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Evaluating the Prospects for Enhanced Solidarity in the Common European Asylum System

Abstract

Faced with persistent Member State concerns regarding the often volatile and highly uneven distribution of asylum applications across the European Union, and with some of the ongoing challenges facing the operation of the Common European Asylum System (CEAS) visibly highlighted by recent migratory flows to the EU as a side effect of the Arab Spring, the European Commission issued a communication in December 2011 "on enhanced intra-EU solidarity in the field of asylum" that seeks to create "an EU agenda for better responsibility sharing and more mutual trust". In this communication, the Commission proposes that the strengthening of so-called responsibility sharing (which refers to the need to share the responsibility for and the costs associated with the protection of refugees among receiving countries) should be reinforced around four axes: practical cooperation and technical assistance, financial solidarity, allocation of responsibilities, and the improvement of tools for governance of the asylum system. The Commission also advocates for an increase in the use of internal relocation of asylum applicants among Member States and for the possibility of a move towards the joint processing of asylum applications in EU territory. While the focus on solidarity as an essential component of the CEAS is not new, the renewed impetus to improve the system and to ensure that those states that are facing higher levels of responsibility are able to uphold their commitments under both EU and international law has become necessary as a result of the lack of progress made in recent years. This paper will analyze this most recent articulation of the Commission's plan for enhancing solidarity and will show that even though many of the recommendations made by the Commission should be encouraged, they fail to address the structural, institutional features of the system – namely the distribution key for financial responsibility sharing and the responsibility allocation principle underlying physical responsibility sharing – which are perpetuating these inequalities.

1 The Need for Increased Solidarity and Responsibility Sharing

In December 2011, the European Commission issued a communication (hereafter referred to as the "2011 Communication") "on enhanced intra-EU solidarity in the field of asylum" which endeavours to establish "an EU agenda for better responsibility sharing and more mutual trust".[1] In order to do this, the Commission has proposed that the strengthening of intra-EU solidarity and responsibility sharing should be reinforced around four axes: practical cooperation and technical assistance, financial solidarity, allocation of responsibilities, and the improvement of tools for the governance of the asylum system. This renewed energy on behalf of the Commission to accelerate progress in this area

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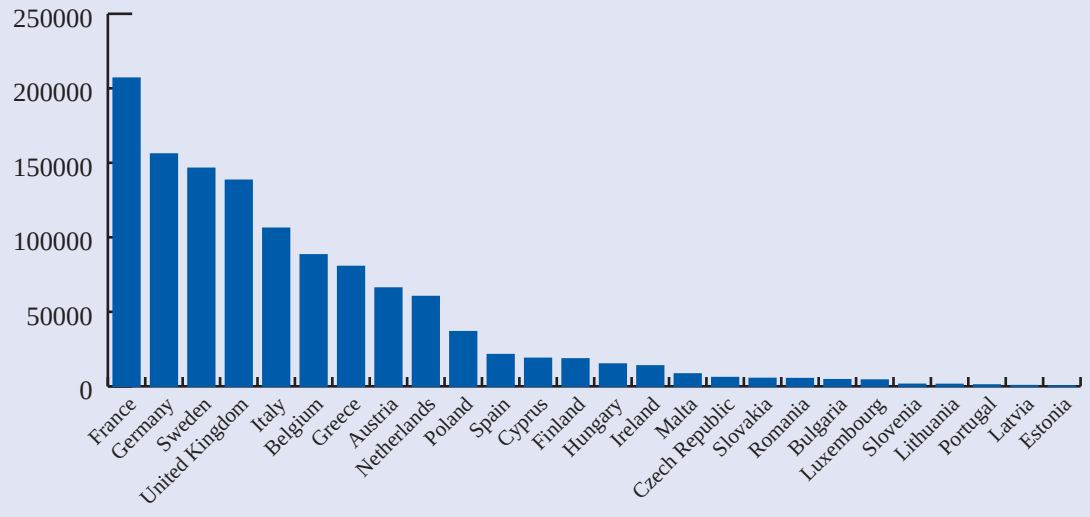
[1] European Commission, (2011a). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Enhanced Intra-EU Solidarity in the Field of Asylum: An EU Agenda for Better Responsibility-Sharing and More Mutual Trust*. Brussels, 2.12.2011 COM(2011) 835 final.

