Rights art. 16.3, Cf. Commission on the European Communities, ‘On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, Improving access to durable solutions’ COM (2004) 410 final p. 45

²³⁸ UNHCR (n 22) 6; cf. UNHCR EXCOM Conclusion No 104 (LVI) ‘Conclusion on Local Integration’ (2005)

²³⁹ European Parliament, ‘Resolution on enhanced intra-EU solidarity in the field of asylum’ (2012/2032(INI)) (September 2012) arts. 47 and 50

²⁴⁰ Sergio Carrera, ‘Integration of Immigrants in EU Law and Policy’ in Karin de Vries and Loic Azoulay, *EU Migration Law: Legal Complexities and Political Rationales* (1 edn, OUP 2014) 186

the obligation of the Member States to contribute to the naturalisation of the asylum seeker as contained in the Refugee Convention art. 34.

All the while, sheer logic suggests that the chances of a well-integrated beneficiary of international protection to become financially independent, thereby decreasing the Member State's required resources towards that beneficiary, are higher compared to a poorly integrated beneficiary of international protection.²⁴¹ This has for example been the forethought behind the temporary new Swedish migration laws of 20 July 2016, through which the relative of the migrant residing in Sweden is required to show that s/he will be able to financially support the incoming migrant, thereby substituting responsibility of the Member State. Reciprocally, the UNHCR has found that refugee employment results in the integration of the refugee in the community.²⁴²

The asylum seekers' eventual employment may help to boost the economy of the Member State and this effectively downplays the fear of increased financial responsibilities incumbent on the Member State upon arrival of asylum seekers, but also their family members, also feared as the "snowball effect".²⁴³ The UNHCR asserts that "[w]hen helped to find work quickly, new arrivals are likely to give back to their communities many times over the investments made initially in their integration".²⁴⁴ As the legal framework currently stands, legal penalties can be incurred on the employer who employs irregular third-country nationals pursuant to the Sanctions Directive²⁴⁵, so perhaps even the directive needs to be reconsidered. The requirement is that the refugee should become part of the labour market nine

²⁴¹ Cf. *Kyenge and Metsola* (n 38) para. 42

²⁴² UNHCR, 'Note on Refugee Integration in Central Europe' (April 2009) 16

²⁴³ *Williams* (n 159) 22

²⁴⁴ UNHCR (n 22) 20; For employment opportunities for refugees cf. Refugee Convention art. 17.1 and Paul Weis, 'The Refugee Convention, 1951: the travaux préparatoires analysed with a commentary by Dr Paul Weis', UNHCR (1990) 106

²⁴⁵ European Parliament and Council Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24

months after his or her application for international protection has been lodged.²⁴⁶

Freedom of movement, and for that matter resettlement after international protection has been granted, can be taken to constitute another element of the pursuit of a dignified life.²⁴⁷ Freedom of movement for citizens is protected in TFEU arts. 20, 21 and 45.1.²⁴⁸ Free movement was one of the founding principles of the European Economic Community, the predecessor to the European Union, encompassing citizens and workers who could take up offers of employment. Taken analogously it would seem to contravene this grounding principle to limit the freedom of movement of those refugees residing legally in a Member State. The exercise of the freedom of movement does not only benefit the individual, but the state and the European Union as well. First of all, if the asylum seeker knows that s/he will be able to move freely in the European Union irrespective of where the asylum application is lodged, then the reasons for absconding during examination procedures or engaging in secondary movements are reduced. The asylum seeker would develop a sense of that s/he is not strictly bound to the Member State that has examined his or her application for the next five years, pursuant to the Long Term Residents Directive²⁴⁹. The Advisory Committee on Migration Affairs speculates that free movement and integration will lead to a “sustainable distribution” of asylum applications.²⁵⁰ As asylum seekers would be more cooperative and accepting of lodging an asylum application in any Member State now, this should have the effect of reducing the number of applications being lodged with a single Member State and so even out the distribution of asylum applications among the Member States in the long run.

²⁴⁶ Reception Conditions Directive art. 15.1

²⁴⁷ UNHCR ‘Resettlement Handbook’ (Geneva 2011) and European Commission, ‘Commission recommendation on a European resettlement scheme’ COM (2015) 3560 p. 9

²⁴⁸ Cf. Universal Declaration of Human Rights art. 13, International Covenant on Civil and Political Rights art. 12 and ECHR Protocol 4 art. 2

²⁴⁹ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16

²⁵⁰ Advisory Committee on Migration Affairs (n 28) 67

7.1.3 A “matching system”

A study for the Committee on Civil Liberties, Justice and Home Affairs suggests that the distribution of asylum applications amongst the Member States, even if “fair” should not be determined in advance.²⁵¹ In the study it is suggested that these factors need to be examined once they emerge and *in casu*. The rationale behind this is linked to the importance of the consent of the asylum seeker, family ties and other strong factors: “meaningful”, “genuine” and “substantial” links that render one Member State more appropriate to examine the asylum application over another Member State.²⁵² This gives room for consideration of “personal circumstances” or “connecting factors”, including social links of the individual.²⁵³ This is an expression of putting in place a “matching system”²⁵⁴ and the Policy Department designates these measures as part of a “light allocation system” and accredits its roots to the UNHCR Proposal from 2001.²⁵⁵

