The future of the CEAS – an analysis of rules on allocation

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Abstract

This paper analyzes the various proposals for reform of the Common European Asylum System by the Commission and the European Parliament, through the lens of the rules allocation. Set-up and objectives of the proposals for reform of the Dublin system are discussed, taking into account the implications of proposals for reform of the rules on qualification, procedures and reception and choices as regards centralization, harmonization and some regionalization and externalization issues. It analyzes how the Dublin system allocates responsibility for illegally staying third country nationals and in fact international protection beneficiaries next to applicants, without a clear Treaty basis. The Commission proposals maintain by and large the current set-up of the Common European Asylum System, and aim to let the allocation system work mainly by introducing punitive measures for applicants who do not stay in the assigned member state, and harmonization of rules on qualification, procedures and reception conditions. Uniformity however can arguably not be achieved for several reasons, such as socio-economic differences between member states, lack of EU competencies, because the subject matter resists exhaustive regulation and because a common appeal body has not been introduced. The EP proposal on the other hand opts for a new system, aimed at fair sharing and introducing a centralized allocation and transfer system. Like the Commission proposals, it is ultimately based on forced distribution.

Keywords: allocation; harmonization; centralization; qualification; reception

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1. Introduction

In 2019 or soon thereafter, a major overhaul of the Common European Asylum System is likely to take place. In 2016, the Commission published proposals for recasting most measures that make up the Common European Asylum System. By the end of 2018, the Commission announced that although on a number of proposals, agreement had not yet been reached; other proposals were ready for adoption in early 2019.[1]

This paper discusses the various options for the development of the Common European Asylum System, as they follow from the 2016 Commission Proposals for reform and the European Parliament (hereafter EP)'s proposals for amendment.[2] It addresses them through the lens of the system for allocation. Thus, this paper analyzes the several options for allocation, taking into account the proposals for changing the measures on qualification, reception and procedures as well. The paper serves to identify the change the Commission and the EP proposals will bring as regards a number of aspects concerning or connected to allocation.

Below, I will briefly discuss why allocation should be seen as the key issue in the proposals for reform of the Common European Asylum System (hereafter CEAS). Then, the concepts underlying the existing Dublin system are introduced. This introduction serves to identify which topics, or aspects, as regards allocation should be analyzed. After that, a few remarks on methodology are made.

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[1] See European Commission (2018b) *Managing Migration: Commission calls time on asylum reform stalling*. Press release, 4 December 2018, Brussels.

[2] European Commission (2016) 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) 270, 4 May 2016. Brussels. Below Commission DIV Proposal; LIBE (2017) Report on Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). A8-0345/2017, 6 November 2017. Below: EP DIV Proposal. European Commission (2016) Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. COM(2016) 466, 13 July 2016. Brussels. Below: Commission Asylum Qualification Regulation or Commission AQR Proposal. LIBE (2017) Report on the proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. A8-0245/2017, 28 June 2017. Below EP AQR Proposal; European Commission (2016) 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, 13 July 2016. Brussels. Below Asylum Procedures Regulation or Commission APR Proposal; LIBE (2018) Report on the 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. A8-0171/2018, 22 May 2018. Below: EP AQR Proposal; European Commission (2016) Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast). COM(2016) 465, 13 July 2016. Brussels. LIBE report on the proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast). A8-0186/2017, 17 May 2017. Below: EP RCD Proposal.

1.1 Dublin: the core of the CEAS

A valid argument can be made that from the perspective of international refugee law, rules on e.g. qualification are far more important than rules on allocation. Still, for the Common European Asylum System not qualification, but the allocation system is the central element. The first common rules on asylum in the European context, the 1985 Convention Implementing the Schengen Agreement[3] and the 1990 Dublin Convention[4] addressed allocation of asylum seekers, not qualification, procedures or reception standards. The Treaty of Amsterdam (1999) rendered the European Community competent to adopt measures on reception, procedures and qualification, but these measures were typically qualified as 'flanking measures', serving the proper functioning of the Dublin system.[5] Despite the fact that, under the Treaty of Lisbon (2009), qualification, reception and procedures became policy objectives in their own right,[6] the allocation system has remained central.[7] Up till now the Dublin system on allocation is the only truly 'common' and truly 'European' element of the CEAS.[8] This centrality was underlined by the perceived refugee crisis of 2015-2016. Thus, whereas divergences in recognition rates among member states as well as serious short comings in reception by greatly overburdened member states such as Greece in the preceding years did not lead to the perception of a crisis, the arrival of large numbers of migrants in other states and the malfunctioning of the Dublin system did, for the Commission. Indeed, the Commission justifies changes to the measures on qualification, procedures and reception specifically from that angle, i.e. to render the Dublin system crisis resistant.[9]

1.2 The design of the current Dublin system

The Dublin system as established since 1990 serves, first, to secure that each applicant for asylum should have his or her application examined on the merits in a member state of the European Union, thus to prevent that asylum seekers are shuffled between member states ('refugee in orbit') and, second, to secure that only one member state should be responsible, in order to prevent multiple applications within the EU and so called 'asylum shopping'.[10] These objectives were laid down in the Dublin Convention and now follow from Article 78(1) and 78(2)(e) TFEU: the CEAS must be developed 'with a view to offering appropriate status' to those in need of protection, in accordance with the

[3] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990 [2000] OJEU L239/19, Articles 29-38. Below: CISA.
[4] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) [1997] OJEU C254/1.
[5] E.g. Boeles, P. et al. (2014) European Migration Law. Mortsel: Intersentia. 2nd edition, 248; Battjes, H. (2006) *European Asylum Law and International* Law, Leiden: Brill, 38-143.
[6] Cf. Article 78(1) TFEU, quoted below.
[7] The Commission states that the Dublin system 'operates through' the instruments on qualification, procedures and reception, calling them 'elements of the Dublin system' (Commission DIV Proposal 4-5).
[8] Wagner, M. (2018) *What remains "common" in the "European Asylum System" if Dublin fails?* Blog Post on "Harmonisation" 1. ICMPD 16 April 2018.
[9] E.g. Commission DIV Proposal, p. 3; Commission AQR, APR and RCD Proposals, Explanatory Memorandum, 2 and Preamble recitals (3) – (5).
[10] Van Oort, H. (2018) Baseline study on access to protection, reception and distribution of asylum seekers and the determination of asylum claims in the EU. CEASEVAL Report 2018, 13.

Refugee Convention, and it should comprise i.a. 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection'.[11]

The Dublin system was designed to reach these aims by combining the concepts of the mutual readmission agreement and the safe third country concept.[12] A readmission agreement is an agreement whereby a state consents to take back or take over a non-national. Such an obligation to take over or take back can be based on previous presence of the non-national on a state's territory. The safe third country concept says that a state can expel a person who applied for asylum only, if the receiving state will not treat that person at variance with the expelling state's obligations under international law, such as those under the Refugee Convention.[13] One way of securing this is by laying down in the readmission agreement the obligation for the receiving state to examine the application for asylum in accordance with relevant standards, and, if the person turns out to be a refugee, to treat him or her in accordance with relevant standards.

Thus, the Dublin system combines responsibility for examination of an application for international protection with the obligation to take over or take back the applicant concerned. Furthermore, the standards on qualification for international protection, on procedures and on reception are conceptually linked to the Dublin system for allocating responsibility.

1.3 Set-up of this paper

Hence, the Dublin allocation system was and is the corner stone of the Common European Asylum System; rules on other issues such as qualification, procedures and reception are conceptually linked to it. There is no reason to assume that this will be different when, in some form, the proposals for reform of the various CEAS measures will be adopted. An analysis of the effects of the proposed reform of allocation rules in the context of the CEAS as a whole is therefore necessary. This means that apart from the proposals for reform of the Dublin III Regulation, also those for replacing the directives on qualification, procedures and reception conditions will be addressed. Choices made (or implied) as regards centralisation, externalisation and regionalisation may have great impact on the working of the allocation system in particular and hence the CEAS in general and should therefore be taken into account.

Thus, the purpose of this paper is to identify which changes the proposals for CEAS measures will bring to this design of the system for allocating responsibility, in the context of the CEAS as a whole. This will be done by comparing the measures currently in force with the proposals of the Commission and, where relevant, the EP Proposals. In particular, the comparison will address the following aspects.

The obvious starting point of the discussion would be an analysis of the objectives and then a description of the envisaged allocation systems. In order to analyze whether and in how far the Dublin III Regulation and the proposals actually do serve various objectives and to avoid needless repetition, this order has been reversed. Hence, under section 2, I will first introduce the various systems for allocation of responsibility. Allocation is defined for the purposes of this paper as any measure that

[11] Cf. Maiani, F. (2016) The Dublin III Regulation: A New Legal Framework for a More Humane System?, in Chetail V., De Bruycker P. and Maiani F. (eds.), Reforming the Common European Asylum System - The New European Refugee Law, Leiden: Brill, 102-3.

[12] G. Noll, *Negotiating Asylum*, *The EU Acquis, Extraterritorial protection and the Common Market of Deflection* , The Hague Kluwer 2000; Wagner (2018).

[13] Battjes (2006), 398-400.

establishes an obligation for a member state as regards a third country national (or stateless person) who has applied for asylum, thus including third country nationals whose applications have been accepted or turned down. Thus, a rule stating that third country nationals can apply for asylum in any member state they wish would be an allocation rule, as well as rules that establish forced distribution. This broad definition is used in order to include other rules, that have bearings on distribution of (former) applicants for asylum, then those set in the Dublin III Regulation (and the proposals for its reform).

The analysis in this paper of these various systems for allocating responsibility will focus on *who or what* is being allocated– as stated above, determining responsibility for examination entails also responsibility for the applicant. As pursuant to the Dublin system, responsibility may concern not only applicants during, but also after the examination procedure. I will address both forms of allocation of responsibility, and not only based on the Dublin system but also based on implications of other instruments.

Furthermore, I will focus on *how* responsibility is allocated, thus the rules that decide which state is responsible in a particular case. Here, it should be observed that readmission agreements between two states under international law can be straightforward – under certain conditions state A takes over a foreigner from State B, and vice-versa. In the context of the Dublin system, allocation of responsibility is more complex, if only because more states are involved. Another complicating factor can be the change of circumstances due to time. Thus, section 2 addresses the various degrees of complexity of the proposals, and their implications for allocation of responsibility other than for examining the claim.

Another matter is *why* responsibility is being allocated on the grounds mentioned in the existing and proposed measures. Above, it was stated that the Dublin system serves to assign one, and only one member state responsible for examining a claim for international protection. To achieve this aim, quite different criteria can be applied, depending on which policy objectives one may have. It is a truism to state that the present Dublin Regulation at least in part serves to render the state of first entry responsible.[14] There may be various reasons for this choice, e.g. the wish to give an incentive to member states to secure the EU outer borders, or the conviction that an applicant should ask for asylum in the EU as soon as possible. Next to that, other objectives could be served with an allocation system for responsibility. Therefore, as a third topic, these objectives will be dealt with in section 3.

Another issue is *who* allocates and *how strict* allocation rules are. As to who allocates, allocation can be done by member states or by a Union agency, or by a combination of both. Furthermore, application of the allocation rules can be a strictly inter-state matter, or other actors may be involved.

If member states are involved in applying allocation rules, a relevant issue is whether these rules are strict, or leave a certain degree of appreciation or discretionary power to the member states. Both issues, relationship between centralization and the role of member states, and the level of uniform application of the Dublin rules, will be discussed under section 4 – thus addressing the institutional setup and the gradual swift of policy making to the EU level. In this context, a number of remarks on regionalisation and externalisation will be made.

In section 5, the level of harmonization will be examined as basis or requirement for the functioning of the CEAS. As stated above, due to obligations under international law, a readmission arrangement

[14] Cf. Commission DIV Proposal, p. 14: 'The proposal retains the link between responsibility in the field of asylum [sic] and the respect by Member States of their obligations in terms of protection of their external border, subject to exceptions designed to protect family unity and the best interests of the child'.

for applicants such as the Dublin system can function only if the expelling state can be confident that the applicant will be treated in accordance with its international obligations – the receiving state should be safe from the transferring's state perspective. CEAS measures on qualification, reception and procedures serve – in the context of the Dublin system – to secure this safety. Under 5, it will be discussed to what extend the Proposals of the Commission and the EP do so. Section 6 contains some concluding remarks.

1.4 Methodology

This paper is based on desktop research. It builds on the Baseline Study published as part of the CEASEVAL project, that summarizes studies on the functioning of the existing CEAS and on the latest proposals done in the context of the Agenda on Migration.[15] Thus, it relies on the results presented in the Baseline Study and on the studies and literature referred to in the study. Furthermore, recent proposals by the EP are addressed as well as some later studies, especially those by ICMPD (see references below).

Later Council positions have not been addressed for a number of reasons. Only part of the documents are public; a full assessment is therefore not (yet) possible. Proposals by e.g. the Presidency on the reform of the Dublin system have not gained the support of the majority of member states. Furthermore, this paper does not aim to assess the correctness of a number of claims made policy makers, such as statements by the Commission on the reasons for lack of harmonisation or secondary movements by applicants. Rather, it aims to assess differences among and consequences of the proposed allocation measures.

2. Allocation measures

In this paragraph the rules for allocating responsibility are being introduced, thus the grounds on which a member state is responsible. This discussion will highlight rules that render application of these rules for allocating responsibility more or less complex. Furthermore, it highlights responsibility for who or what is exactly being allocated. Article 78(2)(e) TFEU calls for 'criteria and mechanisms for determining which member state is responsible for considering an application for asylum or subsidiary protection', the title of the Dublin Regulation employs the phrase 'determining the member state responsible for examining an application for international protection'. Thus, the instrument allocated responsibility for 'examination'. Below, I will identify for which aspects of 'examination' responsibility is allocated. And as already observed above, responsibility for 'examination' in the Dublin system also entails responsibility to take back or take over an applicant – in short, responsibility for an applicant. This responsibility may continue after examination has been completed. The analysis will address in which cases the responsibility continues and hence applies to other persons than applicants for asylum, and how the Dublin rules for allocation of responsibility for these categories relate to other rules for allocating responsibility for those categories.

Below, I will address the currently applicable measures first (section 2.1), and then the Commission (section 2.2) and EP Proposals (section 2.3). In an appraisal of both proposals (section 2.4) I will wrap up the findings on the complexity and personal scope of the instruments, and make some observations on the Treaty basis of the rules on allocation.

