Responsibility allocation and solidarity

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TAMPERE CONCLUSIONS

13. The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System (…).

14. This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application (…).

16. The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States (…).

PART 1: ASSESSMENT OF THE CURRENT SITUATION

The 1999 Tampere conclusions called for a "clear and workable determination of the State responsible for the examination of an asylum application", as well as for a system of "temporary protection for displaced persons on the basis of solidarity between Member States."[2]

The Lisbon Treaty has maintained and developed these elements. Article 78(2)(e) TFEU refers to the adoption of "criteria and mechanisms" for determining the member state responsible as necessary for the establishment of a Common European Asylum System (CEAS). Article 80 TFEU enshrines the "principle of solidarity and fair sharing of responsibility" as a governing principle of all EU migration policies. Furthermore, Article 78(3) TFEU authorises the Council to adopt "provisional measures" for the benefit of the states confronted by an "emergency situation".

However, two decades after Tampere and one after the entry into force of the Lisbon Treaty, the CEAS still lacks a truly workable system of responsibility allocation, while solidarity and the fair sharing of responsibilities remain to a large extent *Zukunftsmusik*.

A. Has the Dublin system failed?

The Dublin system has been in force since the mid-1990s, and statistical data provides a relatively clear quantitative picture of its functioning. Over the past decade, a mere 3% of all applications made in the EU+ states (i.e. EU member states and those of the European Free Trade Association) have given rise to a Dublin transfer. Most (i.e. 60% to 80% yearly) are 'take backs' of persons who have left their responsible State to seek asylum or simply stay elsewhere in the EU+. 'Take charges' (i.e. transfers made because the Dublin criteria indicate a state other than that of application as responsible) were executed for less than 1% of all applications on average.

Thus, while Dublin helps detect multiple applications and prevent their examination, its effects in allocating responsibilities by predetermined criteria are practically nil. Indeed, the state responsible is nearly always the one where the applicant lodges the first application.

This may or may not be regarded as a problem, but it certainly casts doubt on the usefulness of the responsibility criteria and the thousands of yearly 'take charge' procedures carried out in order to apply them. Furthermore, the system is notoriously inefficient: between 66% and 75% of all agreed transfers are not implemented. Therefore, the vast majority of the Dublin procedures carried out yearly – both 'take charges' and 'take backs' – achieve no tangible result even when a transfer decision is adopted.

While this certainly casts the Dublin system as extremely wasteful, the data presented above is not (yet) a sufficient basis to state that the Dublin system fails to achieve its objectives.

To begin with, and quite independently from the goals formally attributed to the system, member states may have different views as to what its purposes or uses are or should be. Some member states lament the fact that the Dublin system does not correct the inherently unbalanced distribution of asylum responsibilities within the Union – a function that it is not in fact designed to perform, despite lip-service paid to solidarity in Recital 25 of Regulation No. 604/2013 (the Dublin III Regulation). Other member states, who receive few asylum claims and few Dublin transfers, are satisfied with the system precisely because it leaves them out of asylum-related migration movements. While this view may be unacceptable to the initially mentioned member states and is inherently problematic in a "common" European asylum system, it may explain why there is still support for the status quo in some quarters.

No system of responsibility allocation can function correctly if reception and protection practices diverge strongly or, worse, if there are 'protection black holes' in the EU+. No system of responsibility allocation is sustainable unless member states can rely on solidarity schemes capable of offsetting distributive unbalances, both structurally and in times of crisis.

Regarding the stated objectives of the system, the statistical data quoted above clearly shows that the Dublin system does not, in fact, allocate responsibilities according to predetermined criteria as it should in theory. Still, the major functions of the system are to assign each application to the responsibility of a member state and to prevent the examination of multiple applications. Arguably, Dublin achieves both purposes: it does indicate a state responsible for every application – most often, by default, the state where the application is first lodged – and makes it practically unavoidable for multiple applications to be detected via the Eurodac database. In fact, we can measure the contribution made by the Dublin system to the functioning of the CEAS by observing the effects of its 'disapplication' in the wake of the 2015 crisis: as member states lost faith in Dublin and turned instead to deterrence and push-back measures of dubious legality in order to curb secondary movements,[3] we witnessed the reappearance of 'orbit situations'. This is a reminder that if it is not to devolve into chaos, the CEAS needs a responsibility allocation mechanism and that, for all its shortcomings, Dublin is better than no mechanism at all.