Indeed there is a risk of the state’s interests being subdued if the applicant’s preferences are allowed to take priority. Di Filippo’s findings can be used to suggest that an assessment of the Member State’s resources and capacity would be carried out simultaneously as the “matching system” investigation and both would be weighted equally.²⁵⁶ This reminds of the “double voluntariness” approach applied in the Humanitarian Evacuation Programme of 1999, which required the consent of both the asylum seeker and Member State for relocation. His proposal is of a “balanced mix of subjective preference and objective factors”.²⁵⁷ In cases where the state’s interests must be prioritised, for example if it is examining asylum

²⁵¹ Maiani (n 15) 7

²⁵² Di Filippo (n 219) 1 and 11; European Committee of Regions, ‘Opinion on the “Reform of the Common European Asylum System – Package II and a Union Resettlement Framework’ (February 2017) 15 f

²⁵³ Maiani (n 15) 16 and 58; UNHCR EXCOM Conclusion No 15 (XXX) (n 224); ECRE calls this the “Preference Based System” in ECRE (n 111) 6; Di Filippo (n 219) 1

²⁵⁴ Alexander Teytelboym and Will Jones, ‘Choices, preferences and priorities in a matching system for refugees’ (2016) 51 *Forced Migration Review* 80; cf. Di Filippo (n 219) 11 – 14 and UNHCR, ‘Revisiting the Dublin Convention’ (January 2001) 5

²⁵⁵ Maiani (n 15) 7 and 46 and the there referred to UNHCR, ‘Revisiting the Dublin Convention’ (January 2001) 5

²⁵⁶ Di Filippo (n 219) 1

²⁵⁷ *ibid* 12

applications having exceeded its full capacity, it should be ensured that at least a minimum or sufficient level of protection, whichever is higher, is granted as regards, for example, the family reunification objective set out in European Union law, international refugee law and human rights law standards.

It is worth noting that the strong fear of the Member States of consent causing a floodgate problem can be dissolved to some extent by the possibility of applying the Temporary Protection Directive. As has been discussed in the previous chapter, the enhanced obligations of Member States to act in solidarity, stemming from the Temporary Protection Directive, and the Member States' reluctance therewith explains why Member States do not see this alternative as a viable option and why it has not been applied till date.

7.2 The role of the European Union – allocation, support and examination

One of the suggested solutions to revive the idea of responsibility sharing and more broadly efficiency, in the Member States has been to have the entities of the European Union, for example the European Asylum Support Office and European Union Agency for Asylum, allocate asylum applications amongst the Member States.²⁵⁸ This would be permissible as per TFEU art. 78 and TFEU art. 352, which give competence to the European Union to undertake measures in this area. The European Union's primacy for taking measures in this field for most appropriate results has often been advanced.²⁵⁹ The idea would be to put at the disposal of the agency relevant expertise and country information.²⁶⁰

²⁵⁸ Maiani (n 15) 59; ECRE (n 111) 6; Helene Urth et al., 'Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for the Joint Processing of Asylum Applications on the Territory of the EU', European Commission (February 2013) 8

²⁵⁹ ECRE (n 102) 7

²⁶⁰ ECRE (n 218) 5

For hesitant Member States, it might come as a relief to know that they would be allowed to retain influence over the operations so that the centralisation of powers would merely be used as a tool for better operability of the system. ECRE holds that the European Asylum Support Office's mandate should be limited to a "minimum option" entailing provision of structural and technical assistance, as opposed to a "maximum option" which would encompass decision influencing powers.²⁶¹ ECRE also reminds that central processing would not require asylum seekers' physical presence at one central processing locality, for obvious reasons of impracticability.²⁶² It seems that the Member States will remain proprietors of their resources, and so the European Union led project would simply pool together the knowledge of the Member States.

This is not very different from the task that the European Asylum Support Office carries out today. To draw a parallel, at present the European Asylum Support Office is not allowed to take decisions on individual asylum applications, as stated in the European Asylum Support Office Regulation arts. 2.6 and 12.2. Its primary mandate is to pool data and provide operational assistance.²⁶³ Hence, any transfer of powers expanding its mandate would be preceded by rigorous weighing of interests, debate and legislative scrutiny. This argument effectively downplays the issues that sovereign Member States might have with letting a European Union led organisation distribute or examine asylum applications. On this note, Tsourdi and De Bruycker have expressed support of processes leading to the expansion of the European Asylum Support Office's powers in determining the Member State responsible.²⁶⁴ Using another example, the role of the Commission in devising the Greek National Action Plan for Asylum and Migration Management in 2009 has been substantial and so perhaps this can be used as evidence to suggest that it is time to review what the European

²⁶¹ ECRE (n 218) 38 f

²⁶² Kmak, McDonough and van Selm (n 15) 27

²⁶³ European Asylum Support Office Regulation arts. 2.2 and 2.4

²⁶⁴ De Bruycker and Tsourdi (n 20) 9

Union may be able to contribute with as regards the allocation, support and examination of asylum applications.