is partially a response to enduring concerns regarding the volume of asylum seekers arriving on EU territory and the nature of their "spontaneous" arrival. Policy makers are equally, if not more, concerned about the highly uneven distribution of asylum responsibilities throughout the EU and the implications that this uneven distribution are having both on those countries that are experiencing high "burdens", as well as on the standard of protection available to those seeking asylum. This paper will therefore analyze and examine the various recommendations put forward in the 2011 Communication so as to evaluate the prospects for achieving reinforced solidarity and responsibility sharing in the CEAS. In order to do this, this paper will first address the need for improved responsibility sharing before discussing existing initiatives. The paper will then move on to discuss the specific recommendations advanced in the 2011 Communication as well as other recently advanced studies which explore the various potential avenues for enhanced cooperation.

The efforts that have been put forward in recent years towards the creation of the CEAS have been closely intertwined with discussions on achieving better "burden" or "responsibility sharing" within the EU. The desire to enhance solidarity and responsibility sharing among Member States has been repeatedly articulated in EU documents, with the intention to create a system for better responsibility sharing being clearly expressed as early as the Amsterdam Treaty of 1997, which stated in Article 63 that measures should be adopted that promote "a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons". The 2007 Commission Green Paper on the future of the Common European Asylum System asserted "there is a pressing need for increased solidarity in the area of asylum, so as to ensure that responsibility for processing asylum applications and granting protection in the EU is shared equitably".[2] In the 2011 Communication, the Commission further states that "solidarity is one of the fundamental values of the European Union and has been a guiding principle of the common European asylum policy since the start of its development" and that it "is the Union's responsibility to assist [capacity-stretched] Member States… in order to uphold the Union's common values and fundamental rights by ensuring adequate reception of asylum seekers and refugees and access to protection."[3]

These repeated commitments to achieving better responsibility sharing certainly make sense when looking at how the numbers of asylum applications lodged in each Member State are distributed throughout the EU. While the number of asylum applications lodged in the EU has been on the decline in recent years, having dropped from 388,000 applications in the EU15 in 1999 to 246,000 in the EU27 in 2009, there continues

FIGURE 1 TOTAL NUMBER OF ASYLUM APPLICATIONS LODGED IN EU MEMBER STATES, 2007-2011



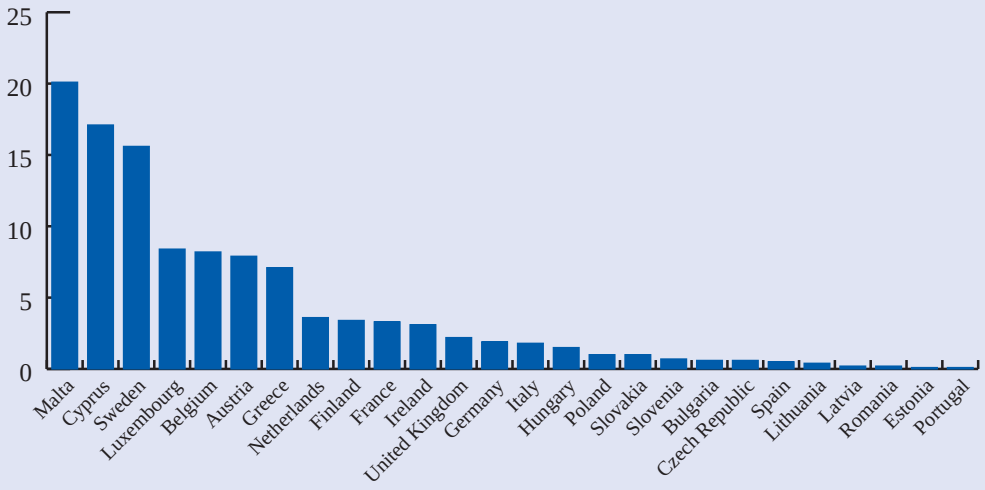
Source: UNHCR, (2012). *Asylum Levels and Trends in Industrialized Countries, 2011: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries*. UNHCR: Geneva, pg. 20.

Note: This represents the total number of applications over the five-year period from 2007-2011 and not annual figures.

[2] Commission of the European Communities, (2007a). *Green Paper on the future Common European Asylum System*. Brussels, 6.6.2007 COM(2007) 301 final, pg. 3.

[3] European Commission, (2011a), pg. 2.