[15] Van Oort (2018).

2.1 The present allocation system

2.1.1 The design

The Dublin III Regulation determines which member state should establish which member state is responsible for examining the claim. According to Article 20(1) DIII, as soon as an application 'is first lodged with a member state', the procedure for determining the responsible member state starts. Hence, the Dublin III Regulation allocates responsibility for determining the member state responsible for examination of the claim with the member state where the application is lodged for the first time.[16]

Responsibility for examination is decided on the basis of 'objective criteria' that apply in the order as they appear in the instrument.[17] These may be divided in two sets. First, criteria that secure or restore family unity.[18] Second, criteria that allocate responsibility because a member state facilitated entry into the EU by issuing a visa or where the applicant entered the EU illegally.[19] Only if none of these apply, the member state where the first application was lodged is responsible.[20]

Two remarks are due. First, it should be noted that this separation of responsibilities (i.e. for determining the responsible state and for examining the claim) is not self-evident: the member state of first application could also have been the member state responsible for examining the claim. As we will see below, in the Commission and EP Proposals indeed do render the member state of first application partially responsible for that. Second, the hierarchy of criteria does not reflect their numerical relevance. In fact, responsibility is most often assigned to the member state that facilitated entry, in the second place to the member state of first application and only in the last to member states where family members are present.[21]

2.1.2 Deviations to the Dublin design

This simple set of criteria is complicated by a number of rules incorporated in the Dublin system[22] that serve three purposes. These rules entail first, accommodate changes brought by the passing of time; second, safeguard overriding human rights concerns; and third, protect state sovereignty.

As to time, for the application of the above criteria, the moment when the applicant applied for the first time is decisive.[23] So as far as the criteria (including those on family unity) are concerned, the assessment of the responsible state is frozen in time. Still, the responsibility of this state may cease. First, this may be so according to the criteria. Thus, responsibility on the ground that the applicant

[16] Article 20(1) Regulation (EC) No 604/2013 (below: DIII). The Dublin III Regulation states not as explicitly as the Commission proposal that responsibility must be established according to the criteria 'only once' (Article 9(1) Commission DIV Proposal), i.e. when the application is lodged for the first time. But its provisions imply that once responsibility has been determined, another member states where the applicant lodges an application does not have to apply the criteria again but can instead request the responsible state to take back the applicant (Articles 20 and 23-24 DIII.).

[17] Articles 3(1) and 7 DIII.

[18] Articles 9-11 and, although formally not a criterion, Article 16 (cf. CJEU *K. v Bundesasylamt* (C-245/11)).

[19] Articles 12 – 15 DIII.

[20] Article 3(2) DIII.

[21] Guild E et al. (2014) New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection, CEPS Paper No. 77, 17-18; European Commission (2016) Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe. COM(2016) 197, 6 April 2016, 4.

[22] The Commission even states that ' the effectiveness of the Dublin system is undermined by a set of complex and disputable rules on the determination of responsibility' (Commission DIV Proposal, p. 3).

[23] Article 7(2) DIII.

entered illegally ceases after 12 months.[24] Second, responsibility may pass to another member state, if that member state did not comply with one of the fatal time limits set for the inter-state procedure – the time limits for requesting to accept responsibility and for answering it, and for transferring the applicant.[25] Third, responsibility ceases if the third country national has left the EU for three months or more or if the third country has been returned on the basis of a return decision.[26] If the third country national applies again for international protection in a member states, the procedure for determining the responsible member state starts again.[27]

There are two exceptions to the allocation rules as described above due to overriding human rights concerns, which both follow from case-law of the Court of Justice of the European Union (hereafter: CJEU). First, responsibility for unaccompanied minors (with no family member or relative present in a Member State) rests with the member state where the minor lodged the application.[28] This rule hence makes exception to the rule that the situation at the moment of first application is decisive. Second, if transfer would result in a breach of Article 4 Charter due to systemic failures in the asylum procedure and reception systems of the receiving member state, transfer is not allowed.[29] This latter state is in fact exempted from taking charge of or taking back an applicant – determining which state must determine responsibility and which one is responsible then falls upon the next member state where the applicant lodges an application.[30] Finally, a member state[31] may decide to disregard the rules for allocating responsibility: it may decide to either send the applicant to a safe third country, or to assume responsibility voluntarily and examine the application itself.[32] These exceptions hence apply to both the allocation of responsibility for determining the responsible member state as well as to the allocation of responsibility for examination.

We should note that these exceptions to the Dublin rules not only add to the complexity of the grounds for responsibility but also deviate from the basic rule that the member state of first application establishes which member state is responsible. The member state where a (later) application has been lodged will have to (re) assess which of the exceptions applies. In other words, not only responsibility for examination may cease and go over to another state, but also the responsibility for determining which state is responsible for the examination shifts.

Furthermore, the current allocation system as established by the Dublin III Regulation has been complemented by a number of *ad hoc* decisions on relocation of applicants from particular member states to the other member states. These decisions will be discussed in part. 3.2.

[24] Article 13(1) DIII.
[25] Articles 21-25 DIII.
[26] Article 19(2) and (3) DIII.
[27] Ibid.
[28] Article 8(4) DIII; cf. CJEU *M.A. a.o. v SSHD* (C-648/11).
[29] Article 3(2) DIII. The requirement of systemic failures follows from CJEU *N.S. v SSHD and M.E. a.o. v Refugee Applications Commissioner* (C-411/10 and C-493/10), and may be taken to imply a higher threshold than the one set in ECtHR *M.S.S. v Belgium and Greece* (30696/09); CJEU *C.K. v Slovenia* (C-578/16 PPU), however does not suggest a higher threshold.
[30] Cf. CJEU *N.S. v SSHD and M.E. a.o. v Refugee Applications Commissioner* (C-411/10 and C-493/10).
[31] Either the member state responsible for determining the member state responsible for (further) examination of the claim, or the member state responsible for examination, or another member state where the asylum seeker is present.
[32] Articles 3(3) and 17 DIII.

2.1.3 Allocation after examination

Under the Dublin Regulation, responsibility for 'examining' the claim implies far more than examination in the sense of taking a decision on the application.[33] According to Article 18, the responsible state must also take charge of an applicant who lodged an applicant in another member state, and take back the third country national whose application is being examined, was withdrawn or turned down and is illegally present in another member state.[34] This responsibility ceases only on a limited number of grounds – as mentioned above, if the third country national left the EU for three months or more, if he lived for five months in another member state, if another member state issued a residence permit, or if the transfer does not take place within six months.[35] Thus, the Dublin III Regulation allocates responsibility for not only examining a claim, but also for taking back and returning most of the third country nationals whose applications have been turned down. It should be noted that this obligation to take back illegally staying third country nationals is an exception to the general rule laid down in Article 6(1) Returns Directive, that allocates responsibility for return to the member state where the third country national is illegally present.

As to allocation for responsibility after international protection has been granted, international protection beneficiaries have the right to stay for three months during a six months period in another member state, as do all legally residing third country nationals in the EU.[36] Pursuant to Article 19(1) DIII the member state that issued a residence permit becomes responsible for taking over or taking back these third country nationals. [37] Thus, the exclusive responsibility for considering the application for asylum entails exclusive responsibility for the third country national also after a residence permit has been granted. EU law provides for just one, modest exception. International protection beneficiaries who resided for more than five years, and who fulfil the relevant requirements set in the Long-Term Residence Directive, concerning a.o. income requirements and health insurance enjoy a limited form of free movement within the EU for the purpose of a.o. work.[38]

Over the past few years, in a number of cases the question has been raised whether exception should be made to the aforementioned exclusive responsibility for the member state that examined the application and granted international protection, when transfer to the latter state would amount to an alleged breach of Article 4 Charter or Article 3 ECHR. This will be discussed in para. 5.4 below.

2.2 Allocation system in the Commission Proposal

In 2016 Commission DIV Proposal maintains the general set-up of the existing Dublin system, but envisages also changes. To start with, it introduces an obligation for the applicant to lodge the claim in the member state of first entry; if the applicant does not comply, the application will be dealt with in the accelerated procedure and reception benefits will be withhold.[39] Furthermore, the Proposal splits the allocation of responsibility for examination, first by introducing two phases in the Dublin procedure and second, by introducing a corrective allocation mechanism.

[33] Cf. Article 2(d) DIII.
[34] Article 18 DIII.
[35] Article 13, 19 and 29 DIII.
[36] Article 21 CISA.
[37] Article 19(1) and 18(1) DIII. In fact, member states may also declare such applications inadmissible on the basis of Article 33(2)(a) APD.
[38] Articles 5 and 14-15 Directive 2003/109.
[39] Articles 4 and 5 Commission DIV Proposal.

2.2.1 Splitting responsibility for examination

The member state where the application was lodged for the first time (if applicants comply: always the member state of first entry, see above) must examine: whether the application is inadmissible or manifestly unfounded[40] because the safe third country exception applies, whether the applicant comes from a safe country of origin and whether the applicant poses a threat to public order.[41] (pursuant to the Asylum Procedures Directive, a third country can be designated as a safe country of origin if there is 'generally and consistently' no persecution or ill-treatment. An applicant from such a designated country thus has to rebut an assumption of safety; the examination may be accelerated, and certain guarantees do not have to be applied in such cases).[42] If one of these grounds applies, that member state is also further responsible, i.e. responsible for examining the claim.[43] Thus, the Proposal introduces a split in the allocation of responsibility for examination.[44] The Dublin III Regulation and its predecessors allocated responsibility for examination including all grounds for rejection to the responsible member state,[45] which implied subsequent obligations to either grant a status and grant residence or issue a return decision and expel to applicant. Under the Commission Proposal, there are two allocation systems: the member state of first application must examine admissibility and manifestly unfoundedness on certain grounds; and if these do not apply, determine which member state is responsible for the further examination of the claim. If these grounds apply, it must turn down the application and it becomes responsible for the return of the third country national.

2.2.2 Splitting responsibility for determining responsibility for examination

The responsibility for determining which member state is responsible for (further) examination of the claim is also split in two. Under normal circumstances, the established Dublin system applies: the first member state where an application was lodged must determine the responsible member state, and the criteria and time limits established in the Dublin III Regulation are maintained.[46] Exceptionally however, the responsibility for determining which member state is responsible is reallocated by the obligatory corrective mechanism. If a member state is responsible for more than 150% of its fair share (see below under Solidarity for details), member states who are responsible for less than their fair share become responsible for determining which member state is responsible (see for a detailed

[40] Article 3(3) Commission DIV Proposal words it slightly differently – it refers to the mentioned grounds for refusal in Article 31(8) 2013/32, which grounds may pursuant to Article 32(2) 2013/32 label as manifestly unfounded in domestic law.
[41] Article 3(3) Commission DIV Proposal.
[42] See Van Oort (2018), 32-33.
[43] Article 3(4) and (5) Commission DIV Proposal.
[44] The Estonian and Bulgarian Presidencies proposed to make the obligation to perform the 'pre-Dublin check' dependent upon pressure on the asylum systems. Thus, in ' normal circumstances' it application is optional, in 'challenging circumstances' (when the number of applicants reaches 90% of a state's fair share and exceeds a certain minimum) application would be mandatory; in 'severe crisis circumstances' the EU presidency would adopt exceptional measures (ECRE (2018a) *Beyond Solidarity: Rights and Reform of Dublin – ECRE's Call on States to Ensure Fundamental Rights Protection in the Reform of the Dublin System. Legal Note 2018-3*, 2-3; see also Meijers Committee (2018) CM1805 *Note on the proposal for the Procedures Regulation and Dublin Regulation*, par. 2.1).
[45] As mentioned above, According to Article 3(3) Dublin III Regulation each member state may (not: shall), instead of determining which member state is responsible, 'send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU', that is, examine the application as far as the exception of the safe third country is concerned.
[46] With some exceptions – e.g. the definition of family members is broadened by including 'siblings' (Article 2(g)) Commission DIV Proposal).

discussion below, para. 3.3).[47] An 'automated system' will monitor when the numbers reach this critical threshold and in general, which portion of its fair share each member state received. After this transfer of responsibility for determining the responsible member state, the normal rules apply – responsibility depends on criteria and time limits, and after determination, the responsible member state must take over the applicant from the (overburdened) member state.

2.2.3 (Not) reducing complexity

The Commission sought to simplify the system by amending the rules defined as exceptions to the set-up above. Thus, the member state where a minor first lodged an application is responsible (not the – eventually, later - one where the application was lodged).[48] Responsibility ceases no longer 12 months after illegally entering the EU, and member states may voluntarily assume responsibility only if the responsible member state has not yet been determined and only on family unity related grounds.[49] Thus, the Proposal reduces the complexity of the present system, by removing all possibilities for the applicant to have his or her claim examined by another member state than the one that was first responsible.[50]

The choice to render the member state assigned by the corrective mechanism responsible for determining which member state should examine the claim, instead of rendering the assigned member state responsible for examining itself, however reintroduces the existing complexity to the corrective mechanism (as opposed to the system proposed by the EP, see below). Further, it introduces a new complexity by imposing the obligation on the member state of first application to assess whether the application is inadmissible or manifestly unfounded. If another member state is responsible, it should assume that this assessment has taken place. According to the Commission Proposal for the Asylum Procedure Regulation (hereafter: APR),[51] when the first member state of application 'considers' the application to be admissible, the responsible one does not 'need' to assess whether the first country of asylum or the safe country exception applies. The proposal is silent on the (implicit) findings of the member state of first application as regards the other grounds for rejection.