7.3 The role of the European Union – compensation and financing

It has been found that Member States deflect responsibility, for example by not registering migrants, declaring applications inadmissible on wrongful grounds or by not communicating important information on the determination procedure for a particular applicant to other Member States.²⁶⁵ Hence, one suggestion deals with putting in place a European Union financing setup to cover the costs incurred on Member States during allocation and examination procedures.²⁶⁶ In other words this would mean giving Member States access to a fund, pooled together in advance by the Member States themselves, in conformity with the Olson's principle.²⁶⁷ This reminds of the "insurance based logic" from *Chapter 6.4*. Similar to the distribution of asylum applications, distribution of funds could be done pursuant to a "reference key". To this effect, the functions of the funding entities such as the European Refugee Fund, now known as the Asylum, Migration and Integration Fund, which is already expected to spend more than three billion euros on the European asylum system over the course of six years up until 2020,²⁶⁸ could be revised. These steps could help to facilitate efficiency, including securing access to status determination procedures for the asylum seeker,²⁶⁹ as reasons for deflecting responsibility will have been eliminated.

The more concretely enumerated areas of financing include costs pertaining to registration, reception, determination of the Member State responsible,

²⁶⁵ Maiani (n 15) 24 and 37; Meijers Committee (n 20) 1; Fratzke (n 10) 25

²⁶⁶ Costello, Garlick, Guild and Moreno-Lax (n 10) 67; Boswell, Thielemann and Williams (n 37) 21

²⁶⁷ Mancur Olson, 'The Principle of "Fiscal Equivalence": The Division of Responsibilities among Different Levels of Government' (1969) 59/2 *American Economic Review* 479

²⁶⁸ Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 14

²⁶⁹ Boswell, Thielemann and Williams (n 37) 169

examination and transfers.²⁷⁰ In a study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs these costs were considered as forming part of a compensation scheme.²⁷¹ The compensation scheme could also cover costs that Member States face as a result of examining applications beyond their capacity, for example in the interests of family reunification, as discussed in *Chapter 6.3.2.2*.²⁷² A hint of this approach has appeared in the Dublin Regulation IV Proposal art. 42, whereby 500 euros are granted to the "benefitting Member State" when it has to transfer an applicant to the "Member State of allocation". Generally, the proposed approach for compensation seems different from the otherwise commonly used method of covering "direct costs"²⁷³ in an attempt to complement national measures by the European Union.

The pertinent question to be aware of in this context relates to the attitudes of Member States towards a centralised fund. Contrary to what one would suspect *a priori*, the fear is not so much that the fund will quickly run out of resources as it is that Member States tend not to make use of the resources. Member States prefer to utilise the resources with caution, as the contrary could eventually lead to the betterment of reception conditions and consequently act as a pull-factor for more asylum seekers. As discussed in *Chapter 7.1.2 – 3*, reception conditions are not the primary reason of immigration into a country. A research group of the European Parliament sees this dilemma as one of the gravest failures of system.²⁷⁴ The failure lies in that as a result of the attitudes and the persisting poor reception conditions, many asylum decisions are decided incorrectly at first instance.²⁷⁵

²⁷⁰ Maiani (n 15) 24 and 59

²⁷¹ *ibid* 23 and 45

²⁷² Wagner et al. (n 61) 93

²⁷³ Christina Boswell, Dirk Vanheule and Joanne van Selm, 'The implementation of article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration', European Parliament (April 2011) 107

²⁷⁴ Costello, Garlick, Guild, Moreno-Lax and Mouzourakis (n 11) 88

²⁷⁵ *ibid* 91

7.4 International solidarity

As mentioned in *Chapter 1*, 86 % of the world's refugees are located outside of the European Union, in developing nations.²⁷⁶ An analysis of this gives that developing countries accommodate relatively far more refugees than countries in the European Union. This begs the question, does solidarity only call for Member States to assist each other with determination and asylum examination procedures or does that obligation stretch outside of the European Union? TFEU art. 78.2.g is indicative of the latter solution.

This idea of owing solidarity to the international community coincides with the notion of “transnational solidarity” developed by Sangiovanni, the intentions behind the Global Approach to Migration and Mobility and other regional programmes.²⁷⁷ Noll would label the same concept as “universalism”.²⁷⁸ At present, the European Asylum Support Office is assigned the task of supporting third countries with managing their asylum systems.²⁷⁹ It might be in place to assist developing countries and Member States located at the borders to strengthen their legal expertise and provide financial resources, for example through the existing Development Cooperation Instrument.²⁸⁰ ECRE categorises this sort of assistance as “frontloading” and the UNHCR has also expressed support of it.²⁸¹ A starting point could be to plan an efficient use of the 3.2 billion euros that

²⁷⁶ UNHCR (n 22) 5

²⁷⁷ Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33/2 Oxford Journal of Legal Studies 232; cf. ”Expert Meeting on International Cooperation to Share Burdens and Responsibilities”, 2012, (24.2) IJRL 472 and Refugee Convention preamble 4; European Commission, ‘Global Approach to Migration and Mobility’ <https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en> accessed 18 March 2017; cf. Commission of the European Communities, ‘Renewed social agenda: Opportunities, access and solidarity in 21st century Europe’ COM (2008) 412 p. 4.7; cf. Council of the European Union, ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’, OJ C53/1 (March 2005) para. 1.6; European Commission (n 4)

²⁷⁸ Noll (n 100) 593

²⁷⁹ European Asylum Support Office Regulation art. 7

²⁸⁰ European Commission, ‘Development Cooperation Instrument’

