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RESEARCH PAPER 7

EU ASYLUM POLICY AND FUNDAMENTAL RIGHTS

‘Dublin Regulation and the True Gordian Knot of a Fair EU
Solidarity Mechanism: Decisively Cut, Deftly Untangled or
Statutorily Bypassed?’



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Με τη χρηματοδότηση της Ευρωπαϊκής Ένωσης. Οι απόψεις και οι γνώμες που διατυπώνονται εκφράζουν αποκλειστικά τις απόψεις των συντακτών και δεν αντιπροσωπεύουν κατ' ανάγκη τις απόψεις της Ευρωπαϊκής Ένωσης ή του Ευρωπαϊκού Εκτελεστικού Οργανισμού Εκπαίδευσης και Πολιτισμού (ΕΑΕΑ). Η Ευρωπαϊκή Ένωση και ο ΕΑΕΑ δεν μπορούν να θεωρηθούν υπεύθυνοι για τις εκφραζόμενες απόψεις.

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1. Introduction

“I will propose a new pact on migration and asylum, including the relaunch of the Dublin reform. I’ve never really understood why Dublin started with the simple equation: Where a migrant first stepped foot in the EU, that’s where he or she must stay. Migration takes place by land or sea. We can only have stability on our external borders if we provide sufficient help to member states that are exposed to a lot of migration pressure because of their position on the map ... We must reform Dublin to achieve more fairness and burden-sharing”¹.

In the context of the above statement by the President of the European Commission Von der Leyen, which explicitly reveals the substantial delay in the commonly accepted necessary legislative reform process of this specific and crucial aspect of the Common European Asylum System (CEAS) and the fact that the pertinent transfer mechanism has been effectively suspended² amid, among others, controversial administrative bilateral agreements, the overall process of attempting to amend Dublin III to Dublin IV or proposing a completely new instrument such as the Regulation on Asylum and Migration Management is being examined and assessed.

The aim of this research article is to highlight the opposing forces battling within the Union in relation to the refugee issue against the backdrop of a long-lasting political deadlock on the reform of a coordinated approach to asylum and migration management in the region and the relevant political and compromise “solutions” adopted in the framework of the subsequent patch-up work approach. The second part makes a brief reference to the pre-existing legal framework. The current framework is presented in the third part together with the problems that remain unresolved. The fourth part sets out the review efforts which have proved

¹ Mowat, L. (2019) ‘New EU boss to rip-up cornerstone of EU - Von der Leyen wants Dublin reforms’, *Express*, 7 August [online]. Available at <https://www.express.co.uk/news/world/1162405/eu-news-Ursula-von-der-Leyen-Dublin-regulation-migration> (Accessed 15 December 2022).

² Trauner, F. (2020) ‘A Multifaceted Crisis as an Opportunity and a Risk: The EU’s Long Struggle to Reform the Dublin System for Asylum Seekers’, in Wöhl, S., Springler, E., Pachel, M. & Zeilinger, B. (eds) *The State of the European Union: Fault Lines in European Integration*, Wiesbaden, Springer VS, p. 267.

fruitless to date and the related obstacles encountered. Finally, the fifth part sets out some reflections on the future taking into consideration the recent New Pact pertinent initiatives. It appears that the new proposed reforms, despite some positive elements they contain, largely try to negate the fair distribution problem of the burden associated with the refugee/migration issue, rather than helping to successfully solve it entirely.

2. Historical development of the pertinent legal framework

Refugee law is a more specific aspect of ordinary aliens law³ and exactly because of this specification relationship between them, their respective development could be characterised as following common and parallel patterns. Up until the 1980s, member states, mainly through policing measures at the national level, aimed at curbing the migration phenomenon⁴.

However, on the 14th of June 1985 in the village of Schengen in Luxembourg, France, Germany, Belgium, Luxembourg and the Netherlands concluded an intergovernmental agreement, the Schengen Convention, on the abolition of border controls between the above member states and on the free movement of their nationals within their territories, with the relevant measures entering into force on 19.6.1990. Intergovernmental cooperation groups, such as the Ad Hoc Group on Immigration, established the 1990 Dublin Convention (Dublin I)⁵, which entered into force in 1997 while according to its provisions the criteria for the designation of the Member State responsible for examining an asylum application were formulated.

Since the collapse of the “Eastern bloc” in the 1990’s, European states have faced significant migratory flows from the former communist states⁶. In an effort to form a common response to these pressures, it was decided to include issues relating to the free movement of persons,

³ Synodinos, H. (2012) *The impact of European law on the asylum status of refugees*, Athens, Nomiki Bibliothiki, p. 20.

⁴ Koppa, M. (2010) ‘EU Immigration Policy’ in Tsolka, O., Foundedaki, P. & Hanos, A. (eds) *Freedoms – Rights and Security in the EU*, Athens, Nomiki Bibliothiki, pp. 95-104, p. 96.

⁵ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention OJ C 254, 19.8.1997, p. 1–12 (adopted 15 June 1990, entered into force 1 September 1997).

⁶ Koppa, p. 97.

asylum, immigration and the rights of foreigners in the third – intergovernmental pillar of the EU Maastricht Treaty of 1991⁷ and to entrust the European Community only with the visa policy⁸. In an effort to further deepen EU integration, the Member States decided, with the introduction of the necessary legal amendments and certain new provisions in the Treaty of Amsterdam of 1997, to “communitarise” immigration and refugee policies as well as to incorporate and transfer the Schengen acquis into EU law. The Treaty of Amsterdam establishes the Common European Asylum System (CEAS)⁹ and sets out the fundamental objective of the development of an Area of Freedom, Security and Justice (AFSJ)¹⁰ which would ensure the free movement of persons, heightened security standards for EU citizens and the promotion of the proper administration of justice within the European Union¹¹. The establishment of AFSJ requires common policies inter alia in the areas of immigration and asylum¹². In the framework of the 1999 Tampere European Council, it was decided to step up efforts on asylum and migration issues¹³ in order to fully implement the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees¹⁴.

A number of pieces of legislation were subsequently adopted within the framework of the EC’s shared competences. On the legal basis of Article 63 of the EEC Treaty, Regulation (EC) 343/2003 (Dublin II)¹⁵ was adopted, replacing and ‘communitarising’ the 1990 Convention (Dublin I). Temporary Protection Directive¹⁶, Eurodac Regulation¹⁷, Schengen Borders Code

⁷ Anagnostopoulou, D. (2012) ‘Area of Freedom, Security and Justice’, in Christianos, V. (ed) *EU Treaty TEU & TFEU Commentary*, Athens, Nomiki Bibliothiki, pp. 412-528, p. 413.

⁸ Naskou-Perraki, P. (2003) ‘Visa, Asylum, Immigration, and other policies pertinent to the Free Movement of Persons’ in Skouris, V. (ed) *A Commentary of the Treaties of the European Union and the European Community*, Sakkoulas Publications, Athens-Komotini, pp. 619-666, p. 623.

⁹ Synodinos, p. 34.

¹⁰ Naskou-Perraki, p. 621.

¹¹ Anagnostopoulou, p. 415.

¹² Synodinos, p. 31.

¹³ Naskou-Perraki, p. 624.

¹⁴ Synodinos, p. 45.

¹⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50, 25.2.2003, p. 1–10.

¹⁶ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L 212, 7.8.2001, p. 12–23.

¹⁷ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 316, 15.12.2000, p. 1–10.

Regulation¹⁸ and a Regulation for the establishment of the European Agency (FRONTEX) for the Management of Operational Cooperation at the External Borders¹⁹ were also adopted, among others. The Dublin II system is based on the principle that all EU Member States are considered as safe countries and establishes the pertinent rule that only one Member State is responsible for examining each asylum claim, with a view to ensuring legal certainty and avoiding “asylum shopping”²⁰. The competent State is the one (a) where family members of the applicant reside, (b) which has already issued a residence permit, (c) which has already issued an entry visa, (d) which has issued a residence permit or a visa taking into account time validity terms, (f) where the applicant stays, (g) where the applicant first entered or resided illegally, (h) where the application for asylum is made in an international transit area of an airport of a Member State, (i) if all the above criteria are inconclusive, where an application for asylum was first lodged²¹.