2.2.4 Allocation after examination

The Dublin IV Proposal of the Commission entails a partial shift of responsibility for return to the first country of application (as noted above, in principle the country of first entry), in case it finds the application is not admissible or manifestly unfounded on the grounds mentioned in Article 3(3) Commission Proposal. Whereas the current Regulation states that responsibility ceases after the applicant left the EU for at least three months, the Proposal states that the member state stays responsible for all subsequent applications.[52] Unlike the Dublin III Regulation, the Proposal further

[47] The Estonian and Bulgarian presidencies proposed voluntary relocation schemes for member states that receive between 90 and 150% of their far share of applicants, and exceptional measures to be adopted by the Council once 150% is reached – see ECRE (2018a) *Beyond Solidarity: Rights and Reform of Dublin – ECRE's Call on States to Ensure Fundamental Rights Protection in the Reform of the Dublin System. Legal Note 2018-3*.
[48] Article 10(5) Commission DIV Proposal – the provision still gives precedence to the member state where family members are present. It should be noted that reintroducing the possibility to transfer minors runs counter to CJEU *M.A. a.o. v SSHD* (C-648/11).
[49] Articles 15 and 19(1) Commission DIV Proposal.
[50] Meijers Committee (2016a) CM1609 *Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final)*, 4.
[51] Article 36(4) Commission APR Proposal.
[52] Article 3(5) Commission DIV Proposal.

states explicitly that member states must take back persons whom they granted international protection who apply for asylum in another member state.[53] Member states become responsible for third country nationals to whom they issued a residence permit up to two years after its expiry at the moment of first application for asylum.[54] The Commission also proposes a new provision in the Asylum Qualification Regulation stating the same.[55] Finally, it proposes amendment of the Long Term Residents Directive by stipulating that if an applicant has irregularly resided in another member state, the preceding period does not count for the five years term of legal residence required to rely on the Directive.[56] Thus, all the Commission Proposals intend to emphasize and reinforce the responsibility for return of rejected applicants and for international protection beneficiaries for whose applications a member state was responsible.

2.3 The EP proposal

The amendments to the Commission's proposal as proposed by the European Parliament depart much further from the Dublin III Regulation, most notably by abolishing responsibility due to irregular entry in the EU on a member state's territory, and instead introducing forced distribution as a rule, that is, not limited to exceptional cases of disproportionately burdened member states.

2.3.1 Splitting responsibility for examination

Under the EP proposal, the member state where the application was first lodged must, if a security verification warrants it, examine in an accelerated procedure whether the applicant is a threat to national security or public order;[57] this member state then becomes the responsible one.[58] If this does not apply, the member state of first application determines which member state is responsible on the basis of family unity considerations or because the applicant is a minor.[59] If these criteria do not apply, and if during the Dublin hearing the applicant did not raise issues relevant for an asylum request, provided the applicant does not require special procedural guarantees, the determining member state is responsible for application.[60] Thus, the European Parliament proposes a split as regards responsibility for examination similar to that in the Commission Proposal: the state of first application is responsible for applications that are manifestly unfounded. However, different from the Commission proposal, the EP Proposal does not allocate responsibility to the first state of application if the safe third country exception applies. And, again different from the Commission proposal, examination whether the application is manifestly unfounded takes place only after application of the criteria on family unity. The latter difference results in reunification during examination procedures, and united returns for family members.

[53] Article 20(1)(e) Commission DIV Proposal.
[54] Article 14 Commission DIV Proposal.
[55] Article 29 AQR. The provision further states, also redundantly, that beneficiaries have no right to reside in another member state save on the basis of Article 21 SIC.
[56] Article 44 AQR.
[57] Article 3(3a) EP DIV Proposal.
[58] Article 3(5) EP DIV Proposal.
[59] Article 9(1) EP DIV Proposal.
[60] Article 9(2a) EP DIV Proposal.

2.3.2 Allocating responsibility for examination

A further major difference concerns the criteria for responsibility that have to do with facilitation of entry or the territory where the applicant entered illegally. In the EP proposal, all these but one, Article 14 on the responsibility for issuing a visa, are deleted. The EP proposal further introduces responsibility for the member state where the applicant acquired a diploma in an educational institution.[61] Thus, the EP Proposal preserves and even extends criteria indicative of a former tie with the responsible member state. Furthermore, it abolishes the rule that the member state of first application is responsible if no criterion applies. Instead, responsibility is allocated by the 'allocation mechanism'. An 'automated system' registering all asylum applications determines which four member states received the smallest portion of their fair share (based on the same key as in the Commission proposal, thus determined for 50% by population size and 50% by GNP) from which the applicant can choose.[62] If the applicant does not choose, the state with the lowest portion of its share is responsible.[63] If prior to the application, the applicant moved to another member state a member state is appointed (and hence the applicant is left no choice).[64] Hence, responsibility for examination on the basis of illegal entry and first country of asylum is replaced by a system of fair sharing.

2.3.3 Deviations to the design

As compared to the Dublin III Regulation, the EP Proposal adds complexity in so far as it introduces for the state of first application the obligation to assess on certain grounds whether the application is manifestly unfounded (after the criteria on family unity have been applied). It maintains the clause that member states can on any ground and at any moment assume responsibility voluntarily,[65] but abolishes responsibility for the state where an unaccompanied minor lodges a later application.[66] But obviously, the exception as to cessation of responsibility 12 months after the applicant entered the EU does not apply, as the EP Proposal does not allocate responsibility to the member state where the applicant entered the EU illegally. Furthermore, it reduces complexity by introducing obligatory distribution of responsibility for examination (not, as in the Commission's Proposal, for determining responsibility) instead of the criteria allocating responsibility to the state that facilitated entry or the state of first application – compared to both the Dublin III Regulation as well as the Commission Proposal.

2.3.4 Allocation after examination

As to allocation after a status has been granted, the EP proposes the amendment to let the 5 years term of legal residence, required for invoking the benefits of the long term residents permit start at the moment of application for asylum, hence not the grant of the residence permit.[67] As to illegally present persons, it proposes that responsibility ceases after the applicant was removed from the EU[68] (not: after the applicant voluntarily left for at least three months). Otherwise, it does not propose

[61] Article 14a EP DIV Proposal.
[62] Article 36(1b) EP DIV Proposal.
[63] Article 36(1c) EP DIV Proposal.
[64] Articles 15(2) and 24c EP DIV Proposal.
[65] Article 19 EP DIV Proposal.
[66] Article 10(5) EP DIV Proposal.
[67] Proposed Article 44 Commission AQR Proposal, A8-0245/2017.
[68] Article 3(5) EP DIV Proposal.

change to the continuation of responsibility after examination for international protection beneficiaries and former applicants illegally present on the territory.

2.4 Complexity, personal scope and the Treaty basis

It was argued above that the present Dublin system for allocating responsibility is rendered more complex by the exceptions to the allocation of responsibility on the basis of the facts at the moment of the first application that serve to accommodate changes in the facts thereafter, overriding human rights considerations and sovereignty. The Commission Proposal reduces this complexity somewhat by reducing the number of exceptions. Both the Commission and EP Proposal increase the complexity by imposing on the first state of application the obligation to address a number of grounds for rejection of the application and application of the accelerated procedure. Where after such assessment another member state becomes responsible, part of the examination of the claim will have to be done for a second time. This begs the question how the responsible member state should appreciate findings as to admissibility and manifestly unfoundedness by the state of first application. That being said, the EP Proposal reduces complexity significantly by replacing a number of criteria by a mandatory distribution system.

As to the scope of allocation, the Dublin III Regulation explicitly holds member states responsible for taking back third country nationals after the examination has taken place, and thus in fact for issuing international protection or returning them. Both Proposals do not question but rather emphasize the continuation of responsibility, stretching it even to subsequent applications after the third country national left the EU.[69]

How does this applicability of the Dublin system to international protection beneficiaries and illegally staying third country nationals relate to the Treaty basis of the relevant instruments? Strikingly, the Dublin III Regulation as well as both Proposals indicate as legal basis only Article 78(2)(e) TFEU, that calls for 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection'. The obligation to take back a person to whom a residence permit was granted or who is illegally present but does not lodge a fresh application for asylum can hardly be called responsibility for 'considering an application'. Arguably, the legal basis for rules allocating responsibility for former applicants after examination must be sought elsewhere.

Article 78(2)(a) and (b) TFEU renders the Union competent to adopt measures on 'uniform status of asylum' (i.e. for refugees) and of subsidiary protection, and Article 79(2)(c) TFEU to adopt measures on 'illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation'. The competence to define rules on granting statuses or unauthorised residence in member states arguably also implies competence to define which member state must grant the status to a third country national, or address the unauthorised presence and return of illegally staying third country nationals. Hence, there is no reason to assume that the rules in the Dublin Regulation and the Commission and EP proposals allocating responsibility for third country nationals after examination are invalid for lack of legal basis in the Treaty. Still, I think there is some tension between these rules and the Treaty. According to Article 78(2)(a) TFEU, the uniform 'asylum status' (i.e. refugee status) should be 'valid throughout the Union'. The latter phrase may imply that states should mutually recognize positive decisions to asylum claims, and possibly that the right of free

[69] Article 3(5) Commission DIV Proposal. Article 3(5) EP DIV Proposal makes exception to this responsibility to cases where the applicant was returned on the basis of a return decision, but does not propose to retain the present rule that responsibility ceases after the third country national left the EU for more than three months.

movement should be granted to refugees after recognition.[70] If this reading is correct, it does not follow that Dublin rules requiring member states to take back refugees because they were in the past responsible for examination of their claims are invalid. Validity of the status throughout the Union is an aim that need not be attained immediately. Still, it is safe to conclude that there is at least tension between the Dublin responsibility for recognized refugees and Article 78(2)(a) TFEU. And application of the Dublin system to illegally staying third country nationals needs justification – which, arguably, is quite sparse in the Dublin III Regulation and both proposals.[71]

3. Objectives of the Dublin system

3.1 Introduction

As observed in the introduction, the Dublin system serves to secure that an application will be examined by a member state, and that only one state will do so. This is in line with, or even follows from the TFEU. Article 78(1) TFEU stipulates that asylum measures should serve to offer 'appropriate status' to asylum seekers in accordance with the Refugee Convention, and Article 78(2)(e) TFEU mentions criteria and mechanisms for 'determining the member state responsible' for examining an application, which implies that other member states do not have an obligation to examine it. A choice for particular grounds for responsibility does not follow from these aims. Thus, grounds for responsibility, firmly entrenched since the Dublin Convention was concluded in 1990 up to the present, such as responsibility for the state where the applicant entered illegally or the state where the applicant first lodged an asylum claim, do not follow from these provisions. The only Treaty provision having implications for the choice of criteria is Article 80 TFEU, which speaks of the 'principle of solidarity and a fair sharing of responsibility'.

It has been pointed out by several authors as well as actors such as UNHCR, that the choice of the applicant could provide for a model for allocation as well.[72] Arguably, neither the Refugee Convention nor any other instrument of international law on asylum bestows a right to choose a particular country of refuge.[73] But if reducing the number of secondary movements is amongst the desired effects of the Dublin system,[74] it would be wise to consider accommodation of those preferences.

In the next paragraph I will discuss which objectives the several allocation systems serve, and in particular whether and if so, how the present Regulation and both Proposals contribute to the aim of fair sharing between member states, and take into account or in fact serve the preferences of the applicant.

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[70] See Pollet 2016 p. 85-86 with references. Otherwise Hailbronner, K. and Thym D. (2016), in Hailbronner, K. and Thym D. (eds.) *EU Immigration and Asylum Law, A Commentary*, München Beck 2016, 1032-3 where Hailbronner and Thym state that the phrase 'valid throughout the Union' does not impose the obligation to grant such freedom, even less that no conditions –e.g. economic sufficiency – could be imposed.

[71] The historical explanation for this absence is quite obvious. As mentioned in para. 1, the Dublin system, including the phraseology of responsibility for 'considering' or 'examining' applications and including responsibility for former applicants, predates the Treaty basis for adopting Community and later Union rules on the matter.

[72] Maiani (2016),102.

[73] See e.g. Kälin, W. a.o., Article 33, Para. 1, in Zimmermann, A. (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Oxford OUP 2011,1386; Battjes H. (2006), 397.

[74] E.g. Commission Dublin IV Proposal, p. 14, and see Wagner M., Baumgartner P. et al. (2016) *The Implementation of the Common European Asylum System*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs. PE 556.953, 31.

Allocation as regards asylum applicants may also address financial resources. This follows from Article 80 TFEU which states that asylum policies and their implementation should be governed by the principle of solidarity and fair sharing of responsibility, 'including its financial implications, between the Member States'. In addition, the current Dublin Regulation and the Proposals show interesting differences.

3.2 The current allocation system

3.2.1 Border protection

As observed by many authors, the goal of Dublin III Regulation to allocate responsibility in the first place to member states of first entry, seems geared to make responsible the member state where the asylum seeker entered the EU,[75] by Articles 13(1) (responsibility due to illegal entry) and 3(2) (responsibility for the state of first application if no other criterion applies). If it had functioned properly, Greece would have been responsible for about 80% of the 1 million applications in 2015.[76] Allocation primarily to the member state of first entry is, according to the Commission, not some undesired side effect, but intentional: 'a linkage should be made between the allocation of responsibility in the field of asylum and the respect by Member States of their obligations in terms of protection of the external border '.[77] When the distribution key in the Commission proposal is taken as a standard, however, the picture is a bit more mixed: asylum seekers would have been relocated from Germany, Greece, Bulgaria, Malta and Hungary, but not from e.g. Italy.[78]

3.2.2 Fair sharing

It is common ground that the Dublin system does not serve or contribute to the objective of equitable burden sharing. We may observe that this is due not only to the choices made by the Union legislator, but also due to the effect of the case-law of the Court of Justice. In the cases of *A.S.* and *Jafari*, the question was referred which state was responsible in the context of extraordinary national measures and practices during the influx of 2015 and 2016.[79] Croatia, a state of first entry, lifted border controls and allowed (or even helped) applicants to travel on to Slovenia and other member states. The Court of Justice ruled that notwithstanding this quite explicit approval, entry into Croatia amounted to 'illegal entry' for the purposes of Article 13(1) DIII, hence forfeiting an opportunity to interpret the Regulation in a way that would render responsibilities of states of first entry and other states more balanced. The Court referred to the early warning mechanism in the Dublin III Regulation (a mechanism that does not cater for fair allocation and besides has never been used) as well as to the Council decisions on relocation as solutions for disproportionally affected states. Apparently, application of Article 80 TFEU is a matter for the legislator, not the Court.