Still, the figures given at the beginning of this section indicate without a doubt that Dublin achieves its objectives in an extremely inefficient and wasteful manner. Furthermore, it generates many 'extra costs' that those statistics do not capture: the direct financial and administrative cost of Dublin procedures; the significant delaying of asylum procedures proper; the hardship caused to applicants and their families; the loss of confidence and cooperation between applicants and asylum authorities; the loss of control on migration movements to and between the member states, as applicants are incentivised to avoid identification in the first state they enter and to engage in irregular secondary movements. It is no small irony that a system born to "rationalise the treatment

of asylum claims"[4] should hinder it to such an extent. Could an alternative system that fulfils the major functions outlined above while minimising the costs described be devised? Before such an alternative is explored, however, the more pressing question is, why does the Dublin system perform as it does?

B. Why does the Dublin system perform as it does?

Applicants' "abuses and asylum shopping" are often cited as the causes of the state of affairs just described.[5] Things, however, are more complex. True, there is widespread resistance and evasion by the applicants, and this strongly affects the functioning of Dublin. Nevertheless, calling this an 'abuse' tout court is a gross simplification: the results produced by the system are widely and justifiably perceived as arbitrary by the applicants, especially in a context where adequate and convergent standards are not guaranteed in all of the member states and the Dublin system functions like a 'protection lottery'. Moreover, the administrative (in)action of the respective member state is as big a factor as applicants' resistance to the (mal)functioning of Dublin. Indeed, delays, inefficiency and ineffectiveness are in many instances due to the inherent complexities of the administrative procedures, bureaucratic difficulties or lack of resources.[6] Furthermore, in the absence of sufficient and reliable solidarity schemes at the EU level, member states tend to apply the system non-cooperatively – to maximise others' and minimise their responsibilities – with high costs for a correct and efficient implementation.

To follow on from this, there is a deep connection between the discussion on the reform of Dublin and broader debates on the lack of solidarity and fair sharing in the CEAS, which many regard as one of the latter's major weaknesses. Dublin itself is part of the problem. As its pivotal responsibility criterion is the irregular crossing of an external border, the system theoretically shifts the 'burden' of protection on the states located at the periphery of the Union. In practice, as noted above, the distributive impact of the Dublin criteria is minimal. Still, the system tends to place responsibility on the states where the first application is lodged, and so to crystallise a profoundly unbalanced distribution of applications.

The current 'solidarity toolbox' falls well short of compensating for such imbalances.[7] While EU funding has grown considerably during the crisis, especially in favour of 'frontline' states such as Greece, it is still far from offering a comprehensive compensation of asylum-related costs incurred by the member states. Operational support via agencies has also been strengthened, but the question on how to transform it into a more effective solidarity tool remains (see Chapter 2).

As for the physical dispersal of protection seekers, the only significant experiences so far have been the relocation programs launched in September 2015 for the benefit of Greece and Italy under Article 78(3) TFEU. These have no doubt afforded some measure of relief to those two 'frontline states', allowed approximately 35,000 persons to access better protection and constituted an important occasion for institutional learning. Still, numbers have been limited

in relation to initial pledges and, most importantly, to the needs of the two beneficiary states. Indeed, the stark limits of 'European solidarity' have been evidenced by both the restricted scope of the schemes and the determined resistance opposed by some member states to their implementation. The current disembarkation crisis in the Mediterranean, where ad hoc solutions are found after protracted negotiations over extremely small numbers of persons, further highlight the lack of structured and reliable solidarity in the EU.

PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

Any system of solidarity and responsibility allocation, present or future, must take account of the following points:

- Respect for fundamental rights and a 'full and inclusive application' of the 1951 Convention must be guaranteed.