<https://ec.europa.eu/europeaid/how/finance/dci_en.htm_en> accessed 25 January 2017

²⁸¹ ECRE, ‘Towards Fair and Efficient Asylum Systems in Europe, The Way Forward, Europe’s role in the global refugee protection system’ (September 2005) 5; UNHCR (n 22) 5

have been reserved for the Asylum, Migration and Integration Fund from 2014 to 2020.²⁸²

In the face of push back efforts²⁸³ by the European Union Member States, asylum seekers continue to undertake dangerous journeys from their countries of origin in search for refuge in Europe. Saturday 18 April 2015 marked fatalities of migrants in the hundreds at sea. Noll's suggestion for the grant of humanitarian visas²⁸⁴ at embassies worldwide could help to stifle to some extent the problem of undertaking unsafe routes to the European Union. "Protected entry procedures", as mentioned in another text, seem to have the same effect.²⁸⁵ Humanitarian visas or "protected entry procedures" do not have to be rooted in the Dublin instruments, rather they can be regarded as deriving from a general responsibility to protect and grant international protection. Of course, the examination of a request for a humanitarian visa would need to be customized with respect to procedural safeguards as defined by international refugee law and human rights law standards and this cannot be an easy task. In a similar effort, Legomsky reasserts faith in readmission agreements, but only when fair status determination processes can be secured, effectively obviating their general nature.²⁸⁶ Judging from the antagonism that the European Union – Turkey deal from 18 March 2016 has triggered, a rethink might be required before such agreements can be resorted to.

7.5 Repercussions for failing Member States

One persistent problem leading to poor results for the European asylum system is the lack of accountability for the Member States. Though individuals have standing in front of the European Court of Justice as per

²⁸² Garlick (n 204) 191

²⁸³ Kyenge and Metsola (n 38) para. 51

²⁸⁴ Noll (n 161)

²⁸⁵ Garlick, Guild, Moreno-Lax and Peers (n 30) 513

²⁸⁶ Legomsky (n 77) 630 and 632

TFEU art. 263.4, it is unlikely that the relevant basis for challenging the Dublin Regulation will suffice to prove direct and individual concern. This means that they in fact lack a real possibility to challenge the acts of Member States in Court through challenging the European Union act. The other alternative is that the individual may submit a complaint to the Commission. The Commission has the power to bring infringement proceedings against the Member States, as per TFEU art. 258, but this possibility is rarely resorted to.²⁸⁷ The one time it did happen, the Commission ended up withdrawing the application because the respondent state Greece could provide evidence to show that its asylum system was now in compliance with asylum law standards.²⁸⁸ A clear risk of a serious breach by a Member State of values, such as human dignity, respect for human rights and solidarity found in TEU art. 2, can be established, as per TEU art. 7. Furthermore, TFEU art. 259 allows for Member States to join in in the investigations and instigate proceedings, but for this, unfettered political will is required.

²⁸⁷ European Commission, 'EU law monitoring' <https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring_en> accessed 16 May 2017

²⁸⁸ C-130/08, Commission v. Greece, ECJ, ECLI:EU:C:2008:584, retracted

8 Conclusion

This thesis has aimed to concretise the efficiency of the Dublin Regulation IV Proposal from the point of view of its aims, while measuring it against European Union law, international refugee law and human rights law standards.

When recalling the aims of the Dublin IV Regulation Proposal and their results as regards the aim of providing fair and effective access to status determination procedures and trying to speed up the process through admissibility procedures and transfers, it can be summed up that inefficiency originates from the fact that the Dublin system focuses on “processing, rather than asylum seekers or refugees”²⁸⁹. The attempt to achieve efficiency by curbing secondary movements is bound to fail as long as secondary movements continue to be regarded as something negative, without due regard to their cause. Rather than subjecting asylum seekers to sanctions to obtain this goal, it may be more worthwhile trying to find ways of winning their cooperation. A large part of achieving the third and final goal relating to an equal distribution of asylum applications in the European Union relies on the harmonisation of realities on the ground. It would not help to harmonise the laws, if the situation on the ground is not harmonised.²⁹⁰ Nonetheless, it should be considered that a completely equal distribution might not be achieved, for example because family unity must be prioritised. However, if one state has to examine some more applications then this Member State should be assisted. Cooperation and “mutual trust”²⁹¹ among the Member States is crucial.

²⁸⁹ Jean Francois-Durieux, ‘The vanishing refugee: how EU asylum law blurs the specificity of refugee protection’ in Helene Lambert, Jane McAdam and Maryellen Fullerton, *The Global Reach of European Refugee Law* (1 edn, CUP 2013) 235

²⁹⁰ Thielemann (n 182) 6; cf. COM (2007) 301 p. 2.2 and Evangelia Tsourdi and Philippe De Bruycker, ‘Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension’ in Francesco Maiani, Philippe De Bruycker and Vincent Chetail, *Reforming the Common European Asylum System* (1 edn, Brill Nijhoff 2016) 502

²⁹¹ Council of the European Union (n 215) 2

The following conclusions have been reached. The proposed admissibility screenings and transfer scheme reduce the efficiency of the proposal considerably. The proposed sanctions for the individual and the “corrective allocation mechanism” have the same effect. The Dublin IV Regulation Proposal is not efficient. To repair the problem, solidarity, consent, fine-tuning the role of the European Union and holding Member States liable for breaches of the laws should be considered. Reparation in law is key, but it need not start or end there.