In September 2015, two Council Decisions took effect which were aimed at providing temporary relief for Italy and Greece. The decisions are a temporary derogation from the Dublin III provisions on allocation of responsibility for examination.[80] The first Council Decision (2015/1523) aims at relocation

[75] See Van Oort (2018), 14 for references.
[76] Ibid.
[77] European Commission (2016) Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe. COM(2016) 197, 6 April 2016, 4.
[78] Wagner, M. and Baumgartner, P. (2017) *Past, Present and Future Solidarity: Which Relocation Mechanisms Work and Which Do Not?* International Centre for Migration Policy Development. Policy Brief.
[79] CJEU *A.S. v Slovenia* (C-490/16) and *Jafari and Jafari* (C-446/16).
[80] Council Decision (EU) No 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, [2015] OJEU L 239 and Council Decision (EU)

of 40,000 asylum seekers and is voluntary, whereas the second Council Decision (2015/1601) accounts for 120,000 places and includes mandatory relocation quota. These quota were founded on a key, based on population, GDP, the number of spontaneous asylum applications and unemployment rates. Under these decisions, asylum seekers are eligible for relocation only if they hail from a country for which the EU-wide recognition rate is more than 75%.

The Decisions could and did address disparities in allocation only very partially. For a start, they concerned only Greece and Italy – and as discussed above, pursuant to the distribution key proposed by the Commission in its Dublin IV Proposal, next to Greece Germany, Austria, Hungary and Malta should have been picked, not Italy. Further, implementation has taken place only very partially. The target number of 160,000 asylum seekers was lowered to 106,000 in 2016,[81] and only about 35,000 had been relocated in October 2018;[82] a number of member states – Poland, Hungary and Slovakia – refused to take part. It has been argued that the choice to limit eligibility for relocation to asylum seekers from states with a high recognition rate is detrimental to Italy and Greece, as the remaining asylum seekers are deemed to put long-term strains on these states' reception systems. [83] Oddly, alongside redistribution on the basis of the Council Decisions, the Dublin Regulation is still being applied – Member States continue to transfer applicants to Italy. Some (such as Belgium and the Netherlands) resumed requesting transfers to Greece.[84]

3.2.3 Applicants' preferences

It has been argued that the preferences or interests of the applicant play no role.[85] Although this is certainly true as far as no criterion explicitly refers to them, a number of criteria may serve to allocate responsibility to the member state an applicant prefers. This applies most obviously to the criteria concerning family unity (which apply only if the applicant wishes reunification).[86] And travelling to the state of preference could result in the latter's responsibility under Article 3(2) DIII.

We may observe that it was not self-evident that the Union legislator opted for an allocation model ignoring the preferences of applicants. Indeed, the legislator did opt for such a model in the Temporary Protection Directive.[87] According to this instrument, designed to offer protection in case of a mass influx of displaced persons, the Council can adopt a decision establishing temporary protection for the group of persons defined in that decision (i.e. people from a particular country or area).[88] The Directive imposes the obligation to offer beneficiaries on their territory benefits such as a residence permit and access to the labour market.[89] Importantly, an application for asylum is not required for applicability

2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJEU L 248/80.

[81] Council Decision (EU) No 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2016] OJEU L 268/82.

[82] See European Commission (2018a), *Member States' Support to Emergency Relocation Mechanism (As of 30 October 2018)*.

[83] Van Oort (2018), 24 with references.

[84] See above, para. 3.4.

[85] Van Oort (2018), 15.

[86] E.g. Article 9 DIII, final clause.

[87] 2001/55.

[88] Articles 2(a) and 5 TPD.

[89] Articles 8-16 TPD.

of the Directive;[90] thus, the Dublin Regulation would not apply.[91] Hence, the instrument in fact allocates responsibility to the state where the beneficiary is present when the protection regime is established, hence in principle the state of the beneficiary's preference. Obviously, in practice third country nationals may already have applied for international protection when temporary protection starts applying to them. Furthermore, also after the Council decision has been adopted they may do so. Still, it should be observed that in order to be granted temporary protection it is not required that the third country national applies for international protection; hence, the protection applies to third country nationals defined by the Council decision on the territory of the member state where they are.

3.3 Objectives of the Commission Proposal

3.3.1 Fair sharing

The Commission Proposal seeks to diminish inequalities in distribution by imposing redistribution. As discussed above, under normal circumstances the existing Dublin system, allocating responsibility by means of objective criteria and fatal time limits remains in place, but the Proposal aims to curb its effects. The corrective mechanism applies if a member states bears responsibility for (further) examination for more than 150% of its fair share.[92] The fair share is based on the number of inhabitants of the member state and it's GDP (both counting for 50%).[93] When it transpires from the automated system (discussed above, para. 2.2) a member state reaches the threshold of 150% of its fair share, the system notifies the member state who received less asylum seekers than their share; asylum seekers arriving in the member state that reached 150% of its share will be distributed to them.[94]

Although the introduction of this obligatory corrective mechanism may indeed diminish inequalities for some member states, the Commission Proposal also provides elements that maintain or even enhance inequalities. Obviously, the mechanism does not correct inequalities for states where the numbers of applicants exceed their fair share (as defined by the distribution key) but does not reach 150%. Furthermore, as we saw above it introduces an obligation to assess admissibility and manifestly unfoundedness on the member state of first application. These inadmissible or manifestly unfounded cases are not subject to re-allocation.[95] It should be noted that under the current Dublin system, member states may, but are not obliged to apply the safe third country exception instead of the Dublin criteria.[96] By restricting the Dublin allocation rules and the corrective mechanism to applicants whose applications were not deemed to be inadmissible or manifestly unfounded on the mentioned grounds, or rather: by restricting the Dublin allocation system to applicants who are more likely to be eligible for international protection, the new rule thus introduces a new disparity. As discussed as regards the

[90] This follows from the set-up of the Directive and see Article 17(1) TPD that stipulates that TP beneficiaries must be able to lodge an application.
[91] The reference to the Dublin system in Article 18 TPD concerns applications for asylum, hence refugee and subsidiary protection, not temporary protection.
[92] Article 34(2) Commission DIV Proposal.
[93] Article 35(2) Commission DIV Proposal.
[94] Arrticle 36 Commission DIV Proposal.
[95] Article 36(3) Commission DIV Proposal.
[96] Article 3(3) DIII. As mentioned in footnote 45 above, the Estonian and Bulgarian Presidencies suggested that the pre-Dublin check would be optional under normal circumstances, but mandatory for member states receiving between 90 and 150% of their fair share. As ECRE comments, this proposal would only enhance disparities as compared to the Commission's proposal (ECRE (2018a) *Beyond Solidarity: Rights and Reform of Dublin – ECRE's Call on States to Ensure Fundamental Rights Protection in the Reform of the Dublin System. Legal Note 2018-3*, 3).

2015 Council decisions on allocation, such a rule is detrimental to the member states of first entry and of first application.

The Commission Proposal introduces more changes to the Dublin system that, if adopted, will enhance disparities between member states. Under the Dublin III Regulation, responsibility ended if the formerly responsible state could show that the applicant had left the EU for at least three months.[97] Moreover, responsibility because the asylum seeker entered the EU on a member state's territory ended 12 months after the illegal border crossing.[98] Both grounds for cessation of responsibility have been deleted in the Proposal, with adverse effects for the member states of first entry. Finally, the allocation of responsibility to the member state of first entry is further enhanced by the Proposal to delete Article 14(2). Article 14(1) states that if the applicant enters a member state that waived the visa requirement, that member state is responsible; according to Article 14(2), the member state where he or she lodged the application is responsible if that member state also waived the requirement.

In sum, by introducing the corrective mechanism the Proposal may result in reducing disparities for those member states whose numbers of asylum seekers exceed 150% of their fair share. For all other situations, the Proposal does not diminish but increase disparities.

3.3.2 Applicants' preferences

The Commission Proposal preserves for normal circumstances (i.e. when the corrective mechanism is not employed) by and large the set-up and rules of the existing system. Hence, the system remains linked to member states responsibilities for border control, and the preferences of applicants affect responsibility only indirectly.

As observed in para. 2.2, the Commission Proposal introduces the obligation for applicants to apply for asylum in the state of first entry. This serves to allocate responsibility primarily with the member state of first entry. The Commission furthermore holds the view that 'secondary movements' are undesirable, partially because multiple applications are inefficient, and because they are thought to undermine the Dublin system. A number of changes, such as diminishing the possibility to shift responsibility after it has been established, serve the aim of discouraging secondary movements.[99] But secondary movements are also seen as 'abusive'.[100] Hence, the Commission proposal introduces punitive measures for applicants who do not register in the state of first entry – denying reception and examination in an accelerated procedure.[101] Thus, where the Dublin III Regulation in some cases could accommodate the preference of applicants, the Commission proposal has the explicit aim of denying these preferences relevance.

3.4 Objectives of the EP Proposal

3.4.1 Fair sharing

It transpires from the sketch of the set-up of the allocation as envisaged by the EP that equitable distribution among member states is central to its proposal. The allocation mechanism replaces illegal entry and first application as grounds for responsibility. Applicants allocated on the basis of the criteria

[97] Articles 18 and 19 DIII.
[98] Article 13(1) DIII.
[99] Explanatory memorandum, p. 11.
[100] Explanatory memorandum, p. 4.
[101] Article 5 Commission DIV Proposal; see also Article 40(1)(g) Commission APR Proposal.

on family unity and responsibility for manifestly ungrounded applications do not detract from the equity in distribution, as all applications count.[102] Application of the Proposal would hence result in a fully equitable distribution of applicants over the member states.

3.4.2 Border control

By deleting responsibility for facilitating entry, the EP Proposal will provide far less than the Dublin III Regulation and the Commission Proposal for incentives to control external borders. Still, like the Commission Proposal it contains the rule according to which the state of first application (often the state of first entry) must examine whether the application is manifestly unfounded and if so, becomes responsible (see above, para. 2.3). This rule is likely to result in states of first application having a bigger share of unfounded applications and hence obligations to return; for as observed above, the EP Proposal maintains responsibility for failed applicants.

3.4.3 Applicants' preferences

The EP Proposal accommodates applicants' preferences in a number of ways: by maintaining the criteria on family unity, by adding a new criterion for responsibility based on previous education in a member state,[103] and by offering the applicant the choice between four member states when the allocation mechanism is being applied.[104] Still, it should be observed that allocation by the mechanism envisaged by the EP is not allocation to the state of first preference of the applicant. The EP Proposal follows the Commission's proposal by maintaining the clause that if the applicant travels on to a non-responsible member state, the responsible must take him or her back. By deleting responsibility for the state of first application, a possibility for rendering the state of preference responsible has been taken away. The EP Proposal further deletes the punitive provisions on secondary movement introduced in the Commission proposal, the obligation to examine the application in an accelerated procedure, and the obligation to reduce reception benefits.[105]

3.5 Financial solidarity

Financial burden sharing can have two meanings in the context of allocation. First, it may address the sharing of costs between member states for reception, transfer, examination, integration, or return. In this regard, the EU Asylum, Migration and Integration Fund allocates resources to the transfer of international protection beneficiaries from one member state to another.[106] The Dublin III Regulation as well as the Commission Proposal stipulate that the member state transferring an applicant or failed asylum seeker pursuant to the Dublin Regulation shall bear the transfer costs,[107] and are silent on reception costs during Dublin proceedings. The Commission Proposal adds that for transfer under the corrective mechanism, the transferring member state can reimburse 500 euro per applicant.[108] The EP

[102] Article 36 EP DIV Proposal.
[103] Article 14a EP DIV Proposal.
[104] Article 36(1b) EP DIV Proposal.
[105] See Article 5(1) and (3) Commission DIV Proposal, and EP amendments 58 and 60.
[106] Articles 15 and 18 Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, [2014] OJEU L 150/168.
[107] Article 30 DIII, Article 31 Commission DIV Proposal.
[108] Article 42.

Proposal stipulates that costs for transfer are to be met by the general EU budget; the same applies to reception.[109] Thus, also in terms of finances, the EP Proposal aims at fair sharing.

Second, the Commission Proposal presented the option for payment by a member state as an alternative to take over applicants under the corrective allocation mechanism; the sum of 250,000 per applicant should be paid by the responsible member state.[110] The European Parliament explicitly rejects this proposal.[111] True, the sum of 250,000, - presents it as an unattractive (and highly unlikely) alternative.

3.6 Concluding remarks

Both the Dublin III Regulation and the Commission Proposal primarily serve to give the state of first entry an incentive to control their borders. This is only very partially balanced by the criteria on family unity that reflect applicants' preferences. The Commission Proposal introduces new rules in order to diminish the possibilities for secondary movements, that is possibilities for applicants to have their preferred state to be determined as the responsible one.

We may observe that the linkage between responsibility for asylum seekers on the one hand and border control obligations on the other hand (as stated by the Commission, see above para. 3.2) fits in awkwardly with other elements of the CEAS. Pursuant to Article 3(1) Directive 2013/32/EU (below also Asylum procedures Directive or APD), the rules on procedures (and by implication, on qualification) apply to all applications made on the territory, including at the border, or in the territorial waters of the member states. So as far as border protection entails precluding entry, it runs counter to other CEAS obligations. Arguably, this linkage only underlines that the Dublin system serves allocation of responsibility for irregularly present third country nationals no less than for examination of applications for international protection. We may further observe that since the first set-up of the Dublin system in 1985 and 1990, Union law and efforts to control borders have dramatically increased.[112] Arguably, the need to use the allocation system as an incentive to control borders must have decreased commensurately.

The Dublin III Regulation was never intended to address solidarity. The 2015 Council Decisions were intended to address that partially, but hardly served that aim. This is due to the poor implementation record, the definition of persons eligible for reallocation, and the ill-informed choice of benefitting countries. The Commission proposal hardly provides a better picture. The allocation rules that apply under normal circumstances may lead to even greater disparities than the Dublin III rules do. It is

[109] Articles 31 and 8a EP DIV Proposal.
[110] Article 37(3) Commission DIV Proposal.
[111] It not only deletes the proposed provision but adds the (rare) comment that 'The corrective allocation system is intended to balance the unfair sharing of responsibilities under a system that places a lot of efforts on frontline Member States. Allowing other Member States to buy themselves out from the system would not be fair to frontline Member States and for such a system to work the cost of the opt out would have to be so dissuasively high that it would become fundamentally unfair also to less economically strong Member States. Finally your rapporteur does not agree with the concept of Member States paying for avoiding a responsibility to assist people in need of international protection' (EP DIV Proposal, amendment 178).
[112] See on e.g. the proposal for a common border and cost guard Carrera S. et al. (2017) *The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?* Centre for European Policy Studies. Task Force Report.

doubtful whether the corrective mechanism, applying only under exceptional circumstances, could balance that.