- No system of responsibility allocation can function correctly if reception and protection practices diverge strongly or, worse, if there are 'protection black holes' in the EU+. Such divergences and gaps turn responsibility allocation into an arbitrary 'protection lottery', undermine trust in the integrity of the CEAS, and fuel irregular onward movements. It is unacceptable that practices which openly disregard core EU and international standards are tolerated. The standards are in place, and implementation gaps must be closed as a matter of priority.[8]

- No system of responsibility allocation is sustainable unless member states can rely on solidarity schemes capable of offsetting distributive unbalances, both structurally and in times of crisis. As experience shows, without these schemes, the incentives to defect (e.g. to stop taking fingerprints, to 'wave through', to engage in push-back practices) may simply be too strong for states that experience or anticipate increased pressure, or believe that they are on the losing side of the bargain.

Regarding reform options for responsibility allocation and solidarity, there is hardly any other area of EU politics where perceptions, interests and ideas on how to go forward diverge as strongly. Discussions surrounding the reform of Dublin have intersected discussions on how to operationalise the principle of solidarity and fair sharing of responsibility enshrined in Article 80 TFEU, adding further complexity.

In the last few years, at least three divergent approaches have emerged. The Commission approach, expressed in its 2016 Dublin IV Proposal,[9] is to maintain the Dublin system, accentuate its coercive aspects in order to curb secondary movements, preface it with a 'pre-procedure' to filter out 'safe country' and 'security cases', and complement it with a 'corrective' allocation mechanism to be activated when necessary. The approach taken by the European Parliament differs substantially. It is based on incentivising compliance by applicants and member states (i.a. through an in-depth revision of the criteria, whereby 'irregular entry' would no longer be relevant and only 'real links' would matter), and the establishment of a permanent quota-based allocation system. A third approach, advocated in academia and civil society, partially coincides with the European Parliament's approach (i.e. the emphasis on 'real link' criteria) but is also based on the idea that in order to

ensure swift and economical responsibility allocation, coercive elements must be abandoned to the extent possible.

Rather than discussing these three approaches as 'closed packages', they will be unpacked, and their most salient issues to be addressed in the coming debates identified.

A. Carefully choosing the function(s) and criteria of responsibility allocation

The three approaches described above all differ in the functions that they assign to responsibility allocation. The traditional Dublin approach, reinforced in the Dublin IV proposal, places responsibility allocation at the service of migration control in the Schengen Area. In this perspective, subject to exceptions designed to protect family life, applicants should ask for protection from and have their application examined by the member state of first entry, while secondary movements should be discouraged or sanctioned. This concept is still strongly supported by some member states and is typically justified with the argument that since the EU is a single area of protection, 'true' refugees must ask protection as soon as they enter it.

However, as intimated above, the EU is not yet a single area of protection in any real sense: protection costs are borne to a large extent by national budgets, national implementation practices diverge, and beneficiaries of protection do not enjoy free movement rights. It is therefore extremely difficult to justify the idea that a handful of states located at the Union's external borders should process the vast majority of the applications lodged in the EU and bear the related costs. From the standpoint of Article 80 TFEU, such a system could only be accepted if costs were entirely offset via structural 'fair sharing' measures (see Part 2, D and E). Ersatz 'corrective mechanisms', such as the one proposed by the Commission, provide only partial compensation and fail to make the concept equitable or sustainable in addition to being unworkable (see Part 2, C).

Quite apart from such considerations, experience shows that without a fully level playing field nor any extensive consideration provided to the 'real links' and aspirations of the applicants, a system of this kind invites widespread resistance from the applicants, requires a considerable amount of coercion, and is inherently prone to cause all the problems observed in the past two decades under Dublin. This is especially true in an area without internal borders: constraining free movement coercively in a common travel area is per se an uphill struggle.

There is, therefore, a very real trade-off between concentrating responsibilities at the Union's borders and pursuing efficiency in responsibility allocation. Increased sanctions, while questionable from a human rights standpoint, are unlikely to constitute a solution (see Part 2, B). More than just constituting a losing choice from an efficiency standpoint, maintaining Dublin amounts to locking member states and the CEAS in a wholly unproductive zero-sum game, whereby thousands of persons are shuttled back and forth and kept in limbo over prolonged periods, instead of having their claim determined and integration or return, as the case may be, swiftly organised. From the standpoint of our common European interest (as opposed to conflicting national interests), the whole system makes little sense.