FIGURE 2 NUMBER OF ASYLUM APPLICATIONS LODGED IN EU MEMBER STATES PER 1,000 INHABITANTS, 2007-2011



Source: UNHCR, (2012). *Asylum Levels and Trends in Industrialized Countries, 2011: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries*. UNHCR: Geneva, pg. 20.

Note: This represents the relative number of applications over the five-year period from 2007-2011 and not annual figures.

to be a wide discrepancy in the volume of applications received by individual Member States. If we consider the absolute number of asylum applications lodged in each country, France, Germany, Sweden and the United Kingdom have led the way in terms of the most applications received (Figure 1 on the previous page).

However, given that the capacity to receive asylum seekers varies significantly across the EU, it is arguably a more meaningful indicator to measure the *relative* numbers faced by Member States. When population size is taken into account, France and Germany no longer lead the pack and instead countries such as Malta and Cyprus now face the highest relative or per capita "burden" despite the fact that they have a considerably lower receptive capacity (Figure 2).

These inequalities are reinforced by the operation of the Dublin Regulation,[4] which is one of the cornerstones of the CEAS. The Dublin system is responsible for allocating the responsibility for processing an asylum claim to the Member State that played the greatest role in the entry of the asylum seeker into the EU, which is most often the "first country of entry". If an asylum seeker makes an application in one Member State when it is believed, based on the criteria outlined in the Dublin Regulation, that another Member State should be responsible for processing that application, the Dublin system facilitates the transfer of asylum applicants between those Member States. The "first country of entry" principle has quite logically led to issues for those countries that have external borders closest to refugee producing regions and has perpetuated the uneven distribution of asylum costs and responsibilities. In its 2007 Green Paper, the Commission itself acknowledged that the "Dublin system may *de facto* result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location".[5]

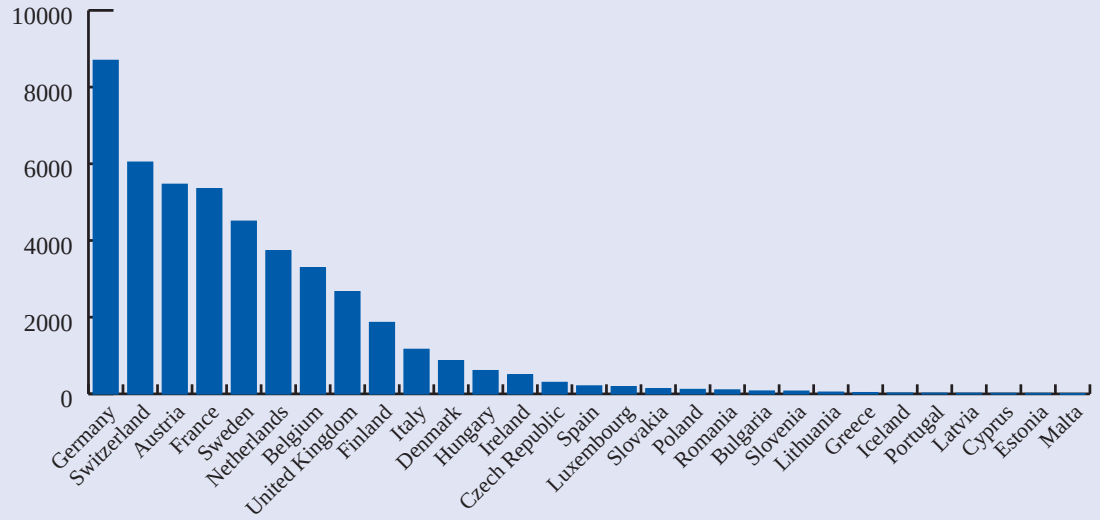
A cursory glance at the figures relating to Dublin transfers confirms this suspicion.[6] When looking at the number of outgoing transfer requests issued in 2009, for example, Germany, Switzerland, Austria and France were the countries responsible for transmitting the highest volume of outgoing transfer requests (Figure 3 on the next page), and Greece, Italy and Poland were the largest recipients of incoming transfer requests (Figure 4 on the next page). If we consider the ratio between incoming and outgoing transfers for each Member State under Dublin in 2005, Greece measured an alarming ratio of 58-1 while Malta had an equally concerning ratio of 39-1. At the other end of the spectrum, however, Germany experienced a 1-1 ratio of incoming versus outgoing transfers while the

[4] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. OJ L050, 25/02/2003.