Equitable allocation is central to the EP Proposal, and its allocation rules seem to guarantee that. The Proposal also secures financial solidarity, attributing costs for both reception and for transfers to the EU rather than to individual member states. It accommodates applicants' preferences slightly better than the Dublin III Regulation and Commission Proposal. As to the possibility for member states to pay a sum instead of accepting applicants under the corrective allocation mechanism as proposed by the Commission, it should be noted that it is questionable whether this option fully addresses or incorporates the EU principle of solidarity with regard to the international obligations of member states to protect refugees (cf. Article 80 TFEU).

4. Centralization, regionalisation and externalisation

4.1 Introduction: reflection on earlier policy options

In 2008, when preparing the second generation of measures of the Common European Asylum System (which would result in the adoption of the regulations and directives on asylum between 2011 and 2013 that are now in force), the Commission published an Impact Assessment study for its Policy Plan on asylum.[113] In this assessment, four policy options as regards the degree of envisaged harmonization and centralization were discussed: (A) status quo, (B1) full scale harmonization, (B2) further development of harmonization, (C) cooperation between member states and exchange of best practices, and (D) the adoption of an overall comprehensive instrument and the creation of a European Asylum Authority. The preferred option turned out to be a combination of B2 and C;[114] the 2016 Commission proposals may be characterized as a move into the direction of B1. Importantly, option D was excluded as a feasible possibility. D was characterized as a combination of B1, full-scale harmonization, under the authority of a European agency that would take over administration and adjudication of asylum claims from member states. According to the Impact Assessment, option D had many advantages, but the Commission identified one major drawback – member states would be unwilling to accept the transfer of sovereignty.[115]

We may observe that as far as examination is concerned, option D is still excluded, as Article 78(2)(e) TFEU provides for allocation of responsibility for the examination to member states, not to an EU agency. This is reflected in Article 78(2)(d) TFEU that calls for 'common procedures' for granting and withdrawing protection status. According to Article 78(3) TFEU, 'in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament'. These provisions express the presupposition that examining and coping with a mass influx is a domestic matter for member states, to be dealt with in accordance with Union law. Accordingly, in the proposal

[113] European Commission (2008), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum - An integrated approach to protection across the EU*, COM(2008)360.
[114] Ibid., 47.
[115] European Commission (2008), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum - An integrated approach to protection across the EU*, COM(2008)360, 6.

for a successor to the EASO, the European Union Agency for Asylum, its tasks are confined to facilitating, monitoring and assisting MS as regards application of Union asylum law.[116]

Still, various degrees of centralization are possible within the limits ('criteria and mechanisms') set by the Treaty (and opted for in the different instruments), which will be discussed below. Furthermore, the degree of 'harmonization' will be discussed. In fact, only a part of the rules concern genuine harmonization of asylum laws (e.g. those on aliens detention an remedies); criteria and so on do not address previously existing domestic law. Here, the varying degree of discretion the allocation rules leave the member states warrants attention.

4.2 Centralization in application

4.2.1 The current allocation system

The current Dublin allocation system relies on member states for applying the criteria and carrying out procedures. The only centralized element is the Eurodac database.[117] In this system, fingerprints of applicants and irregular migrants are being registered. Registration counts as proof for irregular entry as well as previous application for asylum.[118] It has been suggested that some member states do not fully comply with the obligation to store information (in order to elope responsibility).[119] The role of the Commission, EASO and other agencies is restricted to supporting member states, exchange of information and so on, not applying the Dublin Regulation. This is not to say that the activities of Union agencies are without impact – in the hotspots established in Italy and Greece where EASO an Frontex assist domestic authorities, the fingerprint rate of newly arrived migrants reached 100%.[120] Typically, the relocation decisions of 2015-2016 (see for details above, par. 3.2) set criteria and numbers for relocation, but have left their application fully to the member states.

4.2.2 The Commission and EP proposals

The Commission Proposal and even more so the EP Proposal have a strong centralizing tendency. In contrast to the early warning mechanism in the Dublin III Regulation, the corrective allocation mechanism as proposed by the Commission is triggered when a member state notifies that the number of applications it is responsible for has reached 150% of its allotted share, allocating later applications by means of an 'automated system' to member states responsible for a number of applications below their share.[121] The only discretion left for the latter member state is to opt for 'financial solidarity', thus to pay 250,000 Euro for each allotted applicant it does not take over.[122] The allocation system as

[116] European Commission (2016) 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, 4 may 2016.
[117] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ [2013] L 180/1.
[118] Guild E. et al. (2014).
[119] Jurado E. et al. (2016) *Evaluation of the Implementation of the Dublin III Regulation*. Study prepared by ICF International for the European Commission.
[120] Van Oort (2018), 39-40.
[121] Articles 34(2) and 36(1) Commission DIV Proposal.
[122] Article 37 Commission DIV Proposal.

envisaged by the EP applies irrespective of member state decisions as well. As it applies to all cases other than those that are examined as manifestly unfounded by states of first application and those where the criteria for family unity and the issue of a visa (see para. 2.3 above), this automated system would become the most important, centralized allocation tool. The EP Proposal does not contain the possibility for member states to buy themselves out of it.[123]

The automated system relies on the member states for entering data on the applications for asylum.[124] This will be supervised by the European Union Agency for Asylum that will also establish the reference key on the basis of the rules in the Commission's and the EP Proposals.[125] This reliance on member states to submit data might be, as was suggested as regards Eurodac, a weak spot. But under the Commission Proposal, registration of applications may serve to trigger the corrective mechanism; also under the EP Proposal, registration cannot be detrimental to member states interests. For under both Proposals, all applications for which a member state is responsible count when establishing its current share, including manifestly unfounded applications as meant in Article 3(3) and applications for which a member state assumed responsibility voluntarily.[126] The system may hence serve to improve observance of obligations as regards registration.

A major distinction between the Commission and the EP Proposals concerns the actual transfer of applicants to another member state. In the Commission's proposal as under the present Dublin Regulation, it falls upon the member states to carry out the transfer.[127] Under the EP's proposal, transfers are carried out by the EUAA, which is thus granted a second important executive function.[128] This concerns only transfer to the state that must take charge of responsibility, not the transfer after the notification to take back (i.e. when an applicant absconded from the responsible member state).

4.3 Uniformity

The Dublin III Regulation as well as the proposals by the Commission and the EP concern regulations allocating responsibility for the processing of asylum claims to member states. The choice for a regulation instead of e.g. a directive was the obvious one to make in 2003, as allocation was not regulated in domestic law, and this still is the case.

The Dublin III Regulation brought common rules, but not a fully uniform system. A number of provisions, such as Article 17 (the discretionary clause, allowing member states to assume responsibility even if application of the criteria would point to another member state) and rules on remedies against the decision to transfer leave the member states a certain amount of discretion.[129] Indeed, state practice shows great variety, ranging from simply not applying the Dublin Regulation (for humanitarian or efficiency reasons)[130] to differences in interpretation of e.g. the criteria on family

[123] In a (rare) explanation to the proposal for amending the relevant Commission DIV Proposal provision, it is stated that 'Your rapporteur does not agree with the concept of Member States paying for avoiding responsibility for people in need of international protection' (EP DIV Proposal, amendment 178).
[124] See Article 22 Commission DIV Proposal.
[125] Articles 22, 23 and 35(4) in the Commission DIV Proposal, not amended by the EP.
[126] That is, on the basis of Article 18 or 19; see Article 34(2) Commission DIV Proposal and Article 34(1) EP DIV Proposal.
[127] Article 30.
[128] See Article 24(c)(5).
[129] E.g. Article 27(2) and (3) DIII leaves it to national law to set rules on the period for lodging appeal against the transfer decision and on its suspensive effect.
[130] Jurado E et al. (2016).

reunification.[131] According to the Commission, the high number of rejected requests reflects differences in interpretation.[132] We may further observe that the procedures for taking charge and taking back and for transfers leave room for interpretation by member states, or quite strategic use of these rules. Thus, in the *Ghezelbash* case, according to the CJEU, the Dutch authorities did not have to share evidence showing the applicant had left the EU for more than three months with the French authorities indirect suggesting the applicant had left the EU territory for over 3 months.[133] And in *X v Staatssecretaris voor Justitie en Veiligheid,* even if a member state was quite obviously responsible as it examined an asylum application, the CJEU found that that member state was fully justified in requesting a member state where the applicant lodged a later application to take 'back' the applicant and that, when the requested member state did not reply in time, the latter became responsible. Furthermore, according to the CJEU, under the Dublin Regulation there would have been no need to inform the requested member state that the appeal against rejection of the former application was still pending.[134] Thus, the Dublin Regulation allows member states to request other states to take back or over an applicant, betting on expiry of the period for reply. The relocation decisions also retain some room of manoeuver for member states (they may refuse to take over an applicant on public order grounds),[135] but setting numbers of applicants for each member state leaves no room for manoeuver.

The Commission Dublin IV Proposal curtails the discretion of member states significantly. In particular the sovereignty clause states that member states can assume responsibility voluntarily only as long as responsibility has not yet been established, and only on grounds of family unity.[136] This renders a policy of voluntary responsibility as exercised e.g. by Germany in 2015 as regards Syrian refugees illegal. Likewise, the Proposal sets uniform time limits and rules on suspensive effect of appeal by asylum seekers against Dublin decisions.[137] As the criteria for responsibility are left more or less unchanged, it is likely that differences in interpretation will persist. The same holds true for diverging practices (or quite strategic use, se above) as regards the procedure for taking charge. The procedure for taking back however has been simplified: instead of a request that can be refused, a mere 'notification' to the responsible state will do,[138] as the grounds for responsibility leave no room for shift once responsibility has been established.[139] It may be observed that this simplification is at the expense of judicial protection, as the Proposal does not provide for a decision on taking back the applicant can challenge.[140]

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[131] ECRE (2015) *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*. AIDA Annual Report 2014/2015, 82; UNHCR (2017) *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*.

[132] European Commission (2016) Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe. COM(2016) 197, 6 April 2016, 4.

[133] CJEU *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* (C-63/15), cf Meijers Committee (2016a) CM1609 *Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final)*, 3.

[134] CJEU *X v Staatssecretaris voor Veiligheid en Justitie* (C-213/17).

[135] Article 5(7) Decision 2015/1523.

[136] Article 19 Commission DIV Proposal.

[137] Article 28 Commission DIV Proposal.

[138] Article 26 Commission DIV Proposal.

[139] Commission DIV Proposal, Explanatory memorandum, 16.

[140] Meijers Committee (2016a) CM1609 *Note on the proposed reforms of the Dublin Regulation (COM (2016) 197), the Eurodac recast proposal (COM (2016) 272 final), and the proposal for an EU Asylum Agency (COM(2016)271 final)*, 4.

The rules in the EP Proposal as regards taking charge procedures and taking back notifications are similar to those in the Commission Proposal.[141] The EP Proposal brings less uniformity than that of the Commission in so far as under the sovereignty clause, it maintains member state powers to assume responsibility at every stage and on every ground, and as it prescribes that applicants can challenge Dublin decisions on all grounds.[142] It further maintains the criteria for responsibility concerned with family unity and hence the likelihood of diverging interpretation and application. However, as the allocation mechanism replaces many if not most decisions as regards application, the net effect of the Proposal provides far greater uniformity than that achieved by the Dublin III Regulation or the Commission Proposal. Thus, diverging interpretations or practices as to criteria on illegal entry and to taking charge or back procedures do not come up under the allocation mechanism. And as observed above, transfers are carried out by the EUAA, not by member states.

4.4 Supervision over application

4.4.1 Inter-state

It was already noted that the Dublin III Regulation leaves its application fully to the member states. Questions on interpretation can be and are referred to the CJEU. But a working mechanism for solving disputes between member states on the proper application of criteria in specific cases is and remains lacking under the Dublin III Regulation as well as under the Commission and EP Proposals. A conciliation mechanism for solving disputes between Member States on application of the Dublin system was provided for since 1990 but very seldom used;[143] therefore, it is deleted in the Commission and EP Proposals. The Commission observes that in fact member states resolve disputes informally.[144] This means that in practice, the final say on proper application rests with the requested state.[145] For if a state requests another one to take back or take over an applicant and the requested member state refuses, e.g. rejects that the mentioned criterion applies, the only thing the requesting member state can do is ask for reconsideration.[146] If the requested member state again rejects the request or does not answer in the prescribed period,[147] the requesting member state will be responsible. Thus, in this respect allocation of responsibility is and remains an inter-state affair. Again, the relevance of absence of supervision is diminished under the EP Proposal as the allocation mechanism applies to most allocations.

4.4.2 Applicant-state

The Dublin III Regulation as well as the Commission and EP Proposals require an effective remedy against transfer decisions.[148] This right is confirmed in the *Ghezelbash* judgement, in which the CJEU underlined the importance of the right to have effective remedies against incorrect application of the Dublin criteria, not only in the light of the effectiveness of the Dublin system but also to protect the

[141] See Articles 24a and 24b EP DIV Proposal.
[142] Articles 19 and 28 EP DIV Proposal.
[143] See ECRE (2017a) *AIDA Country Report The Netherlands*. 2017 Update, 30 for a rare example.
[144] Commission DIV Proposal, 11.
[145] Article 24 DIII, 25 Commission DIV Proposal and 24a – c EP DIV Proposal.
[146] See Article 5(2) Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJEU L222/3.
[147] CJEU *X and X v Staatssecretaris voor Veiligheid en Justitie* (C-47/17).
[148] Articles 27 DIII and 28 Commission and EP DIV Proposals.

rights conferred on asylum seekers in the Dublin Regulation.[149] But the Commission Proposal limits the grounds of appeal considerably as compared to both the Dublin III Regulation and the EP Proposal, to risk of ill treatment and the criteria that have to do with family unity.[150] This decentralized system of remedies has as a result that key issues as regards the application remain a domestic matter. This is most obvious and problematic where it concerns (alleged) breaches of Article 4 Charter by the requested state. Obviously, when this issue is being raised by an applicant before a national court, it could refer questions to the CJEU for preliminary ruling on the interpretation of Article 4 Charter and the Regulation in the light of the situation at hand. But as it concerns application, courts may feel justified in not referring questions. Tellingly, the matter has occasionally been decided upon by the European Court of Human Rights (hereafter: the ECtHR) – in 2011 the case of *M.S.S.* resulting in a de facto prohibition on transfers to Greece[151] (confirmed 11 months later by the EU Court of Justice in *N.S. a.o.*),[152] and in *Tarakhel*, resulting in a prohibition of transfers of minors to Italy in the absence of guarantees for proper reception.[153] In the absence of guidance by the Strasbourg court, domestic case law as to e.g. resumption of transfers to Greece diverges.[154]

4.5 Regionalization

Separate agreements by member states deviating from Union rules undermine by definition uniform application. In the context of allocation, two such deviations should be mentioned.