Different from the Dublin model, the Parliament's model aims to enhance applicants' integration prospects ('real links' approach), but most of all attempts to fully realise 'solidarity and fair sharing' in the CEAS via a permanent and mandatory allocation to the least burdened state(s). There are many laudable elements in the model proposed, not least the fact that it aspires to transcend the above-mentioned zero-sum game among competing national interests and serve interests that are relatable to the CEAS as a whole.

Loading responsibility allocation with further functions (i.e. solidarity, externalisation, migration management) comes at a high cost in terms of efficiency, swiftness and cost-effectiveness.

However, there is one immediately apparent problem: 'real links' allocations and transfers would still likely be a minority, and nearly all the other cases would require a transfer to a destination that is not of the applicant's choosing. As such, one can anticipate that compared to the current system, the number of yearly involuntary transfers would skyrocket. Nevertheless, if there is one thing that the Dublin experience shows, it is that systems whose functioning is premised on the execution of a large number of involuntary transfers are not workable. For all of its theoretical appeal, therefore, such a model would risk raising the same difficulties that are observed now but multiplied tenfold: low compliance rates, large-scale use of coercion, equally large-scale evasion and absconding, irregular secondary movements en masse and more. Not to mention the fact that sending applicants, against their will, to states to which they have no connection whatsoever would be problematic in light of the UNHCR guidance related to the 'safe third countries' concept, which postulates the existence of just such a connection.

One of the central themes of any future reform debate should be about how to incite applicants to enter the formal reception system and abide by its rules, instead of evading identification, evading transfers and such.

Other models, currently not on the table, are focused on the idea that responsibility allocation must, above all, place the applicant in status determination procedures as swiftly and as economically as possible. As Elspeth Guild *et al.* aptly put it: "Before identifying ways to share the burden, it is [...] desirable to reduce it by avoiding unnecessary coercion and complexity."[10] At least two 'light models' inspired by this idea are imaginable.

The first one is 'free choice': allocating responsibility based on a preference expressed by the applicant upon lodging the first application in the EU. This model would entail very substantial advantages in terms of incentives for applicants to 'play by the rules', integration prospects, preventing secondary movement and ease of implementation – statistics indicate that voluntary transfers are incomparably more efficient and economical than coercive transfers. However, such a model is usually not even discussed by the EU institutions.

One objection that is routinely raised is that applicants should

not, as a matter of principle, have the right to choose their destination country. This, however, cannot be an article of faith. Since the Treaty is silent on the issue, it is, in fact, a policy question, and not one of law or principle: should the legislator, in light of the involved advantages and disadvantages, grant such a right, and if so to what extent or subject to what conditions?

A second objection is that such a system would be too attractive and generate a pull factor towards Europe. There is, however, not a shred of evidence to support this view. Available research rather indicates the opposite: "Most asylum seekers do not have a clear picture of the asylum policy in EU Member States when they leave their country of origin, have no specific country of destination in mind, and do not have any detailed knowledge of how the Dublin system works upon arrival in the EU."[11]

Lastly, fears have been expressed that a 'free choice' system would concentrate responsibilities in only a handful of 'desirable' states, and likely trigger a race to the bottom among all member states to not become 'desirable'. There is merit to both observations. Still, as noted above, the current system also concentrates responsibilities in only a few states, is much more inefficient and provokes a host of undesirable secondary effects – not the least, paradoxically, 'secondary movements'. Furthermore, just like the current system, a 'free choice' system could and should be accompanied by robust solidarity and fair sharing mechanisms.

As for the 'race to the bottom' argument, empirical observations appear to validate it. However, the common standards that the EU has adopted in the field of asylum should precisely have the effect of making such a race to the bottom impossible. If we start from the premise that the EU is inherently incapable of enforcing said standards, then perhaps the idea of establishing a CEAS should be reconsidered. Indeed, as noted above, the top priority on the agenda should be to close the (already existing) implementation gap, whatever the chosen allocation model may be.