3. The current legal framework and its inherent weaknesses

3.1 Dublin III

Article 78 of the Treaty on the Functioning of the European Union (hereinafter TFEU) provides that the Union is to decide, in accordance with the ordinary legislative procedure, on common measures in the fields of asylum, subsidiary and temporary protection. Article 79 TFEU provides that common measures on immigration shall be adopted by the Union in accordance with the ordinary legislative procedure. Article 80 TFEU states that the above articles and their implementation will be governed by the principle of solidarity and fair sharing of burdens and responsibilities between the Member States. Article 19 of the EU Charter of Fundamental Rights (hereinafter CFREU) provides that collective expulsions are not allowed and demands the respect the above-mentioned principle of non-refoulement. Article 18 CFREU establishes the

¹⁸ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105, 13.4.2006, p. 1–32.

¹⁹ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 349, 25.11.2004, p. 1–11.

²⁰ Synodinos, p. 46 & 53.

²¹ Naskou-Perraki, p. 636-637.

right to asylum as laid down in the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967.

On the basis of Article 78 of the TFEU, Regulation (EU) No 604/2013 (Dublin III) was adopted, which determines the State responsible for examining an asylum application. A genuine novelty²² of “Dublin III” could be considered the introduction of an exception to the above rules through the “sovereignty” and “compassionate or humanitarian grounds” clauses. Member States retain the discretion not to transfer the applicant to the State responsible if they either decide to do so or on humanitarian grounds. The Court of Justice of the EU (hereinafter CJEU) interpreted this discretion²³ according to relevant previous ECtHR jurisprudence²⁴ as a positive obligation on condition that the transfer of the applicant to the competent State constitutes a real risk of an indirect violation of the ECHR and the CFREU²⁵, due to the situation in that State. The concept of *systemic deficiencies* and the related condition of compatibility of transfers with, in particular, Articles 3 ECHR and 4 CFREU were also incorporated into Article 3(2) of the Regulation. The addition of Article 33 on the Early Warning Mechanism and the pertinent *Ad hoc* support measures in cases of particular pressure on the asylum system of a Member State should be added here as an important additional innovation of the above legal act.

3.2 The cornerstone in the establishment of the CEAS & its inherent deficiencies

The EU current legal framework has not managed to achieve the expected results both in normal periods and in times of crisis, consequently the relevant return mechanism is often informally circumvented or suspended due to certain more realistic assumptions based on undisputed massive inflows. Therefore, the need of its revision has emerged as a pressing issue that needs to

²² Mountzelou, A. (2017) ‘Fundamental Rights of Irregular Migrants and Refugees in Greece’, *Human Rights*, vol. 19, no. 74, pp. 819-852.

²³ CJEU In Joined Cases C-411/10 and C-493/10, *N. S./Secretary of State for the Home Department & M. E. and Others/Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21.12.2011, ECLI:EU:C:2011:865.

²⁴ ECtHR In Case *M.S.S./Belgium and Greece* (Application No 30696/09), Judgment 21.1.2011 [GC].

²⁵ Aktypis, S. H. (2012) ‘EU Law in ECtHR Case-law: Asylum Seeker Rights’, *Immigration Law Review*, no. 3, pp. 240-250, p. 244.

be addressed urgently. Its arbitrariness, ineffectiveness²⁶ – particularly in terms of preventing secondary movements – and its unjust and bureaucratic nature, as well as its outdated, punitive, and unreasonable approach²⁷ especially for those member states under the greatest pressure due to their geographical location on the sole basis of the principle of causation²⁸ and the respective rule of the irregular first entry, is considered common knowledge among numerous experts. In other words, its rationale to establish a ‘causal link’ between an alleged failure to protect the EU external border and the allocation of responsibility in the field of asylum cannot stand the test of reason and effectiveness and could only be explained as the result of the unwillingness of some member states to share the responsibility and the related burden of international protection in a spirit of mutual solidarity and fairness²⁹.

The specific flaws that have also characterised the previous regime (Dublin II) continue to exist and to be analysed in the relevant case-law developments in the ECtHR and the CJEU, namely: (a) the possibility of refoulement of asylum seekers in breach of the relevant principle of international and European law, (b) the inhumane living conditions or arbitrary administrative detention of refugees and migrants, (c) the bureaucratic delays which amount to inhumane treatment (d) the unequal distribution of the burden of refugee, which falls mainly in frontline countries acting as a ‘protective shield’ or “buffer zone” for the other Member States³⁰, (e) lengthy, costly and ineffective administrative and judicial procedures, (f) diplomatic tensions between Member States and (g) generating huge profits and thus breeding criminal networks providing smuggling services³¹. The reason for these high costs is the lack of European solidarity required by Article 80 TFEU, as it has been established that no member state alone is able to resolve this big issue without the cooperation of the other member states³².

²⁶ Tsourdi, E. and De Bruycker, P. (2022) ‘The evolving EU asylum and migration law’, in Tsourdi, E. and De Bruycker, P. (eds) *Research Handbook on EU Migration and Asylum Law*, Cheltenham- Northampton, Edward Elgar Publishing Limited, pp. 1-55, p. 27.

²⁷ Di Filippo, M. (2016) “Dublin ‘reloaded’ or time for ambitious pragmatism?”, *EU Immigration and Asylum Law and Policy*, 16 October [Online]. Available at <http://eumigrationlawblog.eu/dublin-reloaded/> (Accessed 15 March 2022).

²⁸ Kasperek, B. (2016) ‘Complementing Schengen: The Dublin System and the European Border and Migration Regime’, in Bauder, H. & Matheis, C. (eds) *Migration Policy and Practice: Interventions and Solutions*, New York, Palgrave Macmillan, pp. 59-78, p. 62.

²⁹ Di Filippo.

³⁰ Synodinos, p. 64.

³¹ Di Filippo.

³² Synodinos, p. 67.

4. Recast options, revision approaches and seemingly insurmountable obstacles!

4.1 Council Decisions (EU) 2015/1523 & 2015/1601³³

In 2015, a dramatic increase in the flow of refugees and migrants was recorded at the EU's external borders. According to FRONTEX data between May and August 2015, there was a 20 % and a 250 % increase in illegal border crossings in Italy and Greece respectively, while according to EUROSTAT data, applications for international protection increased for the same period in Italy by 27 % and in Greece by 30 %³⁴. This situation created a disproportionate burden on frontline states compared to the rest ones. The administrative asylum structures of frontline states had collapsed under the pressure of the large number of asylum seekers. The unprecedented crisis facing the EU had highlighted the lack of a permanent mechanism for the relocation of refugees and asylum seekers from the frontline member states to the other member states.

In order to deal temporarily with the crisis, the Council adopted Decisions 2015/1523 and 2015/1601, which regulated the relocation of 40.000 and 120.000 applicants for international protection from Greece and Italy respectively to the rest of the member states. The above Decisions of a temporary nature (in force for a total of two years) are 'non-legislative'³⁵ because they were adopted without following a legislative procedure on the basis of Article 78 (3) TFEU. The measures adopted introduced a temporary derogation from the rule for determining the member state responsible in accordance with the Dublin III Regulation³⁶ with a view to achieving a fairer burden sharing that is compatible with the EU principle of solidarity.

³³ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece OJ L 239, 15.9.2015, p. 146–156 & Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ L 248, 24.9.2015, p. 80–94.

³⁴ Council Decision (EU) 2015/1601, recital 23.

³⁵ CJEU In Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary/Council of the European Union*, 06.09.2017, ECLI:EU:C:2017:631, para 66.

³⁶ Council Decision (EU) 2015/1601, recitals 13 & 14.

The Slovak Republic and Hungary brought actions for annulment against Decision 2015/1601. The applicants relied on procedural grounds, such as the circumvention of a unanimity requirement, lack of consultation of the Parliament, infringement of the principles of institutional balance and sound administration, circumvention of the right of national parliaments to be consulted, infringement of principles relating to the use of languages, as well as substantive principles, such as the absence of the condition of urgency, infringement of the principle of proportionality (appropriateness, necessity and proportionality *stricto sensu*), infringement of the principle of legal certainty and clarity of regulatory provisions. The CJEU held that none of the pleas in law could be upheld, and as a result the actions were dismissed.