First, the Visegrad group or V4, consisting of Poland, Hungary, the Czech Republic and Slovakia, has coordinated its resistance to mandatory allocation of applicants. This concerned the 2015 Council Decisions as well as the corrective mechanism in the Commission proposal. In 2017, the Commission started infringement proceedings against Hungary, Poland and the Czech Republic for their refusal to relocate applicants pursuant to the Council Decisions.[155] In the same year, the CJEU dismissed the actions by Hungary and Slovenia against the relocation decisions, rejecting all claims of these states, including those on the legality and proportionality of the measures.[156]

Second, in August 2018 Greece and Germany concluded an agreement as regards their position on the revision of the CEAS, and an 'administrative arrangement' regarding refusal of entry at the German-Austrian border.[157] This arrangement states i.a. that Germany will return adult third country nationals intercepted at the Austrian-German border who want to apply for asylum to Greece, if an Eurodac entry indicates that the persons concerned has requested protection in Greece from July 1st 2017

[149] CJEU *Ghezelbash* (C-63/15) 52-53.
[150] Article 28(4) Commission DIV Proposal.
[151] ECtHR *M.S.S. v Belgium and Greece* (30696/09).
[152] CJEU *N.S. v SSHD and M.E. a.o. v Refugee Applications Commissioner* (C-411/10 and C-493/10).
[153] ECtHR *Tarakhel* (29217/12).
[154] ECRE states in ECRE (2017b) *AIDA Country Report Greece*, 2017 Update, that Greece received almost 2,000 incoming requests in 2017, and that the Administrative Court of Düsseldorf blocked all transfers due to systemic flaws in procedures and reception (at 16), whereas the Netherlands resumed transfer of applicants in 2018, provided that they were not particularly vulnerable and the Greece provided for individual guarantees for proper reception (TK 2017/18, Aanhangsel 2499; Belgian policy seems similar, cf. Raad voor Vreemdelingenbetwistingen 6 September 2018, nr. RvV 223 867/IX).
[155] Cases C-715, 718 and 719/17.
[156] CJEU *Slovakia and Hungary v. Council* (C-643/15 and C-647/15).
[157] *Administrative Arrangement between the Ministry of Migration Policy of the Hellenic Republic and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border*, 2018.

onward, even if the Greek responsibility has ceased pursuant to Article 13 DIII. Germany further undertakes to swiftly process requests for family reunification in Germany from third country nationals in Greece, capping the number of transfers at 600 persons a month. Obviously, the duty to process such requests already follows from the Dublin III Regulation, which however offers no justification whatsoever for a cap. This arrangement can therefore hardly be characterised as an 'administrative arrangement' allowed for by Article 36 DIII in order to facilitate its application and hence not allowed for.[158]

The latter provision allows for shortening of time limits, not extension, and explicitly requires that arrangements not compatible with the Dublin III Regulation shall be amended. Both the Commission and EP DIV Proposal maintain the provision, and therefore allow for a certain degree of regionalization of application of the Regulation.[159]

Hence, uniform application of the current allocation system is undermined by refusal to abide with Union law. Infringement procedures did not yet bring a solution – as to the agreement between Germany and Greece, the Commission has not even started an infringement procedure. Obviously, this state of affairs bodes ill for the Commission and EP proposals for mandatory distribution. Indeed, resistance to those aspects appear to be a major reason why the Council has not yet reached agreement on the proposal for reform of the Dublin Regulation.[160] In paragraph 7, some possibilities for finding a solution will be suggested.

4.6 Externalization

The Proposals do not imply change as regards their geographical scope – the instruments apply on the territory, at the border and in the territorial waters of the member states,[161] not beyond. In 2017, The CJEU excluded the applicability of the Visa Code in the case of what it deemed a long-stay visa, based on a limited interpretation of the scope of the Visa Code (Regulation 810/2009). Explicitly, the CJEU rejected the obligation for member states to issue humanitarian visa for the purpose to apply for asylum in the EU territory, implicitly the CJEU thus excluded the possibility to apply for asylum at embassies.[162] Member states may be responsible for pushbacks in international waters or territorial waters of other states and for actions by their civil servants on foreign soil under international law, but secondary Union law as it currently stands does not secure that relevant Charter provisions apply extraterritorially.[163]

Considering current measures, proposals and practices in the member states and the EU, two externalization issues deserve further elaboration. First, the safe third country exception. Second, the

[158] Poularakis, S. (2018) *The Case of the Administrative Arrangement between Greece and Germany: A tale of "paraDublin activity"?*.
[159] Article 48 in both Proposals.
[160] See e.g. ECRE (2018b) *Position paper from Southern Member States on Dublin reform*. News 4 May 2018, referring to a.o. the Visegrad group statement at http://www.visegradgroup.eu/documents/2017-2018-hungarian/20172018-hungarian.
[161] Article 2(1) Commission APR Proposal.
[162] CJEU *X and X v Belgium* (C-638/16 PPU).
[163] See Den Heijer M. (2011) *Europe and Extraterritorial Asylum.* Leiden: Leiden University; Battjes H. (2017)*Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses,* in Kuijer M. and Werner W. (eds.), Netherlands Yearbook of International Law 2016, Netherlands Yearbook of International Law 47, 2017, 263-286.

deterritorialization of asylum in Europe. In the latter context, a few remarks will be made on external processing.

4.6.1 Mandatory application of the safe third country exception

The Proposal for the Asylum Procedures Regulation relaxes rules on application of the safe third country exception, in particular where it allows for application even where a country does not provide for protection in accordance with the Refugee Convention.[164] Furthermore, it renders application of the concepts of the safe third country and the safe country of origin mandatory, and pursuant to the Dublin IV Proposal, the state of first application must address these admissibility grounds before even addressing the rules for responsibility (see above, para. 5.2). Thus, the exploration of the possibility to expel the applicant to a non-member state is being prioritised over examination of protection needs, which is a novelty for the CEAS.

Application of the safe third country exception requires in practice readmission agreements. An example is the EU-Turkey statement that entails that Turkey should take back all illegal migrants entering the Greek islands, and that for each Syrian migrant readmitted to Turkey, a Syrian would be resettled from Turkey to one of the member states. The arrangement is based on the assumption that Turkey is a safe third country.[165] As assessments of the arrangement has shown, the way such agreements relate to the need to resettle applicants from non-member states in other to preclude undue pressure begs questions.[166]

4.6.2 Deterritorialization

As analyzed extensively elsewhere, border controls have moved away from the physical borders over the last two decades.[167] As a consequence, the concept of borders has become blurred. It is in this context that externalization should be addressed.

Examples of the mentioned blurring (or deterritorialization) are visa requirements, carrier sanctions and liaison officers controlling passports on foreign soil, and the proliferation of domestic checks on residence status for matters such as employment, education and health care. The existing and proposed measures as well as implementation measures contribute to this tendency. Thus, the so-called borders procedure does not have to be applied close to the physical – in fact, it may anywhere on the territory serve as a special procedure to decide on legal, not factual entry. The policy of establishing 'hotspots' in Italy and Greece, which in a number of cases amounts to impeding applicants to travel further away from the external borders, occurs with an eye to facilitate speedy examination and return.[168] The difference with a disembarkation platform (see below) at the border on the territory of a neighbouring non-member state seems minimal. Thus, a number of features in the present CEAS and member state practice prefigure further externalization.

[164] Article 45(1)(e) Commission APR Proposal; cf.
[165] Van Oort (2018), 33-34.
[166] Den Heijer M., Rijpma J. and Spijkerboer T. (2016) Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System, *Common Market Law Review* 53(2016), 607-642; Battjes H., Brouwer E., Slingenberg L. and Spijkerboer T. (2016), *The Crisis of European Refugee Law: Lessons from Lake Success,* CJV Preadvies 2016.
[167] Battjes H. (2017), p. 263-286.
[168] Van Oort (2018), 38-41.

4.6.3 External processing

As Den Heijer and others observe, a sustainable CEAS will have to find answer to the question what to do in case of a new increase in refugees and displaced persons close to the Union's borders.[169] The Commission starts its explanatory memorandum to the Dublin IV Proposal stating that 'protection in the region and resettlement from there to the EU should become the model for the future',[170] but has hitherto published no blueprint. The ideas that have been published are usually sketchy - the idea for 'regional disembarkation platforms' contemplated by the European Council of June 2018[171] does not even mention whether these platforms would be located inside the EU, in a neighbouring state, elsewhere in Europe, across the Mediterranean or even further south.[172] The conditions on external processing flowing Union and international law as well as other issues involved have been extensively discussed elsewhere.[173] For the purposes of this paper the question comes up to what extend the present proposals suit to accommodate external processing.

If resettlement is to occur on another basis than a voluntary basis, some allocation system is needed. By allocating responsibility in the first place to the state of first application and to the state of first entry, the Commission Proposal for the Dublin Regulation is completely unsuitable; this holds true also for its corrective mechanism. The EP Proposal on the other hand is far better suited to allocate resettled migrants; its distribution key already states that resettled protection beneficiaries do count for the number of applicants a state is responsible for.[174]

As to the other measures, all depends on choices made when establishing the external processing centre. Thus, qualification could be done by UNHCR or by a member state in which case no further measures would be required. If a EU agency would examine applications, rules on procedures would have to be elaborated; furthermore, a Union appeal body would have to be established as well.

4.7 Concluding remarks

The allocation systems of the Dublin III Regulation and the Commission Proposal are decentralized in the sense that interpretation and application of the grounds for responsibility are left to the member states, as well as to the transfer of applicants. The Commission Proposal will bring more unity in interpretation and application by simplifying the grounds for responsibility and procedures. The corrective allocation system allocates applicants regardless of member state requests or acceptations and is hitherto a centralizing element. But transfers of applicants under the mechanisms would still be done by member states.

Under the EP Proposal, allocation by the automated system on the basis of the share of applicants for which a state is responsible will replace the numerically most important grounds for responsibility.

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[169] Den Heijer M., Rijpma J. and Spijkerboer T. (2016).
[170] Commission DIV Proposal, p. 2.
[171] European Council (2018) *European Council meeting (28 June 2018) – Conclusions*. Concl 3 EUCO 9/18.
[172] ECRE observes that all options seem to be on the table as far as Member States are concerned, but that hitherto no third state showed interest in hosting such a platform (ECRE (2018c) *European Council: regional disembarkation platforms a key objective*. News 29 June 2018).
[173] See a.o. Noll G. (2005), *Seeking Asylum at Embassies: A Right to Entry under International Law?*. IJRL [2005] 17, p. 542–573; Den Heijer M. (2011); ACVZ (2010) *External Processing - conditions applying to the processing of asylum applications outside the European Union*. Advisory report 2010.
[174] Article 34(2) Proposal; Cf. Meijers Committee (2016b) CM1614 *Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final)*, 7-8.

Transfers are done not by member states but by the EUAA. Thus, the EP allocation system may be characterized as a mostly centralized system with a decentralized pre-procedure for family unity.

All three systems rely on centralized information management, the Eurodac system, the Commission and EP Proposal furthermore on the 'automated system'. Under all three systems, Eurodac and the automated allocation system rely on member states for entering information on border crossing and application for asylum. Different from the Dublin III Regulation, the Commission Proposal creates an incentive to supply information for states of first entry or first application, as it may result in triggering the corrective mechanism to their benefit. The EP Proposal does so even more: it is hard to see how states can benefit from not entering information into the automated system.

A systemic weakness from the perspective of uniform application is the absence of an appeal body or other mechanism for oversight over application by member states. This concerns both inter-state disputes as well as disputes between applicants and states, in particular where it concerns issues of common importance for all member states and of vital interest for the functioning of the system and compliance with refugee law and human rights. Neither the Commission nor the EP Proposal provide for a solution, apart from enhancing the monitoring and assisting tasks of the EASO by establishing the EUAA.

5. Harmonization of protection

A core assumption underlying the Dublin system is that all member states offer equal or comparable treatment to asylum seekers and to international protection beneficiaries.[175] Inequalities in protection in the member states encourage secondary movements by asylum applicants. There is no doubt that other factors than differences in reception, recognition rates and procedures contribute to such movements – such as ties with a member state (other than those addressed by Dublin criteria) or unemployment rates and availability of work.[176] Still, harmonization as regards reception, qualification and integration will contribute to the effectiveness of the allocation system.[177]

Full harmonization is not possible, if only because a number of states bound by the Dublin system are not bound by the relevant measures.[178] However, problems as regards reception and procedures that seriously affected the working of the allocation system concerned states, bound by all relevant measures.

5.1 Qualification for asylum

Currently, recognition rates differ considerably between member states.[179] The Commission aims to further convergence. It does so by, first, opting for replacing Directive 2011/95/EU (Asylum Qualification Directive or AQD) with a regulation; second, replacing a number of provisions by stricter

[175] Van Oort (2018), 17.
[176] Van Oort (2018), 53.
[177] See e.g. Neumayer E. (2004) *Asylum Destination Choice: What Makes some European Countries more Attractive than Others?*. European Union Politics, 5 (2), 155-180; Kuschminder, K. de Bresser J. and Siegel M. (2015), *Irreguliere Migratieroutes naar Europa en de Factoren die van Invloed zijn op de Bestemmingskeuze van Migranten* WODC, Universiteit van Maastricht; see COM(2016)466final, p. 3.
[178] Van Oort (2018), 26, 42 and 52.
[179] Commission AQR Proposal, 4; Van Oort (2018), 48, 49. As follows from the introduction, this paper does not aim to address why recognition rates differ.

ones and third, by requiring member states' authorities to take into account EUAA analysis and guidelines.[180]

5.1.1 The choice of instrument

The choice for a regulation instead of a directive is not based on a finding that shortcomings in member states' transposition of the AQD has led to a lack of convergence.[181] The quite precise wording of most AQD provisions arguably left member states that opted to stick with the minimum set by the Directive no choice but to transpose them almost literally. According to the Commission, the choice for a regulation explains the absence of a clause allowing for more favourable domestic provisions.[182] As far as this amendment is taken to imply that the provisions on qualification in the AQR address qualification for international protection status exhaustively, three remarks are due.