Bibliography

Primary sources

European Union and international treaties

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326

Consolidated Version of the Treaty on European Union [2012] OJ C 326

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

European Convention on Human Rights and Fundamental Freedoms (1950)

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

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Universal Declaration of Human Rights (adopted 10 December 1948 United Nations General Assembly Resolution 217 A(III))

Vienna Convention on the Law of Treaties (23 May 1969)

European Union legislation

Regulations

European Parliament and Council Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31

European Parliament and Council Regulation (EU) 439/2010 of 19 May 2010 establishing a European Asylum Support Office [2013] OJ L132/11

Directives

Council Directive 2011/55/EC of July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16

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 [2004] OJ L304/12

European Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98

European Parliament and Council Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24

European Parliament and Council Directive 2013/32/EU of the of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60

European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96

Case law

European Court of Human Rights

Conka v. Belgium, ECtHR, Application no. 51564/99, Judgment of 5 February 2002

M.S.S. v. Belgium and Greece, ECtHR, Application No. 30696/09, Judgment of 21 January 2011

Hirsi v. Italy, ECtHR, Application No. 27765/09, Judgment of 23 February 2012

N.S.S. v. the U.K., ECtHR, Application nos. 48420/10 et al., 15 January 2013

Tarakhel v. Switzerland, ECtHR, Application No. 29217/12, Judgment of 4 November 2014

European Court of Justice

C-432/05, Unibet, ECJ, ECLI:EU:C:2007:163, 13 March 2007

C-69/10, Brahim Samba Diouf v. Ministre du Travail, ECJ, ECLI:EU:C:2011:524, 28 July 2011

C-411/10 and C-493/10 N.S. and M.E., ECJ, ECLI:EU:C:2011:865, 21 December 2011

C-179/11, Cimade and Gisti v. Ministre de l'Interior, ECJ, ECLI:EU:C:2012:594, 27 September 2012

C-648/11, M.A. and Others, ECJ, ECLI:EU:C:2013:367, 6 June 2013

C-394/12, Abdullahi, ECJ, ECLI:EU:C:2013:813, 10 December 2013

C-79/13, Saciri and Others, ECJ, ECLI:EU:C:2014:103, 27 February 2014

C-481/13, Qurbani, ECJ, ECLI:EU:C:2014:2101, 17 July 2014
C-695/15, Mirza, ECJ, ECLI:EU:C:2016:188, 17 March 2016
C-63/15, Ghezelbash, ECJ, ECLI:EU:C:2016:409, 7 June 2016
C-155/15, Karim v. Migrationsverket, ECJ, ECLI:EU:C:2016:410, 7 June 2016
C-130/08, Commission v. Greece, ECJ, ECLI:EU:C:2008:584, retracted
C-578/16, C.K. v. Slovenia, ECJ, ECLI:EU:C:2017:127, 16 February 2017

Sweden

Migration Court of Appeal, MIG 2016:16, Case number UM 1859-16, 1 July 2016

Secondary sources

International documents

UNHCR EXCOM Conclusion No 15 (XXX) ‘Refugees Without an Asylum Country’ (1979)

UNHCR EXCOM Conclusion No 22 (XXXII) ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx’ (1981)

UNHCR EXCOM Conclusion No 30 (XXXIV) ‘The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum ’ (1983)

UNHCR EXCOM Conclusion No 58 (XL) ‘Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ (1989)

UNHCR EXCOM Conclusion No 104 (LVI) ‘Conclusion on Local Integration’ (2005)

UNHCR EXCOM Conclusion No 109 (LXI) ‘Conclusion on Protracted Refugee Situations’ (2009)

UNHCR ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status’ (Geneva 2011)

UNHCR ‘Resettlement Handbook’ (Geneva 2011)

Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005 entered into force 1 February 2008) CETS 167

New York Declaration for Refugees and Migrants’ (adopted 19 September 2016)
United Nations Resolution A/71/L.1

European Union institutions

Council of the European Union

Council of the European Union, 'Presidency Conclusions, Tampere European Council, 15-16 October 1999' (October 1999)

Council of the European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', OJ C53/1 (March 2005)

Council of the European Union, 'The Stockholm Programme – An open and secure Europe serving and protecting the citizens', document 17024/09 (December 2009)

Council of the European Union, 'Council Conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows' (March 2012)

European Commission

Commission of the European Communities, 'Commission Staff Working Paper on the Evaluation of the Dublin Convention' SEC (2001) 756

European Commission, 'Green Paper on the future Common European Asylum System' COM (2007) 301

Commission of the European Communities, 'On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, Improving access to durable solutions' COM (2004) 410 final

European Commission, 'The evaluation of the Dublin System' COM (2007) 742

Commission of the European Communities, 'Commission staff working document accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system - Annex to the communication on the evaluation of the Dublin system' SEC (2007) 742

European Commission, 'Policy plan on asylum – an integrated approach to protection across the EU' COM (2008) 360

Commission of the European Communities, 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe' COM (2008) 412

European Commission, 'Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme' COM (2010) 171

European Commission, 'Enhanced intra-EU solidarity in the field of asylum, An EU agenda for better responsibility-sharing and more mutual trust' COM (2011) 835