As regards the urgency of the measure, the Court held that the 2015 migration crisis was sudden and of unprecedented magnitude, whereas the Council had already taken many other actions to support Italy and Greece and could at any time adapt or amend its arrangements according to the circumstances³⁷. Regarding the proportionality principle, the Court, after recognising the broad margin of appreciation granted to the Council by Article 78 (3) TFEU, considered that the relocation measure is not manifestly inappropriate for the purpose it pursues and that it forms part of a set of measures to deal with the crisis, which relates not only to the structural weaknesses of the Italian and Greek systems, but also to the lack of cooperation of certain Member States³⁸.

In its resolution of 18-5-2017, the European Parliament called on the Member States to comply with their obligations to relocate, in particular unaccompanied minors, and expressed its disappointment at the failure of the member states to respect the principle of solidarity in the burden-sharing of refugees³⁹. The Commission in its 12th Progress Report published on 13-6-2017⁴⁰ found that the Czech Republic, Hungary, and Poland had not fulfilled their relocation obligations. Thus, on 7-12-2017, the Commission brought infringement proceedings against Poland, Hungary and the Czech Republic on the ground that Hungary was the only

³⁷ C-643/15 and C-647/15, paras 235, 241, 251 & 275.

³⁸ C-643/15 and C-647/15 paras 133, 213-215 & 223.

³⁹ European Parliament Resolution of 18 May 2017 on making relocation happen (2017/2685(RSP)) OJ C 307, 30.8.2018, p. 137–139, paras 1-4.

⁴⁰ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL, Twelfth report on relocation and resettlement COM/2017/0260 final.

member state that made no formal relocation commitment while Poland and the Czech Republic had not made any relocation commitments for at least 1 year, despite repeated requests from the Commission⁴¹. In her Opinion, former Advocate General Sharpston noted that the relocation obligations arising from the Decisions take into account the need to maintain the public order and internal security of the member states, which, however, should be examined individually (i.e. in relation to a specific case of a foreign national) and could not give member states “carte blanche to disapply a valid measure of EU secondary law”⁴² as a whole. In the very first paragraph of her Opinion, Advocate General Sharpston acknowledges that Regulation 604/2013 regulates the distribution of asylum seekers ‘under normal conditions’, and therefore finds that there is no provision for cases of refugee crises, as in 2015 while she also points out that solidarity, which stems from the principle of sincere cooperation laid down in Article 4 (3) TEU, “is the lifeblood of the European project”⁴³.

The abovementioned extremely important Decision, based on the principle of solidarity, found that the three countries had breached the legally binding relocation obligations laid down in the relevant Council Decisions and therefore found a breach of EU law, by not accepting the line of defence of those Member States based on Article 72 TFEU⁴⁴.

4.2 The first revision proposal (2015)

At the same time as it submitted the proposal for the adoption of the above Decisions, the Commission submitted a proposal⁴⁵ to amend Regulation (EC) No 604/2013 on the basis of Article 78 (2) (e) TFEU which provides that “For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall

⁴¹ OPINION OF ADVOCATE GENERAL SHARPSTON In Joined Cases C-715/17, C-718/17 and C-719/17, *European Commission/Republic of Poland and Others*, 31.10.2019, ECLI:EU:C:2019:917, para 117.

⁴² OPINION OF ADVOCATE GENERAL SHARPSTON, paras 205 & 221.

⁴³ OPINION OF ADVOCATE GENERAL SHARPSTON, paras 1 & 253.

⁴⁴ Bartolini, S. (2020) ‘Analysis: “Solidarity in Times of Crisis”’, *EULAWLIVE*, 7 April [Blog]. Available at <https://eulawlive.com/analysis-solidarity-in-times-of-crisis-by-silvia-bartolini/> (Accessed 7 April 2022).

⁴⁵ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person COM/2015/0450 final - 2015/0208 (COD).

adopt measures for a common European asylum system comprising: criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection”.

This proposal was the first attempt to amend the Dublin III Regulation and aimed at ensuring, in crisis situations, a fair sharing of responsibility between the Member States and the proper application of the Dublin system. The amendment to the Regulation proposed on 9-9-2015 concerned the introduction of a crisis relocation mechanism⁴⁶. The Commission would decide whether the conditions to qualify a given situation as a crisis were met and would trigger the mechanism. The number of beneficiaries of relocation to other Member States would be calculated on the basis of the ‘distribution key’ shown in Figure 1 below, taking into account the total population of the Member State, the total GDP of the Member State, the average number of asylum applications in the previous 5 years and the unemployment rate.

ANNEX III – Formula for a distribution key

$$\text{Population effect}_{MS/AS} = \frac{\text{Population}_{MS/AS}}{\text{Population}_{EU+(32)}}$$

$$\text{GDP effect}_{MS/AS} = \frac{\text{GDP}_{MS/AS}}{\text{GDP}_{EU+(32)}}$$

$$\text{Asylum effect}_{MS/AS} = \min \left\{ \frac{\frac{1}{\sum_{i=1}^{32} \text{Average (5 preceding years) applicants per Million inhabitants}_{MS/ASi}}}{\frac{1}{\sum_{i=1}^{32} \text{Average (5 preceding years) applicants per Million inhabitants}_{MS/ASi}}}, 30\% (\text{Population effect}_{MS/AS} + \text{GDP effect}_{MS/AS}) \right\}$$

$$\text{Unemployment effect}_{MS/AS} = \min \left\{ \frac{\frac{1}{\sum_{i=1}^{32} \text{Unemployment rate}_{MS/ASi}}}{\frac{1}{\sum_{i=1}^{32} \text{Unemployment rate}_{MS/ASi}}}, 30\% (\text{Population effect}_{MS/AS} + \text{GDP effect}_{MS/AS}) \right\}$$

$$\text{Capped Quota}_{MS/AS} = \text{Allocation} * (40\% \text{ Population effect}_{MS/AS} + 40\% \text{ GDP effect}_{MS/AS} + 10\% \text{ Asylum effect}_{MS/AS} + 10\% \text{ Unemployment effect}_{MS/AS})$$

$$\text{Residual Quota}_{MS/AS} = (\text{Allocation} - \sum_{i=1}^{32} \text{Capped Quota}_{MS/ASi}) * (50\% \text{ Population effect}_{MS/AS} + 50\% \text{ GDP effect}_{MS/AS})$$

$$\text{Final Allocation Quota}_{MS/AS} = \text{Capped Quota}_{MS/AS} + \text{Residual Quota}_{MS/AS}$$

$$\text{Final share}_{MS/AS} (\text{de facto key}) = \frac{\text{Final Allocation Quota}_{MS/AS}}{\text{Allocation}} * 100\%$$

Figure 1. Relocation Quota Formula (Proposal for a Regulation of the European Parliament and of the Council COM/2015/0450 final - 2015/0208 (COD))

⁴⁶ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL COM/2015/0450 final - 2015/0208 (COD), article 33a.

Staunch and intense opposition to the proposal was mainly expressed from the Visegrad Group or V4 countries, namely the Czech Republic, Hungary, Poland and Slovakia, which have consistently refused to bear even a minimal refugee burden, but also from other countries facing xenophobic tendencies and populism phenomena. In these circumstances, the Commission's first proposal to amend "Dublin III" had not been successful.

4.3 The Joint EU-Turkey Statement of 18 March 2016

Since it was not possible to find a solution within the EU, controversial solutions were sought abroad by exploring the constitutional limits of the external dimensions of EU migration policies especially in times of crisis. The EU and Turkey agreed on a Joint Action Plan on 15-10-2015 to strengthen their cooperation to support Syrian nationals affected by the situation in Syria. The Heads of the EU member states met with their Turkish counterpart on 29-11-2015 and agreed to activate the Joint Action Plan. Thus, on 18-3-2016, the Heads of the EU member states and their Turkish counterpart issued a Joint Statement on dealing with refugee and migration flows. The Joint Statement stipulates that those persons entering the Greek islands from Turkey from 20-3-2016 will be returned to the latter country and that for each Syrian returned from Greece to Turkey, another one will be resettled from Turkey to the EU.

In the relevant actions for annulment, the General Court held that it lacked jurisdiction to rule on the ground that the Joint Statement concluded an agreement between the Heads of State and Member States, so that this could not be attributed to an EU institution (the appeals were also dismissed by the CJEU as having been manifestly inadmissible)^{47/48}, with the result that judicial review of the legality of the Joint Statement was not possible, especially in relation to the 'indirect' recognition of Turkey as a safe third country and compliance with the conditions for respecting the rights of refugees.