[5] Commission of the European Communities, (2007a), pg. 10.

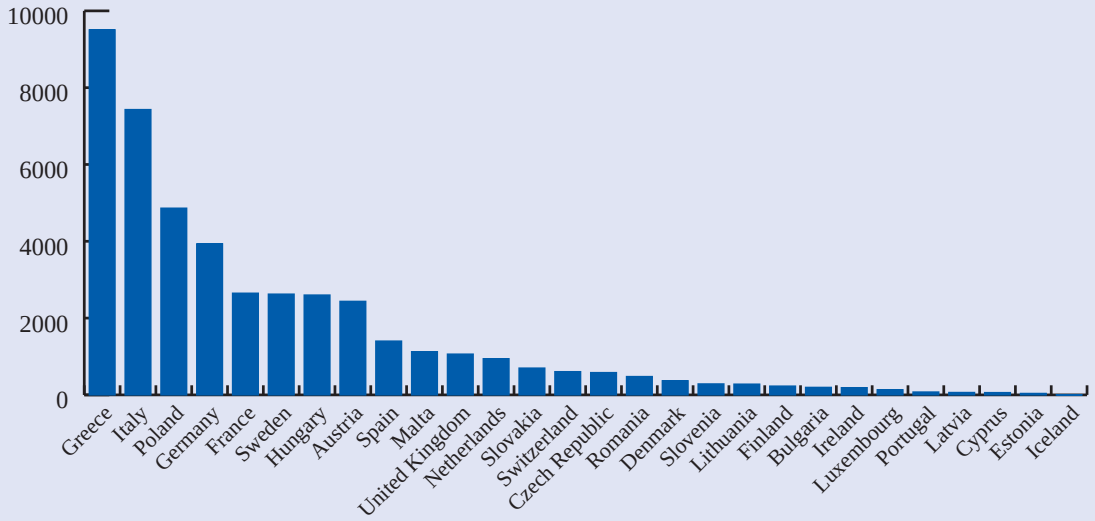
[6] Please note that these figures only partially capture the secondary movements of asylum seekers in the EU.

FIGURE 3 NUMBER OF TRANSFER REQUESTS ISSUED BY EU MEMBER STATES UNDER DUBLIN, 2009



Source: EUROSTAT
Note: Norway has been excluded due to unavailable data.

FIGURE 4 NUMBER OF TRANSFER REQUESTS RECEIVED BY EU MEMBER STATES UNDER DUBLIN, 2009



Source: EUROSTAT
Note: Norway and Belgium have been excluded due to unavailable data.

UK had a ratio of 1-5. In addition, if the number of net Dublin transfers (incoming-outgoing transfers) is evaluated relative to the total number of asylum applications received, incoming Dublin transfers accounted for almost 20% of the asylum applications made in Poland in 2005 and just over 12% of the applications made in Slovakia. Conversely, asylum applicants transferred under Dublin reduced the number of asylum seekers in Germany by 0.1% and in the UK by 4.78% that year.[7]

[7] Commission of the European Communities, (2007b). *Commission Staff Working Document Accompanying Document to the Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System: Annex to the Communication on the Evaluation of the Dublin System*. Brussels, 6.6.2007 SEC(2007) 742, pg. 50-52.

Therefore, empirical data confirms both the unequal distribution of "burdens" as well as the impact of the Dublin system in reinforcing such inequalities. Prior to the introduction of several Community responsibility sharing instruments, the highly uneven distribution of asylum seekers throughout Europe had worked to stimulate regulatory competition and a policy "race to the bottom" between Member States as they tried to limit their relative "burden" by introducing policies that were harsher and more restrictive than those of their neighbours out of the desire to deflect asylum seekers away from their territory in the direction of countries with more lenient policies. Thus, in order to tackle such inequalities and address concerns about this potentially detrimental effect on protection standards, the Member States have been pursuing joint responsibility sharing initiatives through the Common European Asylum System since the late 1990s.