First, the obligation to interpret Union law in accordance with international law implies that if the latter sets a more favourable standard, the Regulation must be interpreted and applied accordingly.[183] Indeed the Regulation is no obstacle to such an interpretation, as it does not prohibit recognition on the basis of an interpretation of the Refugee Convention not worded in the Regulation.

Second, the AQR addresses the interpretation of both the Refugee Convention and of Article 3 ECHR only partially. The AQR does not address the approach to be taken to assessment of credibility, in cases when a crime as meant in Article 1F has been 'committed', or with regard to claims of e.g. *sur place* applications based on alleged conversion to Christianity. Extension of the Asylum Qualification Regulation with dozens if not hundreds of detailed rules may be possible, it may not be desirable. Arguably, the principle of subsidiarity would resist such legislation. We may observe that the present proposal has not yet been adopted in December 2018, 2,5 years after it was published.

Third, an exhaustive set of rules in a Regulation prescribing interpretation and application of the Refugee Definition and the prohibitions of refoulement is, arguably, not feasible, due to the emergence of ever new situations and the evolution of views on interpretation. The codification of the CJEU case law in EU asylum laws bears witness to that.[184] It is to be doubted, therefore, that the choice for a regulation instead of a directive on qualification will contribute in a significant manner to secure coherence.

5.1.2 Harmonization of the common criteria

Aside from a few provisions codifying recent CJEU case law,[185] most proposed changes either replace optional rules or add more 'prescriptive' ones. As analyzed elsewhere, most of these changes increase possibilities to deny international protection, e.g. as revocation on public order grounds would no longer be optional but become mandatory and as assessment of the internal protection alternative would be mandatory as well[186] (thus, member states must assess whether in a part of the country of

[180] C Commission AQR Proposal, p. 4-5.
[181] Cf. Meijers Committee (2016b) CM1614 *Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final* 2.
[182] Commission AQR Proposal, 12.
[183] E.g. Battjes H. (2006), 119f.
[184] Article 10(3) Commission AQR Proposal serves to codify CJEU C-199/12, XYZ; Article 28(2) serves to codify Alo and Osso, C-443/14 and C-444/14.
[185] E.g. Article 12(6) Commission AQR Proposal, codifying C-57/09, B. and D.
[186] See Van Oort (2018), 50; it concerns Articles 8 and 14 Commission AQR Proposal. Another example is the widening of scope of Article 5, see Van Oort (2018), i.l.

origin the applicant has no well-founded fear nor runs a real risk of ill-treatment or has access to protection, and can safely travel and settle there).[187] Mandatory denial may certainly lead to more uniform outcomes. Still, as observed above, member states remain bound by the Refugee Convention and the prohibitions of refoulement; as far as the provisions on mandatory exclusion are at variance with the Refugee Convention, it is questionable whether all authorities will abide by them.[188] Finally, in accordance with CJEU *M'Bodj*, member states remain free to issue statuses on humanitarian grounds as these statuses fall outside the scope of the instruments on qualification for international protection (as recognised in Article 3(2) AQR).[189] Eurostat reports on e.g. selected member states in the second quarter of 2018 show that the share of 'humanitarian reasons' (as opposed to refugee status, subsidiary protection and rejections) of the total of first decisions ranges from 0% in France and Greece to 5% in Germany and even 29% in Italy – a far greater disparity than e.g. the share of rejections (61% in both Germany and Italy, and 73% in France).[190]

5.1.3 EUAA Guidelines

The Commission envisages enhancing coherence by imposing the obligation to take into account country of origin information provided for by the EU Asylum Agency on, *inter alia*, assessment of the internal protection alternative, cessation and review of refugee and subsidiary protection status.[191] Reliance by member state authorities on diverging country of origin may indeed lead to major divergences, for example where it concerns the existence of a general situation of violence in (a part of) a country that warrants all third country nationals from (that part of) that country subsidiary protection.[192] Reliable and up to date information and guidance from EUAA may hence indeed contribute significantly to convergence in decision-making.

That being said, two remarks can be made. First, the obligation to take into account information by EASO already exists as regards the internal protection alternative; furthermore, in general the assessment of well-founded fear or real risk requires reliable country of origin information. Up till now, EASO information and guidelines have at best played a very modest role. Indeed, EASO only recently issued its first guidelines (on Afghanistan); EASO country of origin information on e.g. Ethiopia, Iran and Libya is lacking.[193] Possibly, the convergence into the EUAA and expansion of its budget will bring change. Still, also when EUAA manages to issue on a more regular basis country of origin information and country guidance, its information will be taken into account and assessed next to information from other sources (as the AQR duly requires).[194]

Second, common factual information and guidance may contribute to convergence in decision-making. But ultimately, the existence of an internal protection alternative or of a general situation of violence

[187] See Van Oort (2018), 51.
[188] It concerns the wording of Articles 14 and 26(2) Commission AQR Proposal, see Van Oort (2018), 50.
[189] CJEU *M'Bodj* (C-542/13).
[190] Eurostat (2018) Asylum Quarterly Report 2nd Quarter 2018.
[191] Articles 8, 11, 15, 17 and 21 Commission AQR Proposal.
[192] E.g. the Dutch Council of State ruled in its judgement of 4 January 2018, ECLI:NL:RVS:2018:2 that there is no situation as meant in Article 15(c) AQD in Tripoli, although the British Upper Tribunal (Immigration and Asylum Chamber) had ruled on 28 June 2017, [2017] UKUT 00263 (IAC) that there was such a situation in the whole of Libya; as it concerned a different assessment of facts there was no reason to refer the matter to the CJEU for preliminary, the Council of State reasoned.
[193] Conclusion based on materials available on the EASO website (easo.europa.eu), visited 29 November 2018.
[194] Articles 7(3), 15 and 21 Commission AQR Proposal (requiring authorities to base themselves 'in particular' hence not exclusively on EUAA information), 8(3), 11(2)(b) and 17(2)(b) Commission AQR Proposal (information 'from all relevant sources, including' EUAA).

in a country remains a matter of law, not only of fact. In the absence of a common EU decision-making appeal body, national decision-making and adjudication in the member states will continue to show divergences.[195] As observed above as regards the adjudication of a systemic failure of reception and procedures in a member state for the purposes of application of the Dublin Regulation, such issues may as interpretation questions be referred to the Court of Justice, but in practice the ECtHR acts as a European court on the qualification of facts (e.g. the ECtHR rulings on the existence of a general situation of violence in Somalia and Syria, and the absence of it in Afghanistan and Iraq).[196]

Obviously, the ECtHR can act as EU appeal body as regards facts only to a certain degree. It has no say in matters interpreting the Refugee Convention. As to real risk of ill treatment, it is not bound by the Asylum Qualification Directive (or the proposed Regulation). And ironically, to the extend that the ECtHR in practice contributes to bring coherence to application and adjudication of Union law on qualification, its case-law may also imply a threat to its integrity – namely, where its rulings would run counter to provisions of Union law.

5.2 Procedures

5.2.1 The Asylum Procedures Directive

As to asylum procedures, several shortcomings under the current Asylum Procedures Directive have been identified. First, after the expiration of the transposition date the Commission saw reason to start no less than 18 infringements proceedings, three of which resulted in reasoned opinions.[197] Second, the Directive allowed for a whole array of procedures, which in fact mean that for certain types of situations or rejection grounds, less procedural safeguards than standard could be provided.[198] As observed by numerous authors, the existence of several procedures in itself runs against the TFEU aim of providing for 'a common procedure'.[199] Third, many instances of non-compliance with the APD have been reported, a number of which amounted to possibly serious violations of international and European asylum law, such as breaches of the prohibition of refoulement by sending back applicants while ignoring requests for asylum.[200] That non-compliance may seriously affect the working of the Dublin system was shown in 2011, when the ECtHR and later the CJEU ruled that transfers to Greece were prohibited by Article 3 ECHR (4 Charter), due to (i.a.) shortcomings in the Greek asylum procedure were.[201] Fourth, state practice showed great divergences, in particular (but certainly not exclusively) as regards the application of the safe country of origin and safe third country concept.[202]

[195] Meijers Committee (2016b) CM1614 *Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final* 1.
[196] ECtHR *L.M. a.o. v Russia* (40081/14), *Sufi and Elmi v UK* (8319/07, Somalia), *H. and B. v UK* (70073/10, Afghanistan), *J.K. a.o. v Sweden* (59166/12, Iraq).
[197] Van Oort (2018), with references.
[198] Van Oort (2018), 29.
[199] Ibid.
[200] See Van Oort (2018), 27-28 for a non-exhaustive list of examples such as push-backs at the Mediterranean Sea, fences at the Hungarian-Serbian border and refusal of access by Bulgarian border guards.
[201] ECtHR *M.S.S. v Belgium and Greece* (30696/09); CJEU *N.S. v SSHD and M.E. a.o. v Refugee Applications Commissioner* (C-411/10 and C-493/10); see above para. 3.4.
[202] See Van Oort (2018), 32-34 with references.

5.2.2 The Asylum Procedures Regulation

The Commission Proposal seeks to solve a number of the issues raised with regard to the Asylum Procedures Directive. Obviously, the choice for a regulation excludes problems concerning transposition. Dealing with the several options for the setup of asylum procedures, the Asylum Procedures Regulation according to its heading and Article 1 serves to establish 'a common procedure'. It indeed does annul a number of options the APD offers: certain types of cases shall (not, as in the APD, may) be dealt with in the accelerated procedure, and declaring applications non-admissible (if a safe third country exception applies or if it is a subsequent applicant) or manifestly unfounded on a number of grounds (non-meritorious claims, the applicant comes from a safe country of origin or poses a threat to public order) is mandatory, not optional as under the APD.[203] The Regulation further states that the Commission will make a list of safe third countries and of safe countries of origin;[204] national lists may be used only for five years after the APR enters into force.[205] In so far, the Commission proposal is indeed a move towards a common procedure – and the EP Proposal less so as it aims to render application of grounds for non-admissibility and manifestly unfoundedness and the application of the accelerated procedure optional, not mandatory; it does not opt for a Union list of safe third countries. However, the safe third country concept must also be applied 'in individual cases in relation to a specific applicant',[206] hence 'in individual cases' states not on the list can be regarded as safe third countries as well.[207]

Furthermore, the Asylum Procedures Regulation leaves member state authorities the option to prioritise manifestly (well) founded applications and applications by persons with special needs as well as deciding in border procedures.[208] Obviously this does not concern choice for member states to adopt in domestic legislation e.g. a border procedure or not, but discretion for national asylum authorities. Still, as there will be no Union supervision over application (other than the regular preliminary ruling and infringement procedures), member states can stick to diverging national practices in these regards. It should further be observed that the APR leaves some issues quite explicitly to member states. Thus, it assumes that states may provide for second tier appeal without regulating the matter.[209] And some of the most contentious issues in asylum procedures, such as how exactly asylum authorities should establish the credibility of the statements of applicants is hardly addressed. Hitherto, the Regulation Proposal brings less uniformity than its title suggests. As regards the finding that non-application of the Asylum Procedures Directive is one of the most important causes for divergences, there is no reason to assume that member states will be more able or, as the case may be, willing to comply with procedural rules and standards when these are laid down in a regulation than in a directive.

[203] See Article 36(1) and 37(3) Commission AQR Proposal, as compared to Article 33(2) and 31(8) APD.
[204] Articles 46 and 48 APD. However
[205] Article 50 Commission APR Proposal.
[206] Article 45(2)(c) Commission APR Proposal.
[207] Incidentally, although common lists do contribute to uniformity in decision making, the question can be asked whether from a perspective of subsidiarity Commission best placed to assess; frequent changes easier on national than EU level; Meijers Committee (2018) CM1805 *Note on the proposal for the Procedures Regulation and Dublin Regulation*, 3.
[208] Article 33(5) and 41(1) Commission APR Proposal.
[209] Cf. Article 15(5)(c) Commission APR Proposal, on free legal assistance in higher appeal.

5.3 Reception

5.3.1 The Reception Conditions Directive

Directive 2013/33/EC (the Reception Conditions Directive or RCD) serves to secure that applicants are being offered equivalent treatment as regards reception in all member states. According to the Commission, there are currently not only 'wide divergences' as to the level of reception offered but also 'persistent problems' as to securing standards for dignified treatment, blaming it mainly to poor implementation of existing standards.[210] It has been observed that the current Directive allows for differences as regards the definition of what constitutes an adequate standard of living, and how it is to be achieved. Levels of investment differ considerably, as well as the way reception is being organised.[211] Thus, a number of member states distinguish between first line reception (i.e. of newly arrived applicants) and second line (longer term reception of applicants in procedure).[212] The instrument further allows for diverging practices as regards detention, the identification of and catering for persons with special needs, and access to the labour market.[213] The Directive allows for setting different modalities when accommodation in kind is not available in a certain area or temporarily exhausted.[214] It is left to member states how material reception conditions (such as food and housing) are offered.[215] Financial assistance should be set at a level ensuring 'an adequate standard of living for nationals', but may be set lower.[216] Hence, the benchmark for the level is a national standard, not a common one.

That the Reception Conditions Directive did not achieve its aims was shown most dramatically by the findings of the ECtHR and the CJEU in 2011 that the Greek asylum reception system showed such systemic shortcomings that transfers to that state were no longer allowed for.[217] Similarly, the ECtHR found in 2014 that the reception conditions in Italy were in general not apt for minors.[218]

5.3.2 The Commission Proposal

The 2016 Proposal for a recast of the Reception Conditions Directive serves to further harmonization. It does so to a certain extent by clarifying what material reception standards entail,[219] in regular and in exceptional circumstances,[220] by granting earlier access to the labour market and defining more strictly the conditions on access, and by stating rules on identifying special reception needs.[221] Furthermore, is has been observed that monitoring by the EUAA may contribute to convergence.[222] However, the

[210] Commission RCD Proposal, Explanatory memorandum, p. 3 and preamble recitals (3) and (5).
[211] EASO (2017) *Annual Report on the Situation of Asylum in the EU and latest asylum figures 2016*, 104.
[212] ECRE (2016), *Wrong counts and closing doors: the reception of asylum seekers in Europe*, 11.
[213] See Van Oort (2018), 54-62.
[214] Articles 18 and 19 Commission RCD Proposal.
[215] Article 17 Commission RCD Proposal.
[216] Article 17(5) Commission RCD Proposal.
[217] ECtHR *M.S.S. v Belgium and Greece* (30696/09); CJEU *N.S. v SSHD and M.E. a.o. v Refugee Applications Commissioner* (C-411/10 and C-493/10).
[218] ECtHR *Tarakhel v Switzerland* (29217/12).
[219] Article 2(7) Commission RCD Proposal.
[220] Article 17(9) Commission RCD Proposal.
[221] Article 21 Commission RCD Proposal.
[222] Meijers Committee (2016b) CM1614 *Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final* 12.