⁴⁷ General Court, In Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM/European Council*, 28.02.2017, ECLI:EU:T:2017:128, EU: T:2017:129, ECLI:EU:T:2017:130, para 71 & CJEU, In Joined Cases C-208/17 P to C-210/17 P, *NF, NG and NM/European Council*, 12.09.2018, EU:C:2018:705.

⁴⁸ Tsolaki, D. (2019) 'The European Union's Potential Infringement Proceedings before the CJEU against the 28 Member States Regarding the Joint EU-Turkey Statement under the Principle of Sincere Cooperation Article 4 (3) TEU', *National and Kapodistrian University of Athens-Jean Monnet European Center of Excellence*, June [Online], p. 4. Available at <https://jmce.gr/portal/wp-content/uploads/2019/06/Di%CE%BFnysia-Tsolaki.pdf> (Accessed 7 December 2022).

Despite the fact that the compatibility of the aforementioned externalisation measures with refugee and human rights law at the international and regional level has been widely questioned by renowned academic experts in the field, in practice this action plan has not produced the expected results either. During the 4-year period since its entry into force in March 2016 to the 31st of March 2020, 2.140 persons had been returned to Turkey (with 404 Syrians included in this number)⁴⁹, while Turkey has unilaterally suspended the pertinent procedures and consequently has not been receiving returnees since March 2020^{50/51}. Inefficiency causes could well include the lack of cooperation and consistency on the part of the Turkish authorities, the use of flows for political and geopolitical purposes and the fact that the Joint Statement concerned only the flows from the Aegean and not the Evros river border region, as shown by the massive moves of flows at the Evros border orchestrated by the Turkish authorities in early March 2020.

4.4 The second revision proposal (2016)

On 4-5-2016 and on 13-7-2016, the Commission presented seven legislative proposals to amend the CEAS divided into two groups⁵², including a proposal to amend the Dublin III Regulation,

⁴⁹ United Nations High Commissioner for Refugees UNHCR (2020) *Returns from Greece to Turkey (under EU-Turkey statement) as of 31 March 2020* [Online]. Available at <https://data.unhcr.org/en/documents/details/75075> (Accessed 7 December 2022).

⁵⁰ Human Rights 360° (2022) *EU-Turkey Statement: Six Years of Undermining Refugee Protection* [Online]. Available at <https://www.humanrights360.org/eu-turkey-statement-six-years-of-undermining-refugee-protection/> (Accessed 7 December 2022).

⁵¹ Council of State (2023) *Plenary 177/2023* [Online]. Available at http://www.adjustice.gr/webcenter/portal/ste/pageste/epikairotita/apofaseis?contentID=DECISION-TEMPLATE1675414490147&_afLoop=2054767112130354#!%40%40%3F_afLoop%3D2054767112130354%26centerWidth%3D65%2525%26contentID%3DDECISION-TEMPLATE1675414490147%26leftWidth%3D0%2525%26rightWidth%3D35%2525%26showFooter%3Dfalse%26showHeader%3Dtrue%26_adf.ctrl-state%3Dcxvfx1khn_33 (Accessed 7 December 2022). In the aftermath of the filed judicial review applications before the Greek Council of State for the annulment of the Joint Ministerial Decision which designated Turkey as a safe third country for nationals of Syria, Afghanistan, Somalia, Pakistan and Bangladesh the Greek Council of State Plenary (177/2023) has recently submitted a preliminary reference to the CJEU on the safe third country concept. More specifically, the submitted questions regard the influence on the legality of the national list of the fact that since March 2020 Turkey refuses the readmission of applicants for international protection and has therefore placed the applicants in a legal limbo status.

⁵² European Parliament (2023) *Reform of the Common European Asylum System (CEAS)* [Online]. Available at [https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-reform-of-the-common-european-asylum-system-\(ceas\)](https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-reform-of-the-common-european-asylum-system-(ceas)) (Accessed 7 December 2022).

which was called ‘Dublin IV’⁵³. The Commission proposal recognised the need to reform the Regulation in order to simplify and enhance its effectiveness in practice and to address situations of disproportionate pressure⁵⁴.

However, this proposal also seemed inadequate as it maintains the division of central and regional Member States with the indefinite application of the first irregular entry rule, with the latter further burdened by the obligation to examine inadmissibility [Article 3 (3), (4) & (5)] on the basis of the legal concepts of the first country of asylum or safe third country before the start of the procedure and the shortening of the relevant time limits⁵⁵. According to Professor Peers, this new obligation, in combination with the proposal for the mandatory application of the above concepts (New ‘Procedures’ Regulation and the repeal of Directive 2013/32/EU)⁵⁶, overshadowed other proposed beneficial reforms included in the Regulation in question [broadening the definition of family in Article 6 (1) (d), strengthening guarantees for unaccompanied minors in Article 8 (2)], since its function as a preliminary hyper-criterion nullifies any positive effects and makes them a “legal ‘Potemkin village’ – a cynical façade intending to mislead a naive onlooker”, as it would have created a ‘bottleneck’ phenomenon in the entry member states, it would have curtailed the usage of the ‘sovereignty clause’ and asylum seekers remedies⁵⁷ and it even would have obliged unaccompanied minors to apply for international protection and remain in the Member State of entry⁵⁸.

Nevertheless, the Commission proposed an automated mechanism for allocating asylum seekers in case a Member State faces a disproportionate number of applications. Each Member State is

⁵³ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM/2016/0270 final - 2016/0133 (COD).

⁵⁴ Naskou-Perraki, P., Papageorgiou, G. and Baxevanis, C. (2017) *Refugees and Asylum Seekers*, Sakkoulas Publications, Athens-Thessaloniki, pp. 175-176.

⁵⁵ Naskou-Perraki et al., p. 176.

⁵⁶ Maiani, F. (2016) *The Reform of the Dublin III Regulation*, European Union-Policy, Department for Citizen's Rights and Constitutional Affairs, Brussels, p. 29.

⁵⁷ Peers, S. (2020) ‘First analysis of the EU’s new asylum proposals’, *EU Law Analysis*, 25 September [Blog]. Available at <http://eulawanalysis.blogspot.com/search?q=First+analysis+of+the+EU%E2%80%99s+new+asylum+proposals> (Accessed 15 March 2022).

⁵⁸ Peers, S. (2016) ‘The Orbanisation of EU asylum law: the latest EU asylum proposals’, *EU Law Analysis*, 6 May [Blog]. Available at <http://eulawanalysis.blogspot.com/2016/05/the-orbanisation-of-eu-asylum-law.html> (Accessed 15 March 2022).

responsible for a number of applicants depending on the size of its population and its total GDP. This correction mechanism is triggered, not by a Commission Decision, but automatically, when asylum applications of more than 150 % of those responsible, according to the above mentioned reference key, are collected in a Member State – a percentage that is excessively high according to many analysts, while 100 % could be a more realistic alternative⁵⁹ – and remains in force as long as this disproportional pressure exists and in any case once the condition of the above inadmissibility test is met.

A State may decide not to participate temporarily in the mechanism for a period of twelve months, but in return it is obliged to pay a solidarity contribution of EUR 250.000 per applicant to the frontline responsible State. This proposal seems to have been unrealistic and disproportionate taking into account the relevant stance of many member states during the first recast efforts on this specific issue⁶⁰. Mention should also be made here of the worrying observation of the former President of the European Council, Donald Franciszek Tusk, that “the issue of compulsory quotas has proven to be very divisive and has received disproportionate attention in relation to its real practical significance and has therefore proved ineffective”⁶¹. In addition, there are particularly strict measures to criminalise secondary movements⁶², with the most important being the immediate exclusion from access to a range of social benefits other than emergency health care and the inclusion of specific applications for international protection under the accelerated procedure and shortening the relevant time limits⁶³.

Moreover, this proposal did not reform the criteria for determining a Member State responsible – of ‘Dublin III’ but seeks to set up a system that meets the solidarity requirements of European law and at the same time curtails the resistance of the central Member States. Furthermore, and according to Professor Maiani, this proposal would have been unlikely to achieve its stated

⁵⁹ ECRE (2016) *ECRE Comments on the Commission Proposal for a Dublin IV Regulation* [online], pp. 2-3. Available at <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf> (Accessed 15 March 2022).