2 Previous Responsibility Sharing Initiatives under the Common European Asylum System

The general purpose of the CEAS, as outlined in the 1999 Tampere Programme[8] and confirmed by the 2005 Hague Programme,[9] is to create a common asylum procedure and a uniform status that applies throughout the EU and which ensures that those in need of genuine protection will have access to equivalent standards across the Member States while efficiently dealing with those that do not require protection. The 2007 Commission Green Paper delineates the development of the CEAS into two distinct stages. The first stage involved harmonizing "Member States' legal frameworks on the basis of common minimum standards" while the second stage aims to "achieve both a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States".[10] The second stage of the CEAS was supposed to be adopted at the end of 2010, though the nature of this agenda is obviously of a more ongoing nature.

The harmonization of domestic asylum and refugee legislation was seen as an integral step towards achieving a more equitable distribution of asylum responsibilities, as it was believed that the "further approximation of national asylum procedures, legal standards and reception conditions, as envisaged in creating a Common European Asylum System, is bound to reduce those secondary movements of asylum seekers which are mainly due to the diversity of applicable rules, and could thus result in a more fair overall distribution of asylum applications between Member States".[11] The effort to converge national procedures resulted in several directives outlining minimum standards of treatment applicable throughout the EU being introduced as Community law. This common policy package includes the 2003 *Reception Conditions Directive* (which guarantees minimum standards for the reception of asylum seekers), the 2004 *Qualification Directive* (which explicates the qualification criteria and rights associated with both refugee and subsidiary protection status), and the 2005 *Asylum Procedures Directive* (which outlines the minimum procedural standards).

There are still some concerns about ongoing discrepancies in national asylum legislation. Much of these are a result of the ongoing high level of variation in implementation rates of these directives and the serious impact that these differences can have on the conditions that asylum seekers face while their applications are being processed. Nevertheless, the introduction of these directives represents a significant achievement in the development of the CEAS and the attempt to obtain an adequate and uniform standard of protection throughout the EU. Furthermore, it is important to note that where it has been found that Member States have violated, ignored or incorrectly implemented EU asylum legislation, the Commission has clearly demonstrated its willingness to sanction non-compliant countries. This was evidenced by the infringement proceedings brought against Greece in 2009, which resulted in Member States suspending transfers to Greece under Dublin II.[12]

In terms of the secondary aim of achieving enhanced equality and solidarity among Member States, the aforementioned "sharing of policies" has been supplemented with other responsibility sharing initiatives that involve the sharing of "money" and "people".[13] The creation of the European Refugee Fund (ERF) in 2000 is an example of explicit financial responsibility sharing and was established to allocate financial resources

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8 The Tampere Programme was the result of a European Council meeting and outlined the steps towards "the creation of an area of freedom, security and justice". The Programme also included a specific section dedicated to discussing the development of a common EU asylum and migration policy.

9 The Hague Programme followed up on the Tampere Programme and addressed how the area of freedom, security and justice could be strengthened and established ten priorities for the next five years.

10 Commission of the European Communities, (2007), pg. 2-3.

11 *Ibid*., pg. 11.

12 European Asylum Support Office Press Release. 20 July 2012. *2011 Annual Report on the Situation of Asylum in the European Union and on the Activities of the European Asylum Support Office*. Available from: http://ec.europa.eu/dgs/home-affairs/pdf/press_release_easo_annual_report.pdf.

13 This follows Noll's categorization of burden/responsibility sharing initiatives as found in: Noll, Gregor, (2000). *Negotiating Asylum: The EU Acquis, Extraterritorial Asylum and the Common Market of Deflection*. The Hague: Kluwer Law International.

in a proportional manner to those countries facing disproportionate "burdens". Collectively financed by the Member States, the ERF had an operating budget of €216 million for its initial funding period from 2000-2004, which was then tripled to just under €700 million for its extended operation from 2005-2010. The most recent extension of the ERF will expire in 2013 and will be replaced by the Asylum and Migration Fund, which is currently projected to run from 2014 to 2020. The most prominent example of the physical redistribution of "burdens", or "people sharing", is the "mass influx" directive.[14] Events in Kosovo and Bosnia in the 1990s highlighted the need for special provisions in the case of large-scale refugee emergencies, and this led to the 2001 *Council Directive on Temporary Protection in the Case of Mass Influx*, which encourages solidarity in the form of voluntary transfers of beneficiaries of protection between Member States.