Urth H et al., ‘Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for the Joint Processing of Asylum Applications on the Territory of the EU’, European Commission (February 2013) <<http://www.refworld.org/docid/524d5ba04.html>> accessed 11 April 2017

European Commission, ‘An open and secure Europe: making it happen’ COM (2014) 154

European Commission, ‘A European Agenda on Migration’ COM (2015) 240 final

European Commission, ‘Commission recommendation on a European resettlement scheme’ COM (2015) 3560

European Commission, ‘Back to Schengen – A Roadmap’ COM (2016) 120 final

European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’ COM (2016) 270 final

European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010’ COM (2016) 271 final

European Commission, ‘Proposal for a [Eurodac Regulation]’ COM (2016) 272 final

European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ COM (2016) 467

European Committee of Regions

European Committee of Regions, ‘Opinion on the “Reform of the Common European Asylum System – Package II and a Union Resettlement Framework” (February 2017) <<http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%205807/2016>> accessed 20 March 2017

European Council

European Council, ‘26/27 June Conclusions’ EUCO 79/14 (June 2014) <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf> accessed 13 April 2017

European Economic and Social Committee

Diaz M, ‘Opinion, the [Dublin IV Regulation Proposal]’, European Economic and Social Committee, C 34/144 (October 2016) <<http://www.eesc.europa.eu/?i=portal.en.soc-opinions.39248>> accessed 16 June 2017

European Parliament

European Parliament, ‘Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration’ (2015/2095(INI)) (April 2016)

European Parliament, ‘Resolution on enhanced intra-EU solidarity in the field of asylum’ (2012/2032(INI)) (September 2012)

Apap J and Orav A, ‘Safe countries of origin: Proposed common EU list’, European Parliamentary Research Service PE 569.008 (February 2017)

Boswell C, Thielemann E and Williams R, ‘What system of burden-sharing between Member States for the reception of asylum seekers?’, European Parliament (January 2010)

Boswell C, Vanheule D and van Selm J, ‘The implementation of article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration’, European Parliament (April 2011)

Costello C, Garlick M, Guild E and Moreno-Lax V, ‘Enhancing the Common European Asylum System and Alternatives to Dublin’, European Parliament (July 2015)

Costello C, Garlick M, Guild E, Moreno-Lax V and Mouzourakis M, ‘New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection’, European Parliament (October 2014)

Jaillard M et al., ‘Setting up a Common European Asylum System’, European Parliament (August 2010)

Kyenge K and Metsola R, ‘Draft Report on the situation in the Mediterranean and the need for a holistic EU approach to migration’, European Parliament (2015/2095(INI)) (January 2016)

Maiani F, ‘The Reform of the Dublin III Regulation’, European Parliament (June 2016)

Wagner M et al., ‘The Implementation of the Common European Asylum System’, European Parliament (May 2016)

Williams R, ‘Beyond Dublin’, The Greens/EFA in the European Parliament (March 2015)

Eurostat

Eurostat News Release, ‘Asylum in the EU Member States’ (March 2017)
<<http://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1>> accessed 29 June 2017

Reports, research papers and articles

AIDA

Mouzourakis M, 'Admissibility, responsibility and safety in European asylum procedures', Asylum Information Database (September 2016) <https://www.ecre.org/wp-content/uploads/2016/09/ECRE-AIDA-press-release_Admissibility-responsibility-and-safety-in-European-asylum-procedures.pdf> accessed 7 June

ECRE

Paul McDonough, Magdalena Kmak and Joanne van Selm, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered', ECRE (March 2008)

ECRE, 'Discussion Paper, Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU' (November 2014)

ECRE, 'Towards Fair and Efficient Asylum Systems in Europe, The Way Forward, Europe's role in the global refugee protection system' (September 2005)

ECRE, 'Guarding the Refugee Protection Standards in Regions of Origin', The Way Forward, Europe's role in the global refugee protection system (December 2005)

ECRE, 'Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System' (January 2013)

ECRE, 'The Road out of Dublin: Reform of the Dublin Regulation', Policy Note No 2 (2016)

ECRE, 'Memorandum to the European Council Meeting 17-18 March 2016, Time to Save the Right to Asylum' (March 2016)

ECRE, 'Comments on the [Dublin IV Regulation Proposal]' (October 2016)

Odysseus Network

Noll G, 'Failure by Design? On the Constitution of EU Solidarity' in 'Searching for Solidarity in EU Asylum and Border Policies', Odysseus Network's First Annual Policy Conference, (February 2016) <<http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>> accessed 15 March 2017

Tsourd E, 'Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance "crisis"?' in 'Searching for Solidarity in EU Asylum and Border Policies', Odysseus Network's First Annual Policy Conference (February 2016) <<http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>> accessed 15 March 2017

UNHCR

Weis P, 'The Refugee Convention, 1951: the travaux préparatoires analysed with a commentary by Dr Paul Weis', UNHCR (1990)

UNHCR, 'Revisiting the Dublin Convention' (January 2001)

UNHCR, 'Annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status' (February 2003)

UNHCR, 'Note on Refugee Integration in Central Europe' (April 2009)

McDonough P and Tsourdi E, 'Putting solidarity to the test: assessing Europe's response to the asylum crisis in Greece', UNHCR (January 2012)