⁶⁰ Peers, (2016).

⁶¹ European Council (2017) *Leaders’ Agenda - Migration: way forward on the external and internal dimension* [online]. Available at https://www.consilium.europa.eu/media/32143/en_leaders-agenda-note-on-migration_.pdf (Accessed 15 March 2022).

⁶² Carrera, S., Stefan, M., Cortinovis, R.& Chun Luk N. (2019) ‘When mobility is not a choice’, *CEPS*, 20 December [online]. Available at <https://www.ceps.eu/ceps-publications/when-mobility-is-not-a-choice/> (Accessed 15 March 2022).

⁶³ Peers, (2016).

objectives mainly because of its coercive and punitive nature (asylum seekers disobeying certain obligations would be deprived of their reception conditions benefits while their applications would be fast-tracked even in their absence)^{64/65} and its complete disregard of the possible preferences and choices made by asylum seekers⁶⁶. The remaining Commission proposals concerned the strengthening of the Eurodac Regulation, the creation of a fully-fledged EU asylum agency, the replacement of the Asylum Procedures Directive, the replacement of the Qualification Directive with a regulation harmonising the protection standards and rights of asylum seekers, the revision of the Reception Conditions Directive and the creation of a permanent EU Resettlement Framework⁶⁷. This reform package had been approved by the European Parliament since October 2017, but it had not been ultimately accepted and adopted mainly by the countries of the Visegrad Group (Czechia, Hungary, Poland, and Slovakia).

4.5 Bilateral Para-Dublin Agreements, the Temporary Protection Model of Free Choice, and the New Voluntary Mechanism

The weaknesses of Dublin III and the need to address the refugee crisis led to the search for other alternative solutions, such as the conclusion of bilateral ‘para-Dublin’ agreements between some EU Member States under the pretext of ‘Administrative Arrangements’⁶⁸. Germany had concluded a bilateral agreement with Spain under which refugees arriving at the German border and registered in Spain would be returned to it within 48 hours while a similar agreement had also been concluded with Portugal^{69/70}. Germany had also concluded an agreement with Greece, which provides that, from 1-7-2017, anyone who had applied for asylum in Greece and was

⁶⁴ Maiani, (2016), p. 38.

⁶⁵ Peers, (2020).

⁶⁶ Maiani, F. (2017) “The reform of the Dublin system and the dystopia of ‘sharing people’”, *Maastricht Journal of European and Comparative Law*, vol. 24, no. 5, pp. 622-645, p. 636.

⁶⁷ European Parliament (2023).

⁶⁸ Poularakis, S. (2018) ‘The Case of the Administrative Arrangement on Asylum-Seekers between Greece and Germany: A tale of “paraDublin activity”?’ , *EU Law Analysis*, 8 November [Blog]. Available at <http://eulawanalysis.blogspot.com/search?q=poularakis> (Accessed 15 March 2022).

⁶⁹ Reuters (2018) *Germany reaches deal on sending back migrants to Greece*, 17 August [Online]. Available at <https://www.in.gr/2018/08/17/politics/kyvernisi/vitsas-ti-provlepei-dimeris-symfonia-elladas-germanias/> (Accessed 15 March 2022).

⁷⁰ IN GR (2018) *Vitsas: What is agreed in the Bilateral Deal between Greece and Germany*, 17 August [Online]. Available at <https://www.in.gr/2018/08/17/politics/kyvernisi/vitsas-ti-provlepei-dimeris-symfonia-elladas-germanias/> (Accessed 15 March 2022).

located at the German-Austrian border would return to Greece and in return Germany committed to complete 2.000 reunions of asylum seekers⁷¹.

Although the texts of the agreements have never been officially announced, they appeared to have a subject matter going beyond ‘administrative arrangements’ and raising concerns about the prospects of creating a Common European Asylum System and additional serious doubts as to their compatibility with the relevant European Union law. More specifically, such agreements could have comprised a derogation from the European Union acquis and the creation of a “Quasi-Dublin” system / a Dublin-like system which would have contained certain positive obligations and limitations outside the scope and the respective restrictions of the relevant secondary EU law instruments⁷².

Another important aspect that should be presented here as a useful reference point for the further evaluation of the Dublin mechanism regards the recent activation⁷³ of the Temporary Protection Directive⁷⁴ in the context of the Russian invasion in Ukraine and the pertinent comparison between their respective allocation systems. Indeed, the framework created by the above activation provides the Ukrainian refugees with the freedom of choosing the member state where they wish to enjoy the rights of the temporary protection status and even self-relocate while solidarity measures between members states do not include any mandatory quotas on transfers or relocations of the beneficiaries^{75/76}. More specifically, according to the relevant Council Decision: “... Furthermore, Ukrainian nationals, as visa-free travellers, have the right to move freely within the Union after being admitted into the territory for a 90-day period. On this basis, they are able to choose the Member State in which they want to enjoy the rights attached to

⁷¹ Reuters (2018).

⁷² Poularakis (2018).

⁷³ Council of the EU (2022) Justice and Home Affairs Council, 3-4 March 2022 [Online]. Available at <https://www.consilium.europa.eu/en/meetings/jha/2022/03/03-04/> (Accessed 15 October 2022).

⁷⁴ Council Directive 2001/55/EC.

⁷⁵ De Somer, M. & Neidhardt A. H. (2022) *EU responses to Ukrainian arrivals – not (yet) a blueprint* [Online], Brussels, EPC DISCUSSION PAPER EUROPEAN MIGRATION AND DIVERSITY PROGRAMME 14 OCTOBER 2022, p. 5. Available at <https://www.epc.eu/en/publications/EU-responses-to-Ukrainian-arrivals-not-yet-a-blueprint~4b5eec> (Accessed 19 October 2022).

⁷⁶ Papadopoulou, R. E. (2022) ‘The Activation of the EU Temporary Protection Directive in the case of Ukraine’, in Anagnostopoulou, D. (ed) *Challenges for Migration and Asylum Policies & for the European Union Values*, Papazisis Publications, Athens-Thessaloniki, pp. 120-141.

temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union.....”⁷⁷.

The activation of temporary protection, without the first country of entry rule and the additional lack of the usual consequential responsibility, without the take-back procedures of article 11 of the Directive⁷⁸ and any kind of mandatory relocation mechanism, reveals the underlying novel approach of not deterring onward secondary movements for the beneficiaries of temporary protection as this particular mobility, although not directly allowed, could facilitate the spontaneous redistribution of migrants and the use of private reception resources, generously offered by the Ukrainian diaspora in different EU countries⁷⁹.

Furthermore, solidarity among member states in the context of temporary protection is provided mainly via a voluntary allocation mechanism of beneficiaries in combination with the free choice of the persons concerned⁸⁰. Additionally, this system has been working on the basis of the innovative coordination tool called ‘Solidarity Platform’^{81/82} which operates as a forum for the representatives of the member states whose main mission is to agree on mutual assistance in managing the reception of people from Ukraine and to centralise the effort to match each state’s reception capacities with the respective transfer needs⁸³. However, these indications of a tendency to depart from the usual Dublin practices cannot represent a more general and permanent paradigm shift in EU asylum law due to the uniquely extreme circumstances of the

⁷⁷ Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection ST/6846/2022/INIT OJ L 71, 4.3.2022, p. 1–6, recital 16.

⁷⁸ Council Implementing Decision (EU) 2022/382, recital 15.

⁷⁹ Savino, M. & Gatta, F. L. (2022) ‘On the Brink of a New Refugee Crisis: Temporary protection as a paradigm shift?’, *Verfassungsblog*, 10 March [Online], p. 4. Available at <https://verfassungsblog.de/on-the-brink-of-a-new-refugee-crisis/> (Accessed 21 October 2022).

⁸⁰ Papadopoulou, pp. 131.

⁸¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS European solidarity with refugees and those fleeing war in Ukraine COM/2022/107 final.

⁸² COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Welcoming those fleeing war in Ukraine: Ready Europe to meet the needs COM/2022/131 final.