The second 'light model' was advocated by the UNHCR at the start of the 2000s, and more recently in this author's work under the moniker 'Dublin minus'.[12] It is a pragmatic model based on the idea that each application should be examined where it is first lodged unless a 'real link' criterion is applicable and the applicant's consents to the transfer. While clearly very different from a model based on free choice – applicants do not always choose where they apply for the first time, otherwise current statistics would only show applications in 'popular' destination states; nor would they have full control as responsibility criteria would still be objective –, this would similarly ensure a swift and economical passage from the first application to the asylum procedure proper. Indeed, a transfer would usually not be necessary and, as noted above, voluntary transfers are at any rate incomparably less resource-intensive than coercive ones. Transitioning from the current Dublin system to 'Dublin minus' would also be relatively uncomplicated for both the legislator and the implementing authorities: it would be enough to eliminate the criteria that do not reflect a real link (e.g. irregular entry) and make transfers under the remaining criteria subject to the applicant's consent, as is currently the case under the family criteria.

The chief objection usually raised against this model is that it would leave us in the same situation as the current Dublin system. This is true to an extent: the distribution of responsibilities would be largely unchanged, and the incentives to avoid early identification and move irregularly to the preferred destinations would remain.

Critics of this model lose sight of an important aspect, however: 'Dublin minus' would produce results comparable to Dublin

while at the same time being incomparably less time- and resource-consuming. Asylum processes would be quicker and more efficient. The resources currently wasted on shuttling applicants back and forth between member states could be freed up and put to better use (e.g. providing decent reception conditions, making asylum processes fair and efficient). This would, in turn, bring a real contribution to reducing secondary movements.[13] The remaining problems – unbalanced distribution, incentives to evade the system, 'mismatches' between applicants and the responsible states in an integration perspective – could be solved through complementary reforms and mechanisms. Indeed, that is also the case of the 'free choice' model, or of the traditional Dublin model (see Part 2, B, D and E).

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- What should the function(s) of the instrument to be adopted under Article 78(2)(e) TFEU be? Should it primarily aim to confine applicants in the first state of entry? Should it aim to realise a 'fair distribution' of applicants across the member states? Should the mechanism rather aim to place applicants as quickly and economically as possible in the status determination procedure?

- Accordingly, what criteria should be chosen as its 'core' criteria?

INITIAL SUGGESTIONS AND IDEAS:

1. Fully considering the trade-offs implicit in the choice of responsibility allocation model based on available evidence. In particular, recognising that loading responsibility allocation with further functions (i.e. solidarity, externalisation, migration management) comes at a high cost in terms of efficiency, swiftness and cost-effectiveness.

2. Considering responsibility allocation as part and parcel of the CEAS rather than a self-standing system, so that desirable results (e.g. fair sharing of responsibilities) may be pursued in responsibility allocation itself, as well as in complementary instruments.

3. Exiting the pattern of path dependency that has characterised the successive Dublin reforms so far, and openly discuss the virtues and potential shortcomings of all available models, including those that have traditionally been regarded as taboo (e.g. 'free choice').

B. Taking applicants' agency and 'real links' seriously

While positions may vary widely on the issue of how to allocate responsibility, two facts are beyond dispute. First, no system may work unless it elicits cooperation from applicants. Second, as things currently stand and contrary to the mantra that "[a]pplicants should not have a free choice",[14] the latter do exercise a high degree of agency in responsibility determination. This comes, however, at a high personal cost, and fuels avoidance of identification, irregular movements, destruction of evidence and more.

Based on this premise, one of the central themes of any future reform debate should be: how do we incite applicants to enter the formal reception system and abide by

its rules, instead of evading identification, evading transfers and such? The language spoken by the Commission is that of sanctions. However, draconian sanctions have been applied for years by member states without any tangible results. The European Parliament's position relies more on positive incentives: 'real link' criteria and a (very limited) choice in selecting among the least-burdened states. It is a start, but it is doubtful that it will help in the cases where 'real link' criteria are not applicable, and the choices among less burdened states all equally unattractive. More could and should be done, whatever the model of responsibility allocation chosen.