UNHCR, 'Better Protecting Refugees in the EU and Globally, UNHCR's proposals to rebuild trust through better management, partnership and solidarity' (December 2016)

UNHCR, 'Comments on the [Dublin IV Regulation Proposal]' (December 2016)

Other

Advisory Committee on Migration Affairs, 'Sharing responsibility, A proposal for a European asylum system based on solidarity' (December 2015) <<https://acvz.org/wp-content/uploads/2016/03/Sharing-responsibility.pdf>> accessed 14 February 2017

Bruycker P and Tsourdi E, 'EU Asylum Policy: In Search of Solidarity and Access to Protection', Migration Policy Centre (May 2015)
<<http://cadmus.eui.eu/handle/1814/35742>> accessed 18 January 2017

Carrera S and Guild E, 'Rethinking asylum distribution in the EU, Shall we start with the facts?', Centre for European Policy Studies, (June 2016) <<https://www.ceps.eu/publications/rethinking-asylum-distribution-eu-shall-we-start-facts>> accessed 17 March 2017

Churches' Commission for Migrants in Europe, 'Comments on the [Dublin IV Regulation Proposal]' (October 2016)
<http://www.ccme.be/fileadmin/filer/ccme/20_Areas_of_Work/01_Refugee_Protection/2016-11-03_Chr_org_comments_Dublin_IV_final.pdf> accessed 16 March 2017

Costello C and Mouzourakis M, 'Reflections on reading Tarakhel: Is 'How Bas is Bad Enough' Good Enough?', A&MR (2014) <<https://ssrn.com/abstract=2548542>> accessed 11 May 2017

Council of Bars and Law Societies of Europe, 'Comments on the [Dublin IV Regulation Proposal]' (September 2016)
<http://www.cbbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Position_papers/EN_MIG_20160916_CCBE_comments_on_Dublin_regulation_reform_proposal.pdf> accessed 9 May 2017

Karageorgiou E, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees', *European Politics and Society* (January 2016) <<http://www.tandfonline.com/doi/full/10.1080/23745118.2016.1121007>> accessed 20 January 2017

Karageorgiou E, 'The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value', 2016:14epa Swedish Institute for European Policy Studies (2016) <http://www.sieps.se/sites/default/files/2016_14epa%20eng%20A4%20korr4%20%28003%29.pdf> accessed 30 January 2017

Filippo M, 'From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures', *International Institute of Humanitarian Law* (January 2016) <<http://www.iihl.org/wp-content/uploads/2017/05/IIHL-A-plea-for-the-reform-of-the-Dublin-system-policy-brief-DEF-2.pdf>> accessed 3 April 2017

Fratzke S, 'Not adding up, The fading promise of Europe's Dublin system, EU Asylum: Towards 2020 Project', *Migration Policy Institute Europe* (March 2015) <<http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system>> accessed 5 June 2017

Kraler A and Wagner M, 'An Effective Asylum Responsibility-Sharing Mechanism', *International Centre for Migration Policy Development* (October 2014) <https://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Policy_papers/Migration_asylum/Beyond_Dublin_paper_final.pdf> accessed 16 April 2017

Meijers Committee, 'Comments on the [Dublin IV Regulation Proposal]', CM 1609 (2016) <http://www.commissie-meijers.nl/sites/all/files/cm1609_note.pdf> accessed 12 June 2017

Mitsilegas V, 'Solidarity and Trust in the Common European Asylum System', 2/2 *Comparative Migration Studies* (June 2014) <<https://link.springer.com/content/pdf/10.5117/CMS2014.2.MITS.pdf>> accessed 5 March 2017

Mouzourakis M, 'We need to talk about Dublin – Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union', *Refugee Studies Centre* (December 2014) <<https://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf>> accessed 5 March 2017

Lisbon Expert Roundtable, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (9-10 December 2002) <<http://www.refworld.org/docid/3fe9981e4.html>> accessed 2 February 2017

Stern R, 'Responses to the "refugee crises": What is the role of self-image among EU countries?', 2016:10epa Swedish Institute for European Policy Studies (2016) <http://www.sieps.se/sites/default/files/2016_10epa%20eng%20A4%20korr3.pdf> accessed 17 May 2017

Thielemann E, 'Burden Sharing: The International Politics of Refugee Protection', The Center for Comparative Immigration Studies (March 2006) <https://ccis.ucsd.edu/_files/wp134.pdf> accessed 10 April 2017

Thielemann E, 'The Future of the Common European Asylum System – In Need of a More Comprehensive Burden-Sharing Approach', 2008:1 Swedish Institute for European Policy Studies (2008) <<http://www.sieps.se/sites/default/files/419-20081epa.pdf>> accessed 1 March 2017

Books

Boswell C, 'The Politics of Irregular Migration' in Loic Azoulay and Karin de Vries *EU Migration Law: Legal Complexities and Political Rationales* (1 edn, OUP 2014)

Byrne R, Noll G and Vedsted-Hansen J, 'Western European Asylum Policies For Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics' in *New Asylum Countries? – Migration Control and Refugee Protection in an Enlarged European Union* (1 edn, Kluwer Law International 2002)

Carrera S, 'Integration of Immigrants in EU Law and Policy' in Loic Azoulay and Karin de Vries, *EU Migration Law: Legal Complexities and Political Rationales* (1 edn, OUP 2014)