While all three types of responsibility sharing actions (policies, money and people) are significant initiatives, the actual "burden sharing" effectiveness of these efforts has been called into question.[15] It has been argued that EU policy harmonization has actually hindered the ability of individual Member States to utilize national asylum policies to moderate or counter the structural pull factors (such as language, colonial ties, etc.) that are unique to their country and that, at least partially, account for why they may be a particularly attractive destination country for some asylum seekers.[16] The ERF has been accused of having insufficient funding for its purpose and for disproportionately benefitting larger countries while providing insufficient assistance to smaller countries.[17] In addition, the specific conditions that must be met to invoke the provisions of the Mass Influx Directive have meant that it has never been used, indicating that perhaps the conditions for use are too stringent. While recent forced migration flows in the Southern Mediterranean did not rival the mass influx of persons that resulted from events in Kosovo and Bosnia, the Directive was not called upon to assist over-stretched Member States. Therefore, members of both the academic and NGO community have been highly sceptical as to the effectiveness of existing EU responsibility sharing initiatives in terms of addressing the unequal distribution of asylum pressures across the Member States.

3 Proposals and Prospects for Enhanced Solidarity and Responsibility Sharing

The 2011 Communication contains important recommendations for improving the CEAS so as to facilitate an environment hospitable to enhanced solidarity and improved protection levels. The paper will first provide a brief overview of sections one and four on "realizing the full potential of practical co-operation and technical assistance" and placing "mutual trust at the heart of a renewed governance system" respectively. The paper will then provide an in-depth analysis of the second section on "enhancing the added value of financial solidarity instruments supporting asylum policy" and the third section on "engaging with the issue of allocation of responsibilities" as they represent more explicit responsibility sharing arrangements with the potentially greatest redistributive impact.

Section 1: "Realizing the Full Potential of Practical Co-operation and Improved Governance"

The section on practical co-operation discusses the need to introduce practical cooperation as a constitutive pillar of the CEAS and highlights the role of the recently inaugurated European Asylum Support Office (EASO) of June 2011.[18] The EASO was created to constitute a "centre for expertise in asylum at [the] European level" that "will help Member States become familiar with the systems and practices of others, to develop closer working relations between asylum systems at operational level, build trust and confidence in each others' systems and achieve greater consistency in practice".[19] It also discusses how the European Asylum Curriculum could help to act as a standard for caseworkers in so that practices and decisions can be made in a consistent manner. As already proposed in the Stockholm Programme,[20]

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[14] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L212/12, 7/8/2001.

[15] Thielemann, Eiko, (2008). *The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach*. Report for the Swedish Institute for European Policy (SIEPS).

[16] Thielemann, Eiko, (2004). "Why Asylum Policy Harmonization Undermines Refugee Burden-Sharing", *European Journal of Migration and Law* 6: pg. 47-65.

[17] For a more detailed discussion on the ERF, see Thielemann, E.R. (2005). "Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-Payments and the European Refugee Fund", *Journal of Common Market Studies*, 43(4): pg. 807-824.

[18] The purpose of the European Asylum Support Office is centred around three main objectives: 1) to support practical cooperation in the area of asylum; 2) to assist Member States under particular pressure through the deployment of specialized asylum support teams; and 3) to contribute to the further development of the CEAS. The establishment of EASO was welcomed by both UNHCR and ECRE.

[19] Commission of the European Communities, (2009). *Commission Staff Working Document Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council Establishing An European Asylum Support Office*. Brussels, 18.2.2009 SEC(2009) 153, pg. 54.

[20] On the heels of the 1999 Tampere Programme and the 2005 Hague Programme, the Stockholm program followed up on these agendas by establishing the roadmap for the further development of the area of freedom, security and justice for the period 2010-2014.

the Commission also encourages further exploration of the role that the secondment of officials between Member States can play.

Section 4: "Mutual Trust at the Heart of a Renewed Governance System"

The section on placing "mutual trust at the heart of a renewed governance system" discusses the need to complement infringement proceedings with assistance programmes for Member States found to be in breach of EU law so that they may receive the support they need to become compliant. This is set against the background of the Commission recently launching infringement proceedings against Greece. The 2011 Communication acknowledged that it was important to provide several forms of assistance simultaneous to the infringement proceedings so as to actually improve the humanitarian situation. In the Greek case, the Commission assisted Greece in developing a National Action Plan on Asylum and Migration Management and coordinated help from other Member States. Greece also received emergency ERF funding and EASO worked to deploy Asylum Support Teams. Ultimately, such measures have been acknowledged as having begun to improve reception conditions and asylum determination processes in Greece. The 2011 Communication stresses that the necessary penalties associated with the improper implementation of EU law will need to be further complemented with other support measures. This is to allow for shortcomings to be addressed and for faith to be restored in the country's asylum system on behalf of both the country in question, and the other Member States. The same rationale applies to the Commission's reiterated advocacy for early warning mechanisms to be built into the Dublin system and to improve the overall performance of migration management more generally throughout the EU by making enhancements to the EU's visa and Schengen regimes.[21]