⁸³ Rasche, L. (2022) ‘Implementing Temporary Protection in the EU: From crisis response to long-term strategy’, *Jacques Delors Centre-Hertie School*, 24 June [Online], p. 3-5. Available at <https://www.delorscentre.eu/en/detail/publication/temporary-protection> (Accessed 21 October 2022).

war in Ukraine, the pertinent status temporality and the strong attachment to the status quo ante evident even in the activation actions of the temporary protection regime⁸⁴.

The last element worth mentioning here regarding the aforementioned negative prospects for a paradigm change concerns the mid-June 2022 agreement of the willing which was reached between the majority of member states (21 member states), with the active stance of the French Presidency of the EU, on the Eurodac and Screening Regulations⁸⁵ combined with a new temporary solidarity mechanism to be activated for a period of one year, based on voluntary contributions, focusing on solidarity through relocations, although it offers financial or operational assistance as acceptable alternatives^{86/87}. The operational value of the mechanism is heavily questioned in terms of enforceability and effectiveness as it has remained exclusively voluntary, limited in time and not established by an EU legal act. The above arguments seem to be confirmed by a Commission paper that has found that the whole plan could be in jeopardy due to a failure by other EU member states to actually accept people for relocation as so far, only 207 people have benefited from the scheme⁸⁸. It is also claimed that it could not even be considered a mechanism but merely a legally non-binding (soft law) arrangement giving priority to an intergovernmental, asymmetrical and unequal notion of solidarity⁸⁹. In addition, Slovakia,

⁸⁴ De Somer & Neidhardt, p. 5.

⁸⁵ Council of the EU (2022) *Asylum and migration: the Council approves negotiating mandates on the Eurodac and screening regulations and 21 states adopt a declaration on solidarity*, 22 June [Online]. Available at <https://www.consilium.europa.eu/en/press/press-releases/2022/06/22/migration-and-asylum-pact-council-adopts-negotiating-mandates-on-the-eurodac-and-screening-regulations/> (Accessed 1 October 2022).

⁸⁶ European Commission (2022) *Migration and Asylum: Commission welcomes today's progress in the Council on the New Pact on Migration and Asylum*, 22 June [Online]. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3970 (Accessed 1 July 2022): "The solidarity Declaration is a first step in the gradual implementation of the New Pact on Migration and Asylum, as proposed by the French Presidency". Moreover, the implementation of the Solidarity Declaration to support the EU's southern countries, approved on 22 June by 21 countries is progressing well, according to the Commission.

⁸⁷ FRENCH PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION (2022) *First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism*, 22 June [Online] Available at <https://wayback.archive-it.org/12090/20221120105510/https://presidence-francaise.consilium.europa.eu/en/news/first-step-in-the-gradual-implementation-of-the-european-pact-on-migration-and-asylum-modus-operandi-of-a-voluntary-solidarity-mechanism-1/> (Accessed 1 October 2022).

⁸⁸ Statewatch (2023) *EU: Tracking the Pact: Only 207 refugees relocated so far via "voluntary solidarity mechanism"*, 31 January [Online]. Available at <https://www.statewatch.org/news/2023/january/eu-tracking-the-pact-only-207-refugees-relocated-so-far-via-voluntary-solidarity-mechanism/> (Accessed 1 February 2023).

⁸⁹ Carrera, S. & Cortinovia, R. (2022) 'The Declaration On A Voluntary Solidarity Mechanism And Eu Asylum Policy: One Step Forward, Three Steps Back on Equal Solidarity, *CEPS*, 4 October [Online], abstract, p.3 & 8. Available at

Hungary and Poland as well as Austria do not provide their support for this form of burden-sharing, as these countries remain faithful to completely halting any process of finding a solution to the thorny issue of a fairer burden sharing arrangement⁹⁰. As a result, there is little hope for progress in asylum reforms which could affect or alter the Dublin logic as past political divisions remain firmly entrenched.

4.6 The New Pact and the AMMR Proposal

It is a widely accepted fact that the Common European Asylum System (CEAS) needs to be reformed mainly due to the recent migration crisis phenomena recorded on the external and internal EU borders and the consequential non-uniform treatment of asylum seekers across the EU characterised by significantly differentiated percentages of positive asylum decisions in various member states⁹¹. In the framework of a more general reform of the EU migration and asylum rules, on 23 September 2020 the European Commission submitted to the Council a New Pact on Migration and Asylum (“the Pact”) for their adoption through the ordinary legislative procedure⁹². The Pact included three new legislative proposals and two amended ones:

- proposal for a Regulation introducing a screening of third country nationals at the external borders ("proposed Screening Regulation");
- proposal for a Regulation on asylum and migration management ("AMMR Proposal");
- proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum ("proposed Crisis Regulation");
- amended proposal for a Regulation establishing a common procedure for international protection in the Union ("amended APR Proposal");

<https://www.ceps.eu/ceps-publications/the-declaration-on-a-voluntary-solidarity-mechanism-and-eu-asylum-policy/> (Accessed 21 October 2022).

⁹⁰ De Somer & Neidhardt, p. 6.

⁹¹ European Council & Council of the European Union (2022) *EU asylum reform*, 5 December [Online]. Available at <https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-asylum-reform/> (Accessed 1 January 2023).

⁹² European Commission (2020) *Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020*, [Online]. Available at https://commission.europa.eu/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en (Accessed 21 January 2022).

- amended proposal for a Regulation on the establishment of 'Eurodac' ('amended Eurodac Proposal')⁹³.

The above proposals in combination with the already existing legislative proposals since 2016 they comprise a novel comprehensive common European framework for migration and asylum management⁹⁴. The main aims of the above reform package according to the European Council site are the following:

- establish a common framework that contributes to the comprehensive approach to asylum and migration management,
- make the system more efficient and more resistant to migratory pressure,
- eliminate pull factors as well as secondary movements,
- fight abuse and support the most affected member states better⁹⁵.

The previously largely stalled negotiations on the new EU 'Pact' were successfully unlocked by the former EU French Presidency's strategy which had been based on a 'gradual approach' logic. In this respect, by early December 2022 the EU member States have already approved their negotiation position with the European Parliament on three asylum proposals (Qualification, Reception Conditions and Resettlement) while the European Parliament and the Council have

⁹³ European Council (2021) *OPINION OF THE LEGAL SERVICE: The proposed new Pact on Migration and Asylum - Variable geometry*, 19 February [Online]. Available at <https://data.consilium.europa.eu/doc/document/ST-6357-2021-INIT/en/pdf> (Accessed 1 January 2023).

⁹⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612, 23 September 2020; European Commission, Amended 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 (2020) 611 final, 23 September 2020; European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23 September 2020; European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final, 23 September 2020; European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818\ COM(2020) 614 final, 23 September 2020.

⁹⁵ European Council & Council of the European Union (2022) *EU asylum reform*, 5 December [Online]. Available at <https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-asylum-reform/> (Accessed 1 January 2023).

also been ready to start inter-institutional negotiations (trilogues) on the Eurodac Regulation. Moreover, they have agreed on a joint roadmap to adopt all the relevant asylum and migration reforms by the 2024 EU election⁹⁶. This approach has also managed to avoid the implementation of the long-held ‘package approach’ that associated the reform of the EU Dublin Regulation and a permanent relocation system with the rest of the legislative reforms comprising the Pact while simultaneously favoured the division of the negotiation procedures into groups of distinct stages and pieces of legislation⁹⁷.

However, according to Professor Lang the New Pact “... if adopted in its proposed form ... will make it extremely difficult for member states to put the new rules into practice without violating asylum seekers’ rights ... including the principle of non-refoulement, especially in the case of a new increase in the number of arrivals” and furthermore “... it might also trigger increased discontent and requests for stronger EU support to the most affected member states and mutual accusations among member states”⁹⁸.

As a result of overcoming the relevant negotiating impasse, the 2020 legislative proposal currently on the table regarding the new Asylum and Migration Management Regulation (hereinafter AMMR Proposal)⁹⁹ and repealing the Dublin Regulation III has been under intense negotiations. This proposal, although it does not differ significantly compared with the 2016 second revision proposal¹⁰⁰, it does not contain the hyper-criterion provision or the ‘sovereignty clause’ curtailment modifications¹⁰¹, while at the same time aims at replacing the Dublin system with a novel allocation system by means of a new solidarity mechanism and guaranteeing the

⁹⁶ European Parliament (2022) *Migration and Asylum: Roadmap on way forward agreed between European Parliament and rotating Presidencies*, 9 September [Online]. Available at <https://www.europarl.europa.eu/news/en/press-room/20220905IPR39714/migration-and-asylum-roadmap-on-way-forward-agreed> (Accessed 21 January 2023).