A 'free choice' system would provide sufficient incentives per se for applicants to lodge their claim at the first opportunity, 'enter the game' as soon as possible and provide their consent and cooperation to any transfers that might be necessary. It is important to stress, again, that coercive transfers and consensual transfers are simply not the same ball game: consensual transfers have an incomparably higher success rate, do not require coercion and therefore cost less and involve much simpler legal processes.

Under any other system, incentives could be provided by expanding 'real links' criteria to encompass extended family ties, for example. Furthermore, short of offering full free choice, the applicants could be presented with a "reasonable range of options".[15] For instance, in the absence of a 'real link' to a particular member state, they could be given a choice between all of the states that are 'below quota'. This would be conducive to a fairer distribution and – because of the element of choice involved – possibly attract applicants into the system and prevent, at a later stage, secondary movements.

Finally, the credible promise of fully-fledged free movement rights post-recognition – whether immediately or after a reasonable waiting period – might convince applicants to accept a less-than-ideal allocation under the Dublin system or its successor. Of course, cooperation cannot be expected, and irregular onward movements are unavoidable whenever responsibility allocation risks condemning the applicant to sub-standard reception and protection.[16] To reiterate, tolerating 'black holes' in the CEAS comes at a high cost, including for the integrity and efficiency of responsibility allocation.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- Short of 'full free choice' as evoked above, how could applicants be incentivised to enter the formal reception and allocation system, cooperate with it, and remain into it until the end of the asylum process?

- Would it be possible to expand 'real link' criteria (e.g. encompassing extended family ties) to incentivise compliance and improve integration prospects?

- Would it be possible to grant a 'reasonable range of options' to the applicants to the same effect?

INITIAL SUGGESTIONS AND IDEAS:

4. Selecting responsibility criteria that correspond to the real links and legitimate aspirations of applicants while avoiding any responsibility criteria that may incite applicants to circumvent identification or controls (e.g. 'irregular entry').

5. Exploring to what extent an element of 'choice' might be embedded into responsibility allocation, or at later stages (e.g. a credible promise of free movement once recognised as beneficiaries of protection).

6. As a matter of priority, identifying and eradicating 'implementation gaps' that, intentionally or unintentionally, make certain member states unattractive to applicants.

C. Extricating responsibility determination from state-to-state request-and-reply procedures

As noted in the first part of this paper, national administrations also contribute through action and omissions to the inefficiency of the system. On the one hand, recent reports highlight how far bureaucratic difficulties and a lack of resources impact the Dublin system's operation.[17] On the other hand, the very fact that Dublin procedures require agreement between 'Dublin units' that represent (conflicting) national interests has the effect of hindering and distorting the process.

The first lesson to be drawn from this is that, if anything, the complexity of the current process should not be increased further. The 'corrective mechanism' foreseen in the Dublin IV proposal provides a textbook example of such heightened complexity. While it purports to offer a swift solution to situations of crisis and overburden, it multiplies administrative stages and transfers instead of streamlining and reducing them: registration, a 'pre-procedure' to screen out 'safe country' and security cases, a first partial Dublin procedure, automatic allocation, a first transfer, then another fully-fledged Dublin procedure and possibly a second transfer. In other words, it is an "administratively unworkable" mechanism incapable of solving the problem it purports to tackle.[18]

Instead of multiplying administrative procedures, new avenues should be explored. The Wikström Report suggests a radical simplification for the residual cases where the 'real link' criteria do not apply: automatic 'allocation', to be implemented by the European Asylum Support Office or the future EU agency for asylum.[19] Further along this line, one could imagine that responsibility allocation is entrusted squarely to an EU agency.

Both avenues are interesting but raise a number of questions. First, it is doubtful that fully 'automatic' allocation would be permissible in light of human rights standards that require an individualised assessment of personal circumstances (e.g. family circumstances). Second, any arrangement involving EU agencies would entail the need to endow such agencies with new resources and legal powers (e.g. the power to order the detention of recalcitrant transferees). Third, and concerning the previous point, full appeal rights against the actions and omissions of the competent EU agency should be granted. As these are EU bodies, the competence to decide on those appeals would, in principle, need to be entrusted to an EU court. However, it is unlikely that the judicial system of the EU as it currently stands could cope with the foreseeable amount of litigation. Thus, reforms would probably be required, such as setting up a specialised court or, better still, a network of specialised EU 'circuit courts'.