Section 2: "Enhancing the Added Value of Financial Solidarity Instruments Supporting Asylum Policy"

The European Refugee Fund is set to expire at the end of 2013, and the Commission has recently urged Member States to ensure that they make the most strategic use possible of the remaining funds[22] and it re-asserts that message in its 2011 Communication. From 2014 until 2020, the Asylum and Migration Fund (AMF) will replace the ERF. The AMF will experience a dramatic increase in funding available when compared to the ERF. This is a very positive development given that resource limitations have been identified as one of the ERF's principal shortcomings.[23] While the ERF had a budget of around €628 million over its secondary five-year operating period from 2008 to 2013, the proposal for the AMF stipulates a budget of €3,869 million for the six-year period of 2014-2020, the vast majority of which will go towards national programmes.

The Commission asserts that the new fund contains several improvements, which should help to enhance the value of financial solidarity instruments. These improvements include a "policy dialogue" with each country regarding the objectives they would like to achieve with the Fund's resources. This would occur on an annual basis and would be supplemented by an annual report on implementation. The new fund also aims to take fluctuations in asylum flows into account by establishing a mid-term review, which would facilitate the distribution of additional resources to countries finding themselves in particular need. It also reasserts and builds on previously existing financial incentives for Member States that engage in resettlement or that agree to host internal relocations. While these are all welcome developments, a closer examination of the proposal establishing the AMF[24] (hereafter referred to as the AMF proposal) reveals that it is likely to be subject to similar limitations as its predecessor.

Prior to issuing the AMF proposal in November 2011, UNHCR was consulted for recommendations pertaining specifically to EU funding in the area of Home Affairs following the year 2013 (or after the termination of the ERF). The recommendations issued by UNHCR in June 2011[25] were along much the same vein as previous recommendations and reflected previously expressed concerns regarding the functioning of EU financial responsibility sharing mechanisms that had followed the release of the 2007 Green Paper.[26] In its 2011 report, UNHCR stressed that funding should target those countries that still require an upgrading of standards in terms

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21 With regards to the EU's visa regime, the Commission has proposed the introduction of a visa safeguard clause, which would, "as a last-resort measure… make it possible to suspend visa free movement from a third country where there is evidence that it has led, inter alia, to abuse of the system." In the case of Schengen, proposals include improving the "common management of Schengen by revising the Schengen evaluation mechanism" in order to "safe[guard] freedom of movement by improving mutual trust." European Commission, (2011), pg. 12.

22 European Commission, (2011), pg. 5.

23 Thielemann, E.R. (2005). "Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-Payments and the European Refugee Fund," *Journal of Common Market Studies*, 43(4): pg. 822.

24 European Commission, (2011b). *Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund*. Brussels, 15.11.2011 COM(2011) 751 final.

25 UNHCR, (2011). *UNHCR's Observations on Future Arrangements for EU Funding in the Area of Home Affairs after 2013*. UNHCR, Bureau for Europe.

26 UNHCR, (2007). *UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System*. UNHCR: Brussels, p. 40.

of both asylum procedures and reception conditions so that they are compliant with both EU and international standards. They also recommended that certain funds should be earmarked for integration support services. UNHCR stressed that funding should target Member States that are faced with particular pressures and that require capacity building. UNHCR also emphasized that any incentive-related funding that Member States might receive in exchange for their willingness to accept higher rates of resettled refugees or internally relocated refugees must be kept entirely separate from funding that aims to achieve solidarity. They insisted that incentive-based funding should not be placed in competition with funding that should be used to promote capacity building and to assist or support countries in need. Another important recommendation related to the flexibility surrounding the allocation and distribution of money set aside for emergency funding.