⁹⁷ Carrera & Cortinovis, p. 1.

⁹⁸ Goldner Lang, I. (2022) ‘The New Pact on Migration and Asylum: A strong External and a Weak Internal Dimension?’, *European Foreign Affairs Review*, vol. 27, no. 1, pp. 1-4, pp. 1-2.

⁹⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 final.

¹⁰⁰ Maiani, F. (2022) ‘Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact’, in Thym, D. & Odysseus Academic Network (eds) *Reforming the Common European Asylum System*, Baden-Baden, Nomos Verlagsgesellschaft mbH & Co, pp. 43-60, p. 51.

¹⁰¹ Peers, (2020).

timely processing of applications¹⁰². However, the 2020 AMMR proposal has maintained, with minor changes the irregular entry criterion (Article 21 which illustrates the old ‘Dublin rationale’ for distributing responsibility¹⁰³), the reduced remedies time limits and the bulk of the other allocation criteria of Dublin III, which would also apply after Search and Rescue (SAR) operations¹⁰⁴ in addition to ‘risk of pressure’, ‘pressure’ or ‘crisis’ situations (articles 47-53 AMMR)¹⁰⁵.

As far as the above novel allocation system is concerned, the AMMR attempts to solve the issue of the disproportionate asylum seekers allocation based on an alleged pragmatic¹⁰⁶ but simultaneously a dialectically misconceived mode of a ‘menu of solidarity contributions’¹⁰⁷ - as it tries to balance the absolute and obstinate refusal of accepting any refugees at all and externalized migration control measures with their fair allocation among member states- which consequently includes:

- relocation of applicants not subject to border procedure (Article 45(1)(a)) and of those subject to border procedure (Article 45(2)(a), optional);
- return sponsorship of illegally staying third country nationals (Article 45(1)(b)) and relocation of illegally staying third country nationals (Article 45(2)(b), optional) (if the return is not completed within 8 months the sponsoring member state must accept them on its territory);
- relocation of certain beneficiaries of international protection (Article 45(1)(c));

¹⁰² European Council & Council of the European Union (2022).

¹⁰³ Carrera, S. (2021) ‘Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum’ in Carrera, S. and Geddes, A. (eds) *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, San Domenico di Fiesole, European University Institute (EUI), pp. 1-24, p. 9.

¹⁰⁴ Peers, (2020).

¹⁰⁵ Tsourdi & De Bruycker (2022), p. 44.

¹⁰⁶ Thym, D. (2022) ‘Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the ‘New’ Pact on Migration and Asylum’, in Thym, D. & Odysseus Academic Network (eds) *Reforming the Common European Asylum System*, Baden-Baden, Nomos Verlagsgesellschaft mbH & Co, pp. 11-32, p. 15.

¹⁰⁷ Peers, (2020) & Milazzo, E. (2023) ‘Asymmetric Interstate Solidarity and Return Sponsorship’, *Journal of Common Market Studies*, 15 January [Online]. Available at <https://doi.org/10.1111/jcms.13457> (Accessed 1 February 2023) which argues that: **return sponsorship should be rejected both because it does not further solidarity among member states and because the rights of rejected asylum seekers set a strong presumption against it.**

- capacity building measures in the field of asylum, reception and return, operational support and assistance through cooperation with third countries (Article 45(1)(d))¹⁰⁸.

The above complex solidarity mechanism foreseen in the AMMR includes the introduction of concepts such as "flexible solidarity, solidarity pool and adaptable responsibility" which are practically translated into three levels/modes¹⁰⁹ of measures in terms of the respective degree of legal compulsoriness¹¹⁰ with respectively adjusted relocation eligibility criteria as shown in Figure 3 below:

- ‘Basic Mode’¹¹¹: a solidarity pool is created with the combined voluntary contributions to cover needs determined by the respective yearly Commission Report, following SAR disembarkations due to pertinent recurring arrivals, including relocations of illegally staying third-country nationals and of applicants and beneficiaries of international protection, assisted voluntary return and antitrafficking, anti-smuggling and reintegration programmes in addition to direct financial contributions or alternative measures focusing on capacity building, services, staff support, facilities and technical equipment in member states or non-EU countries. If the above contributions are not sufficient in terms of the respectively determined needs (by a Commission Implementing Act) the member states may opt for their preferred mix of the above alternative measures. If the overall responses still fall short of the 30% Commission relevant target, a mandatory mix of the above measures emerges after the activation of the correction mechanism with member states being obliged to fulfill at least 50% of concrete relocation quotas, decided by the Commission and based on the relevant key in Figure 2 below, through relocation or return sponsorships and the rest with other forms of contributions. The eligible persons for relocation include asylum applicants not subject to border procedure or having meaningful links [Article 58 (3)] with the benefitting state.

¹⁰⁸ European Council (2021) *OPINION OF THE LEGAL SERVICE: The proposed new Pact on Migration and Asylum - Variable geometry*, 19 February [Online]. Available at <https://data.consilium.europa.eu/doc/document/ST-6357-2021-INIT/en/pdf> (Accessed 1 February 2023).

¹⁰⁹ Maiani, F. (2022), pp. 52-54.

¹¹⁰ Tsourdi & De Bruycker (2022), p. 44.

¹¹¹ Maiani (2022), pp. 52-53.

- ‘Pressure Mode’: the same operation of the mechanism described above applies. The only difference regards the relocation eligibility criteria which in this mode additionally include the international protection beneficiaries.
- ‘Crisis Mode’: the same operation of the mechanism described above applies. Further adjustment provisions include that member states are obliged to contribute only via a mix of relocation and voluntary return programmes and certain shorter procedures deadlines (e.g. the return sponsorship has to be completed within 4 months before the sponsoring member state is under the obligation to accept returnees on its territory). Moreover, asylum applicants subject to border procedure and persons having entered EU irregularly are not excluded by the relocation measures¹¹².

Formula for the distribution key pursuant to Article 44k of the Regulation:

$$\text{Population effect}_{MS} = \frac{\text{Population}_{MS}}{\text{Population}_{EU25}} \text{ }^{29}$$

$$\text{GDP effect}_{MS} = \frac{\text{GDP}_{MS}}{\text{GDP}_{EU25}} \text{ }^{30}$$

$$\text{Share}_{MS} = 50\% \text{ Population effect}_{MS} + 50\% \text{ GDP effect}_{MS}$$

Figure 2. Formula for the distribution key pursuant to Article 44k of the Regulation (Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (Council doc. 5165/23, LIMITE, 11 January 2023, pdf)]

¹¹² Maiani (2022), pp. 54.

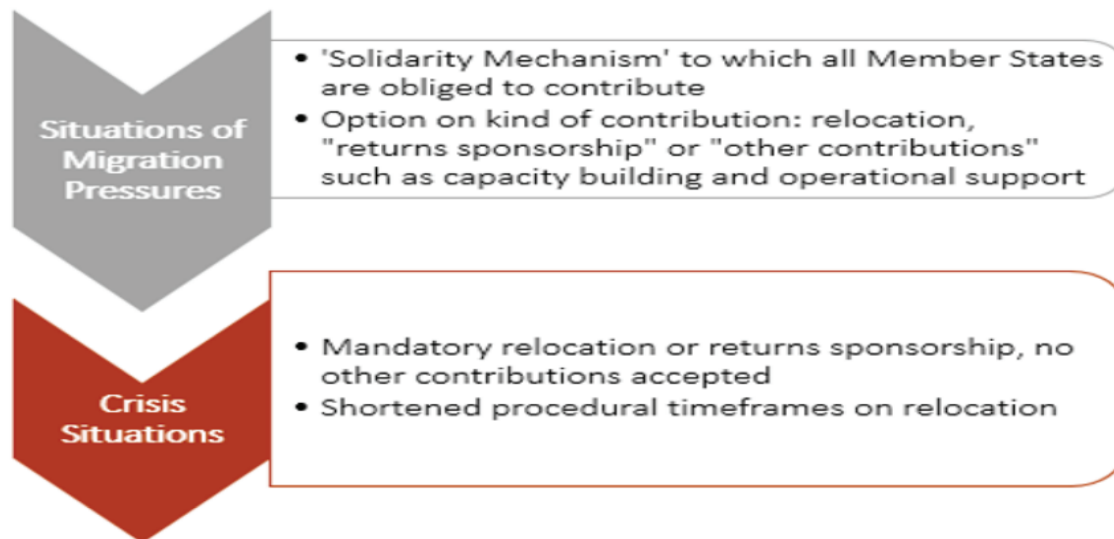


Figure 3. Two-layered interstate solidarity [Carrera, S. (2021) 'Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum' in Carrera, S. and Geddes, A. (eds) *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, San Domenico di Fiesole, European University Institute (EUI), pp. 1-24, p. 10.