Let it be noted that the choice-based systems outlined above (see sections A and B) – 'full free choice' or 'limited range of options' – would also constitute an alternative to the current system based on state-to-state requests and replies, while at the same time obviating the need for novel appeal mechanisms. The applicant would choose the responsible state, and as such, no form of appeal would need to be granted.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

► In order to improve the efficiency of responsibility allocation, should alternatives to the current 'state-to-state' procedures be considered?

► If so, should a greater role be reserved for EU agencies? How would legal protection be organised, and what additional material and legal resources would need to be entrusted to the agencies?

► Could other options be considered, such as 'automated' decision-making, or choice-based systems?

INITIAL SUGGESTIONS AND IDEAS:

7. Extracting responsibility determination from state-to-state request-and-reply procedures has the potential to improve its efficiency and integrity significantly.

8. Full respect for fundamental rights must be ensured. This might rule out certain solutions (e.g. 'automatic' allocation that does not take personal circumstances and risks into account).

9. EU agencies could be assigned a significant role to play. However, entrusting them with full decision-making power and with the task of carrying out the transfers would require potentially far-reaching reforms of their functioning and the EU judiciary.

10. Choice-based processes could constitute a (technically) simpler alternative.

Past experience should have made it abundantly clear that 'sharing persons' via coercive allocation systems is the most inefficient, polarising and wasteful method imaginable. Relocation schemes based on the consent of the applicant hold more promise. Most of all, there appears to be much untapped potential both in operational support and/or centralising services, and in decisive increases to EU funding.

A good reform of the Dublin system might simply be out of reach for the time being, and no reform would be better than a bad reform, including reforms that look good on paper but are unworkable on the ground.

D. A new debate on the 'how' and 'how much' solidarity in the Common European Asylum System

In order to ensure that EU standards are respected permanently and suppress member states' incentives to defect, the CEAS requires more robust solidarity mechanisms. As the Treaty indicates, this is not only about 'emergency' measures but also about structural 'fair sharing' (i.e. correcting the asymmetrical distribution of costs among the member states).

The political debate surrounding the relocation mechanism and the reform of the Dublin system has generated more heat than light. The false dichotomy of 'solidarity' and 'responsibility' has also been detrimental: fear of moral hazard has de facto stifled decisive steps forward in risk- and burden-sharing. While "millions" have been disbursed in solidarity efforts and "thousands" have been relocated,[20] these figures are never presented in relation to the needs they supposedly address. The praxis of solidarity of the EU is still limited and, most importantly, it lacks a theory to support it. A foundational debate must still take place.

As to the required *quantum* of solidarity, the phrase 'full support' is gaining currency,[21] but for the time being, it seems no more than a catchphrase. Literally speaking, 'full support' would mean that all the costs associated to asylum are shared among all of the member states or are compensated by the EU – via the EU budget or service provisions, or by sharing out asylum applicants proportionally. Under the principle of fiscal equivalence, this would seem fully justified or even required: whenever a member state receives an applicant, examines the claim and provides protection or ensures return, it is providing a service to all of the other states – or at least to those belonging to the same travel area. Anything less would result in under-provision of the service, externalities and free riding. So, with this in mind, should the EU tool up to provide 'full support' in asylum matters? Can this even be done?

As to the 'how' of solidarity, past experience should have made it abundantly clear that 'sharing persons' via coercive allocation systems is the most inefficient, polarising and wasteful method imaginable. Relocation schemes based on the consent of the applicant (see Part 2, B) hold more promise. Most of all, there appears to be much untapped potential both in operational support and/or centralising services, on the one hand; and in decisive increases to EU funding, changing its function from project co-financing to 'full financing', on the other hand. In all likelihood, a mix of measures is what is called for. 'Sharing money' may still be the preferred – and most efficient – form of solidarity for many actors, but it is also perceived as insufficient per se.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- What kind and what level of solidarity is needed for the CEAS of the future? What would the underlying principle be – project-financing, 'full support', or some middle way?