Costello C, *The Human Rights of Migrants and Refugees in European Law* (1 edn, OUP 2015)

De Bruycker P and Tsourdi E, 'Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani, *Reforming the Common European Asylum System* (1 edn, Brill Nijhoff 2016)

Francois-Durieux J, 'The vanishing refugee: how EU asylum law blurs the specificity of refugee protection' in Helene Lambert, Jane McAdam and Maryellen Fullerton, *The Global Reach of European Refugee Law* (1 edn, CUP 2013)

Gammeltoft-Hansen T, *Access to asylum: international refugee law and the globalisation of migration control* (1 edn, OUP 2011)

Garlick M, 'The Dublin System, Solidarity and Individual Rights' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani, *Reforming the Common European Asylum System* (1 edn, Brill Nijhoff 2016)

Garlick M, Guild E, Moreno-Lax V and Peers S, 'The Dublin III Regulation' in *EU Immigration and Asylum Law* (2 edn, Brill Nijhoff 2015)

Hathaway J, *The Rights of Refugees under International Law* (1 edn, CUP 2005)

Herman M, 'Council Regulation (EC) No 343/2003 of 18 February 2003' in Kay Hailbronner, *EU Immigration and Asylum Law Commentary* (1 edn, Hart 2010)

Noll G, *Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (1 edn, Martinus Nijhoff Publishers 2000)

O’Nions H, *Asylum – A Right Denied, A Critical Analysis of European Asylum Policy* (1 edn, Ashgate 2014)

Ross M, ‘Solidarity – A New Constitutional Paradigm for the EU?’ in Malcolm Ross and Yuri-Borgmann-Prebil, *Promoting Solidarity in the European Union* (1 edn, OUP 2010)

Online journals

Boswell C, ‘Burden-Sharing in the European Union: Lessons learned from the German and UK Experience’ (2003) 16/3 *Journal of Refugee Studies* <www.oup.silver-chair-cdn.com> accessed 14 February 2017

Guild E, ‘The Europeanisation of Europe’s Asylum Policy’ (2006) *International Journal of Refugee Law* <www.ijrl.oxfordjournals.org> accessed 1 April 2017

Jones W and Teytelboym A, ‘Choices, preferences and priorities in a matching system for refugees’ (2016) 51 *Forced Migration Review* <<http://www.fmreview.org/destination-europe/jones-teytelboym.html>> accessed 6 March 2017

Legomsky S, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15/4 *International Journal of Refugee Law* <www.oup.silver-chair-cdn.com> accessed 5 February 2017

Olson M, ‘The Principle of “Fiscal Equivalence”: The Division of Responsibilities among Different Levels of Government’ (1969) 59/2 *American Economic Review* <http://econpapers.repec.org/article/aeaarec/v_3a59_3ay_3a1969_3ai_3a2_3ap_3a479-87.htm> accessed 18 January 2017

Sangiovanni A, ‘Solidarity in the European Union’ (2013) 33/2 *Oxford Journal of Legal Studies* <<https://academic.oup.com/ojls/article/33/2/213/1547121/Solidarity-in-the-European-Union>> accessed 12 June 2017

Schuck P, ‘Refugee Burden-Sharing: A Modest Proposal’ (1991) *Yale Journal of International Law* <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2691&context=fs_s_papers> accessed 24 April 2017

Thielemann E, ‘Between Interests and Norms: Explaining Burden-Sharing in the European Union’ (2003) 16/3 *Journal of Refugee Studies* <<http://www.lse-students.ac.uk/THIELEMA/Papers-PDF/JRS-16-3-BS-Interests-Norms.pdf>> accessed 3 May 2017

Websites and blogs

ECRE, 'Our Work' <<http://www.ecre.org/our-work/>> accessed 19 May 2017

European Commission, 'Development Cooperation Instrument' <https://ec.europa.eu/europeaid/how/finance/dci_en.htm_en> accessed 25 January 2017

European Commission, 'EU law monitoring' <https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring_en> accessed 16 May 2017

European Commission, 'Global Approach to Migration and Mobility' <https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en> accessed 18 March 2017

Hruschka C, 'Dublin is dead! Long live Dublin!' (EU Migration Law Blog, 4 May 2016) <<http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>> accessed 12 April 2017

Kjaerum M, 'Can the Drownings in the Mediterranean be Stopped?' (Human Rights Forum, Lund, 30 April 2015) <<http://rwi.lu.se/2015/04/can-the-drownings-in-the-mediterranean-be-stopped/>> accessed 14 February 2017

Merriam-Webster 'Efficiency' <<https://www.merriam-webster.com/dictionary/efficiency>> accessed 22 January 2017

Noll G, 'Why the EU gets in the way of refugee solidarity' (open Democracy, 22 September 2015) <<https://www.opendemocracy.net/can-europe-make-it/gregor-noll/why-eu-gets-in-way-of-refugee-solidarity>> accessed 1 April 2017

Peers S, 'The Orbanisation of EU asylum law: the latest EU asylum proposals' (EU Law Analysis, 6 May 2016) <<http://eulawanalysis.blogspot.se/2016/05/the-orbanisation-of-eu-asylum-law.html>> accessed 19 January 2017