The remaining issues regarding the aforementioned mechanism concern mainly the non-prioritisation of relocation, the problematic relation between the alternative solidarity measures offered in terms of intrinsic irreconcilability or comparability¹¹³ and the fact that this 'half compulsory' solidarity embeds the notion of voluntary return sponsorships which will be implemented via bilateral administrative agreements raising further concerns associated with possible inadequate accountability, liability and compatibility^{114/115} with the pertinent EU legal framework, and more specifically the justice and rule of law principles on which and the EU Treaties and the Charter of Fundamental Rights are founded¹¹⁶.

¹¹³ Tsourdi & De Bruycker (2022), p. 44.

¹¹⁴ Tsourdi, E. (2022) 'The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding', in Thym, D. & Odysseus Academic Network (eds) *Reforming the Common European Asylum System*, Baden-Baden, Nomos Verlagsgesellschaft mbH & Co, pp. 113-128.

¹¹⁵ Tsourdi & De Bruycker (2022), pp. 44-45.

¹¹⁶ Carrera & Cortinovis (2022), p. 12.

The latest draft of the AMMR proposal¹¹⁷, further modifies certain key concepts by the adoption of provisions for a "Permanent EU Migration Support Toolbox" [Article 6a] while it also introduces the notion of "adaptable responsibility based on derogations foreseen in the Union acquis providing Member States with the necessary tools to react to specific migratory challenges," (Article 6a (2) (c))¹¹⁸. In this way the derogations from the AMMR proposal provisions on the application of the solidarity measures– a right subject to a mere notification-, set out in the Crisis Regulation proposal addressing situations of crisis and force majeure¹¹⁹ are formally placed in the former proposed legal instrument resulting in **a flexible** (no mandatory relocations included) and **adaptable** (certain derogations provided from solidarity contributions) **‘half compulsory’ solidarity**. Thus, the frontline member states remain under serious reliability and predictability risks in terms of the new mechanism effectiveness, workability as well as its realistic solidarity potential¹²⁰.

5. Concluding Remarks

Efforts to revise “DUBLIN III” and in particular the criteria for determining the member state responsible have so far been unsuccessful. The problem could be characterised as acute, taking into consideration the limited time available before the end of the Commission and the European Parliament mandates in 2024, amidst further concerns that the earthquake in Turkey has dramatically destabilised the region and could significantly increase the number of irregular entries in the EU. Frontline states have been in favour of a system that provides for a fairer distribution of asylum seekers and the abolition of the first entry principle while simultaneously they are deeply and legitimately concerned with the fact that currently there is neither a robust

¹¹⁷ (Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (Council doc. 5165/23, LIMITE, 11 January 2023, pdf)].

¹¹⁸ Statewatch (2023) *Tracking the Pact: Unaccountable new decision-making bodies and "adaptable responsibility"*, 23 January [Online]. Available at <https://www.statewatch.org/news/2023/january/tracking-the-pact-unaccountable-new-decision-making-bodies-and-adaptable-responsibility/> (Accessed 1 February 2023). European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final, 23 September 2020

¹¹⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final, 23 September 2020.

¹²⁰ Maiani (2022), pp. 55.

solidarity mechanism with a firm legal basis nor a guaranteed and reliable new method that could effectively relieve them of the political, financial, and administrative burden associated with migration and asylum policies. The Visegrad Group or V4 countries have been refusing to admit refugees to their territory except for Ukrainians, despite the CJEU recent relevant decisions and thus notably undermining any attempt to adopt the corrective mandatory allocation mechanism and the related solidarity contributions while the New Pact seems to be just a repackaging exercise which still fails to address the previous fundamental challenges and systemic scheme flaws¹²¹. The rest of the member states are trying to strike a balance between the widespread negative attitudes towards foreigners, that have become politically exploitable by populist and eurosceptic parties, and the preservation of cohesion within the EU. Moreover, the EU legacy associated with the recent swift and unified response to the major Ukraine displacement crisis does not seem to be replicated or to signify the potential start of a new differentiated political and legislative approach relating to the pertinent asylum and migration challenges¹²² as “the conception of pragmatism promoted in the Pact emphasizes excessive formalism through calculative rules and complex procedures sidestepping questions of political organization, community and belonging that solidarity has squarely brought to the table in 2015”¹²³.

The catalyst of (non-)cooperation between all member states is based on the concept of “solidarity”. According to Eleanor Sharpston “Solidarity, ultimately, is based on the understanding that, apart from acquiring rights and benefits, sharing in the European ‘demos’ also entails the willingness to shoulder collective responsibilities to further the common good”¹²⁴. The solidarity between Member States in the refugee field, as it has been very thoroughly analysed¹²⁵, can be expressed both internally and externally. Internally it manifests itself – *if force majeure* derogation provisions have not been previously invoked - in funding, relocation, return sponsorships, hotspots assistance, mutual recognition of national asylum decisions and

¹²¹ Maiani (2022), pp. 59.

¹²² De Somer & Neidhardt, p. 4.

¹²³ Karageorgiou, E. (2023) ‘Why the European Commission’s Pragmatic Approach to Asylum Is Not Enough: Re-imagining Solidarity as a New Form of Conducting Regional Politics’, in Idriz, N. & Kassoti, E. (eds) *Global Europe: Legal and Policy Issues of the EU’s External Action*, Berlin, t.m.c. asser press by Springer-Verlag Berlin Heidelberg, pp. 163-180, p. 177.

¹²⁴ Sharpston, D. (2023) ‘Thinking About Solidarity and EU Law’, in Idriz, N. & Kassoti, E. (eds) *Global Europe: Legal and Policy Issues of the EU’s External Action*, Berlin, t.m.c. asser press by Springer-Verlag Berlin Heidelberg, pp. 153-165, p. 153.

¹²⁵ Tsioutra, O. M. (2018) ‘The Solidarity and Fair Sharing of Responsibilities Principles in the Fields of Asylum, Migration and External Borders (Article 80 TFEU)’, in Naskou-Perraki, P., Gaitenidis, N. & Katsoulis, S. (eds) *Asylum, Borders and Rights in Europe: Seeking Fair Balances*, Athens-Thessaloniki, Sakkoulas Publications, pp. 121-150.

temporary protection of refugees in the event of a mass influx. External solidarity means agreements on resettlement of refugees to a third country, refugee admission programmes in third countries and operational initiatives to save lives and fight human smuggling at the EU's external borders.

The revision of “Dublin III” will inevitably go through further tough negotiations on the proposed à la carte character and the respective mix of the above solidarity measures that will be embedded in the new asylum system. The often-contradictory mixture between mandatory and optional measures aims to transform the new proposals into more acceptable versions of previous reforms for each member state and its respective public opinion, in order to tackle the widespread phenomenon of the lack of compliance and the implementation gap of the relevant legal framework. Let us hope that the serious issue of the continuing lack of European solidarity will not be solved exclusively on the basis of the “real politique-pragmatism” underpinning, the strengthening process of the iron gates of the ‘Fortress Europe’¹²⁶, externalised management and the effective elimination of the pertinent internal burden of the refugee/migration problem. In terms of academic research in this particular field, it is preferable and more constructive to believe in the eventual gradual establishment of a fair and feasible form of solidarity capable of offsetting distributive unbalances despite the successive disappointments of no real and bold breakthroughs, rather than be pessimistic about the prospect of a real reform and abandon the work towards this worthwhile objective.

¹²⁶ Binetti Armstrong, A. (2020) “You Shall Not Pass! How the Dublin System Fueled Fortress Europe”, *Chicago Journal of International Law*, vol. 20, no. 2, p. 332-383.