- To the extent that the physical redistribution of applicants is concerned, could consensual schemes be boosted in such a way as to contribute more significantly to fair sharing?

INITIAL SUGGESTIONS AND IDEAS:

11. Gathering and publishing information on not only the absolute numbers of EU solidarity measures (e.g. millions disbursed to member state X in year Y) but also on their importance relative to the needs addressed (e.g. total costs incurred by member state X in year Y in the field of asylum).

12. Holding a principled discussion on how much solidarity is needed for the good functioning of the CEAS and, more broadly, migration policies. What costs should be entirely mutualised, and be left to individual member states?

13. Making physical dispersal measures consensual on the part of protection applicants while considering decisive advances in operational support and/or centralisation of services, on the one hand, and in the increase of EU funds, on the other hand.

E. Going forward without reforming the Dublin III Regulation?

What if decisive progress could be achieved without reforming the Dublin III Regulation? This may seem like a provocative proposition, but a reflection on this point seems necessary for at least two reasons. First, a good reform of the Dublin system might simply be out of reach for the time being, and no reform would be better than a bad reform, including reforms that look good on paper but are unworkable on the ground. Second, many of the woes of the Dublin system derive from elements that are extraneous to it. These include, to reiterate, the absence of a 'level playing field of protection', adequate solidarity and fair sharing, and free movement rules post-recognition. A resolute effort to address these historical weaknesses of the CEAS – as well as the sometimes blatantly inadequate implementation of the existing *acquis* – would certainly yield better results on the ground than a legislative patch-up.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:

► What are the available strategies to improve the functioning of the CEAS and of responsibility allocation if a good reform of the Dublin system is beyond reach?

INITIAL SUGGESTIONS AND IDEAS:

14. Taking resolute action to ensure better implementation of the existing CEAS legislation (including the Dublin III Regulation itself), whatever the progress (or lack thereof) in reforming the Dublin system.

15. Placing a reinforcement of solidarity (see Part 2, D) and the long-overdue introduction of a 'status valid throughout the Union' firmly on the agenda, and contributing decisively to resolving some of the problems and rigidities observed in the operation of Dublin, even if reform is not to happen.

1. Professor of EU Law, Centre for Comparative, European and International Law, University of Lausanne.

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4. *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (2011), Judgment of the Court of Justice of the European Union, C-411/10, para.79.

5. See e.g. 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 final, Brussels, p.3.

6. Cravesana, Silvia and Maria Hennessy (2017), "Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation", United Nations High Commissioner for Refugees.

7. See e.g. Tsourdi, Evangelia (Lilian) (2017), "Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System", *Maastricht Journal of European and Comparative Law*, Volume 24, Issue 5, pp.667-686.

8. Adviescommissie voor Vreemdelingenzaken (2019), "Secondary Movements of Asylum Seekers in the EU: Advisory Report", The Hague, pp.29 and 34.

9. European Commission (2016), *op.cit.*

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12. Maiani, Francesco (2016), The Reform of the Dublin III Regulation, PE 571.360, Brussels: European Parliament.

13. Adviescommissie voor Vreemdelingenzaken (2019), *op.cit.*, p.12.

14. European Commission (2018), Communication from the Commission to the European Parliament, the European Council and the Council. Managing migration in all its aspects: progress under the European Agenda on Migration, COM(2018) 798 final, Brussels, p.16.

15. Guild, Elspeth; Cathryn Costello; Madeline Garlick; Violeta Moreno-Lax and Sergio Carrera (2015), Enhancing the Common European Asylum System and Alternatives to Dublin, PE 519.234, Brussels: European Parliament, p.56.

16. Adviescommissie voor Vreemdelingenzaken (2019), *op.cit.*, p.21.

17. See e.g. Cravesana and Hennessy (2017), *op.cit*, pp. 35ff, 98ff, 155ff.

18. Hruschka, Constantin, "Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission", *EU Immigration and Asylum Law and Policy Blog*, 17 May 2016.

19. European Parliament (2017), Report on the 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).

20. See e.g. European Commission (2019), Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration, Brussels, p.1.

21. See e.g. European Council (2018), European Council meeting (28 June 2018) – Conclusions, EUCO 9/18, para.6.