Proposal still leaves options for member states that will lead to differences. Thus, it allows for reduction or withdrawal of benefits from applicants who (a.o.) abandoned a determined place, lodged a subsequent applicant, or left the responsible member state.[223] And the standard for reception conditions remains the standards of living for nationals.[224] Most telling in this respect is the explanation by the Commission why a Directive and not a Regulation was proposed: 'Considering the current significant differences in Member States' social and economic conditions, it is not considered feasible or desirable to fully harmonise Member States' reception conditions.'[225]

5.4 Benefits for international protection beneficiaries

The AQR Proposal brings few changes to the provisions on benefits in the Asylum Qualifications Directive, apart from those already mentioned (mandatory exclusion and withdrawal of status, and restart of the five year period for obtaining long term resident status if an applicant is illegally present in another member state – see paras. 5.1 and 2.2 above).[226] Following the approach in the Refugee Convention, the Regulation like the Directive requires treatment as regards e.g. access to education, welfare and housing on the same terms as the member state grants access to nationals, or to aliens generally. Obviously, this has led and will continue to lead to great disparities. Standards for benefits for international protection beneficiaries are dependent, first, on choices made by Member States – the Union is not competent to set standards on e.g. access to housing. Secondly, even when states did make comparable choices, what the benefit will actually amount to will vary from state to state, depending on the domestic social and economic situation. To a certain extent, disparities could have been diminished: by setting the same standard for all member states – e.g. treatment as nationals or as EU citizens who exercise freedom of movement. Still, as long as education, health, housing and so on remain the exclusive competence of the member states, no meaningful harmonization is possible.[227]

As observed above, the lack of harmonization with regard to benefits for international protection beneficiaries does have consequences for the functioning of the allocation system. Third country nationals who were granted international protection by a.o. Bulgaria, Greece and Italy lodged applications for asylum in other member states, stating that their socio-economic circumstances were comparable to those in the cases of *M.S.S.* and *Tarakhel* and hence resulted in a violation of Article 4 Charter and 3 ECHR. Hitherto, the ECtHR has not found such a breach in cases of transfer of international protection beneficiaries, inter alia because due to their legal status the situation of protection beneficiaries and applicants as deemed incomparable.[228] But the Human Rights Committee as well as among other domestic courts the German Constitutional Court stated that international

[223] Article 19(1) and (2) Commission RCD Proposal.
[224] Article 16(6) Commission RCD Proposal.
[225] Commission RCD Proposal, Explanatory memorandum, p. 6.
[226] Most importantly, the validity of the residence permit for refugees is set at three years, and for subsidiary protection beneficiaries at one year (Article 26 Commission AQR Proposal).
[227] Den Heijer M., Rijpma J. and Spijkerboer T. (2016); Meijers Committee (2016b) CM1614 *Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final*.
[228] See e.g. the decisions ECtHR *E.T. and T.N. v Switzerland and Italy* (79480/13); ECtHR *Mohammed Hussein a.o. v the Netherlands and Italy* (27725/10).

protection beneficiary status does not preclude such claims.[229] A question on the matter has been referred for preliminary ruling to the CJEU.[230]

Whatever their outcome, these cases show (besides non-compliance with legal obligations by member states) that the choice to disregard preferences of applicants when determining the responsible member state not only leads to so-called secondary movements before the application has been examined, but also afterwards. As argued above, Union law is not able to address the inequalities between member states as regards benefits for status beneficiaries in order to diminish the incentive for such movements.

5.5 Concluding remarks

Further harmonization of rules on qualification, procedures, reception and benefits for international protection beneficiaries is justified partially by the wish to take away incentives for secondary movements, which would be beneficial for the functioning of the allocation system. In how far harmonization can indeed contribute is unclear – other factors do also stimulate secondary movements. That harmonization in law and practice is mandatory for the functioning of the system however is beyond doubt as the cases of *M.S.S.* and *Tarakhel* have shown.

It is unlikely that the Proposals by the Commission will result in the level of harmonization the Commission aims at. As to qualification, the aim of exhaustively defining who is eligible for international protection is arguably unattainable due to the unpredictability of issues that may come up. Further, qualification is as much a matter of international law, which resists uniform definition by Union law. A major cause for disharmony between member states may be divergent country of origin information. In this respect, the broadening of tasks and budget for the European Union Agency for Asylum may certainly contribute to further harmonization, although not to uniformity as other sources of information will stay relevant as well. As to procedures, the simplifications envisaged by the Asylum Procedures Regulation as well as the choice of instrument will undoubtedly contribute to harmonization. Still, the instruments allows for diverging practices in member states, and leaves certain issues virtually unregulated. For both qualification and procedures the level of harmonization aimed for can arguably be achieved only by establishing a European decision-making or at least a European appeal body. As argued above, currently the European Court of Human Rights partially functions as such.

As to reception, again the new proposal does bring clarification and a number of stricter rules which will beyond doubt contribute to more harmonized practices. But the instrument still leaves options for member states, which hampers harmonization. And above all, social and economic differences between member states are an obstacle to common standards beyond the reach of the instrument. The latter holds true also for Union rules on benefits for international protection beneficiaries. As the content of these benefits depends completely on domestic arrangements and on the development of member states, it is fair to say that in this respect the Proposal can and will achieve harmonization in name only.

It follows from all this that disparities will persist. These disparities will be remaining incentives for secondary movements. Serious disparities amounting to breaches of human rights are furthermore

[229] HRC 15 December 2016, *R.A.A. v Denmark* (2608/2015, on Bulgaria), HRC 21 April 2017, *Y.A.A. and F.H.M. v Denmark* (2681/2015, on Italy), BVerfG 8 May 2017, ECLI rk20170508.2bvr015717 (on Greece) and BVerfG 29 August 2017, ECLI rk20170829.2bvr086317 (on Bulgaria).
[230] C-541/17, *FRG v Amar Omar*.

justifications for secondary movements: it followed from *N.S.* that third country nationals arriving in the Union on Greek territory could lodge an application in another member state that hence would be responsible. Arguably, the punitive measures for applicants who did not stay in the country of entry in the Proposals for the new Dublin and Procedures Regulations and the Reception Conditions Directive are in so far unjustified.

6. Concluding remarks

The Dublin Regulation does not only regulate responsibility for applicants whose application must be examined, it also determines allocation of responsibility after examination, hence of international protection beneficiaries and illegally present third country nationals. The proposals for recasting the Dublin Regulation and other CEAS instruments by the Commission and the European Parliament maintain this set-up and even reinforce it, e.g. by introducing the rule that a member state remains responsible even after an applicant left the European Union for more than three months (see para. 2.4 above). This is remarkable as the Treaty basis of the instrument asks for criteria and mechanisms for determining responsibility for considering an application for international protection, not for third country nationals also after the examination. Like the Dublin Regulation, neither of both Proposals offer for a justification for this extension of scope.

Whereas the Dublin III Regulation leaves the member states as to a number of grounds for responsibility a certain or even considerable margin of discretion (in particular in the humanitarian and sovereignty clauses), the Commission and EP proposal provide for far stricter rules (see para. 4.6 above). The Commission Proposal for a Dublin IV Regulation maintains the existing, decentralized set-up of allocation: normally, member states apply the criteria and carry out transfers, and if a member state refuses to accept responsibility, there is no appeal body to decide. The corrective mechanism envisaged by the Commission Proposal is a centralizing element that however applies only in exceptional circumstances. The EP Proposal maintains the decentralized set-up only as regards the criteria on a genuine link between the applicant and a member state (because a family member is legally present, a diploma was obtained there or because the member state issued a visa). For most cases, it opts for centralized distribution. Furthermore, transfers are carried out not by member states but by the EU Agency for Asylum – that is, as far as taking charge is concerned. Transferring applicants, international protection beneficiaries or illegally residing third country nationals who left the responsible member state remains a matter for the member states.

In the introduction, it was observed that the TFEU establishes as aims securing that an asylum seeker will receive appropriate protection, observance of the Refugee Convention and by extension, of human rights, and solidarity among member states. Several criteria of the Dublin system, as well as other rules of EU law and national practices do not seem to serve one of these aims. The Dublin III Regulation seems to be geared to primarily allocating responsibility with the member state where the applicant entered the EU, thus serving as an incentive to border control.[231] The same applies to the Commission Proposal: responsibility due to irregular entry is even reinforced by deleting the clause on cessation 12 months after the entry. This effect is mitigated only in exceptional circumstances by the corrective mechanism. In stark contrast, the criteria allocating responsibility for entry or to the first state of application have been abolished in the EP Proposal.

[231] Van Oort (2018), para. 2.2.1 with references.

As to the preferences of the applicants, it was observed in para. 3.1 that there is no reason to assume that applicants have a right to choose a country of refuge, but also that if precluding secondary movements is among the aims of the allocation system, it would be wise to accommodate those preferences when and where possible. The preferences of the applicants are reflected only very partially in the Dublin III Regulation and the Commission: in the criteria that concern family unity, and partially in the rule that states that if no criterion applies the state of first application is responsible. Under the corrective mechanism, the applicant's preferences play no role. The EP Proposal introduces a few criteria that may serve allocation to a state preferred by the applicant (although it may be doubted that responsibility for the state where an applicant received a diploma will apply to big numbers).[232] And under the allocation mechanism, the applicant may choose between four states. However, the rule rendering the member state of first application responsible is abolished by the EP. The applicant would hence lose this means of expression of preference. It is safe to conclude that the EP Proposal at best strives to balance solidarity among member states and the applicants' interests, but in fact subordinates the latter to the former.

Further harmonization of rules on qualification, procedures and reception conditions is expected to take away pull factors for applicants, and hence reduce secondary movements. The Proposals of the Commission do certainly cater for more harmonization, especially with regard to the common procedure and to reception conditions. But the proposals still leave room for diverging practices (see para. 5.5). It was argued that uniformity is not possible for several reasons. The EU simply lacks the competencies to regulate issues such as housing for international protection beneficiaries. Member states differ to much in socio-economic respects to achieve uniformity in reception conditions, and the subject matter of procedures and qualification resists exhaustive regulation. International law in general and the evolving case-law of the European Court of Human Rights in particular can always provide for incentives to diverge. In this context, it has been observed that the role of the latter Court is ambiguous. On the one hand, it in fact serves as a common, supranational court on certain issues of fact, such as the question whether treatment of asylum seekers in a member state resists Dublin transfers or whether the general situation of violence in a third country stands in the way of expulsion. On the other hand, as its binding rulings may diverge from rules of EU law it remains a possible source of divergence.

Practices in the current CEAS and the Proposals of the Commission show a certain tendency towards externalization. Border procedures are and remain allowed for, and reception does and may continue to take place close to the border; both the Dublin III Regulation and the Commission DIV Proposal provide for a strong incentive to control entry into the territory. The Proposal furthermore requires application of the safe third country exception before determination of responsibility for (further) examination. It has been observed above (para. 6) that further externalization, e.g. in the form of common processing of applications outside the EU, will require that a number of the issues identified above should be solved: a system for allocating responsibility on other grounds than entry into the EU, full harmonization of rules on qualification, procedures and reception and arguably, an EU appeal court as to the facts.

[232] The EP further proposes to add a clause to Article 19, the successor to Article 17 DIII according to which a member state may voluntarily assume responsibility, stating that the applicant may request the state to do so. It is hard to see what this means as it is this state where the applicant lodged an application for asylum, which implies a request to assume responsibility.

In this paper, little attention has been paid to the deliberations on the Proposal for the Dublin IV Regulation and other proposals as these have thus far not led to elaborated alternatives. It is clear from those deliberations that it will be hard to make a compromise out of the quite opposite approaches to allocation in the Commission and EP Proposals, and divergent approaches of groups of member states.[233] The findings of this study do contain elements that may help to find a way out.

First, allocation does not concern only numbers of applicants whose application must be examined, it also concerns allocation of responsibility after examination, hence of international protection beneficiaries and illegally present third country nationals. The perceived burden of a certain number of applicants can partially be relieved by curtailing responsibilities for one of these categories, or for both of them. The most audacious way to approach this would be to grant beneficiaries freedom of movement directly or sooner or on more lenient conditions than the Long-Term Residents Directive does, and to centralize return.

Second, an allocation system that aims to secure fair sharing cannot accommodate all preferences of applicants, and vice versa. Also the EP Proposal, although seeking to accommodate preferences, ultimately gives fair sharing precedence. Still, there are possibilities to try and accommodate such opposed interests. Preferences of applicants can be accommodated outside the system for allocating responsibility for examination, hence by granting freedom of movement to international protection beneficiaries. As to the aim of giving member states an incentive to control external borders, the same holds true: as cooperation on external border controls has been intensified, the need to stimulate this by means of a system for allocation of responsibility decreases.

Third, as Den Heijer a.o. state, allocation systems that are based on force against either applicants unwilling to apply in the responsible member state or member states unwilling to receive applicants are bound to be severely strained if not to fail.[234] As to forcing applicants, one way to reduce pressure would again be granting freedom of movement earlier and/or in more lenient terms. As to forcing member states, the possibility of exchanging sharing people for sharing money seems a possibility. Although one may, as the LIBE rapporteur (see para. 3.2), find the possibility to opt out of distribution in exchange for money reprehensible, it may provide a solution with regard to ensure 'financial solidarity' amongst member states. It should be noted that as matters currently stand, Hungary applied asylum measures in such a way that the Commission started infringement proceedings. Indeed, as far as the Dublin system functioned over the last seven years, it did so without one or more member states of relocation effectively taking part.

[233] One Belgian minister even declared the proposal for reform of the Dublin system 'dead' (see europarl.europa.eu/doceo/document/E-8-2018-003954_EN.html).
[234] Den Heijer M., Rijpma J. and Spijkerboer T. (2016).

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