The AMF proposal stipulates that 80% of the available funds will go to national programmes, while the Commission will manage the remainder of the funds centrally. For the national programmes, all Member States will receive a basic amount that will be comprised of five million euros in combination with an amount that will be determined by a calculation on the basis of a number of asylum-related measures. Though the enhanced size of the AMF will result in more funding for each country, no effort has been made to better distribute funds on the basis of relative "burdens" or relative capacity. The calculation and the data that will be used to determine the allocation of funding for the AMF is to be the same as that used for the allocation under the ERF. This unfortunately means that the AMF is likely to continue to disproportionately favour larger Member States with well-developed asylum systems that receive a higher absolute volume of applications over those smaller Member States that receive higher relative numbers and which require assistance in the development of their asylum systems and receptive capacity.

When examining the projected funding allocation under the new fund, it is evident that considerations of relative "burdens" or the need for capacity building have not served as a more important determinant for allocation. Despite the fact that Malta and Cyprus currently experience the highest relative number of asylum applications proportional to their population size (see Figure 2 above) they will only be receiving 1% or less of the funding, while high absolute recipients such as the UK, France and Germany will receive 15.1%, 11.1% and 9.0% of the funding respectively.

The fact that the largest allocation is earmarked for the UK is also surprising given that the UK has actually decided to opt out of the recasts of the various directives on minimum standards introduced by the EU.[27]

FIGURE 5 PROPOSED MULTI-ANNUAL BREAKDOWN OF FUNDING PER MEMBER STATE FOR 2014-2020 UNDER THE ASYLUM AND MIGRATION FUND (AMF)

Member State	Amount (Euros)	Percentage
United Kingdom	358,190,975	15.1
Italy	327,612,301	13.8
France	264,144,969	11.1
Greece	260,226,050	11.0
Spain	251,997,020	10.6
Germany	212,601,650	9.0
Sweden	122,165,199	5.2
Netherlands	91,470,175	3.9
Belgium	79,592,179	3.4
Austria	68,223,378	2.9
Poland	61,510,753	2.6
Portugal	30,748,854	1.3
Czech Republic	29,608,422	1.2
Cyprus	27,924,043	1.2
Hungary	24,064,351	1.0
Ireland	22,950,380	1.0
Finland	22,858,874	1.0
Romania	20,536,629	0.9
Slovenia	15,451,804	0.7
Malta	14,484,725	0.6
Latvia	13,728,530	0.6
Slovakia	13,604,418	0.6
Bulgaria	11,492,853	0.5
Estonia	10,283,369	0.4
Lithuania	9,327,992	0.4
Luxembourg	7,200,106	0.3

Source: European Commission (2011b, pg. 35)

Note: Denmark decided to opt out of this Regulation and is therefore not included.

[27] Denmark and Ireland have also opted out of the recast directives on procedures, reception conditions, qualification and returns.

This includes the procedures directive,[28] the reception conditions directive, the qualification directive and the returns directive as previously referenced. In addition, the UK has further opted out of the family reunification directive as well as the long-term residents' directive, which was only recently extended to apply to refugees. While there are still issues regarding the consistency of implementation across the Member States that are bound by these directives,[29] it is quite perplexing that the UK's lack of cooperation in terms of policy harmonization (and what could therefore arguably be perceived as their lack of contribution to the overall achievement of the CEAS) would in turn be rewarded with the largest proportion of community funding in this area.

The AMF proposal further stipulates that in addition to the basic amount allocated to each Member State, there will be a variable amount to be distributed. However, this pot of money will be distributed on the basis of the willingness of Member States to participate in different operations and will be utilized as a financial incentive to compensate those countries that make resettlement pledges or that volunteer to accept internally relocated persons within the EU. Once again, this appears to achieve very little in terms of helping those countries that find themselves under strain and will only further serve to advantage larger, more well-established asylum systems. Member States with underdeveloped asylum systems that face capacity issues, on the other hand, are not likely to be in a position to commit to resettling refugees given their constraints and therefore will probably not receive any of this quota of the AMF funds.

The remaining funds will be allocated on the basis of a mid-term review, which will determine which Member States face particular pressures or significant changes in migration flows and distribute the funds accordingly. The funds dedicated to the mid-term review amount to €160 million and will be allocated in the budget year 2018.[30] The distribution is to be determined by the Commission on the basis of information from Eurostat, the European Migration Network, EASO and Frontex with regard to the specific needs of the asylum and reception system of a Member State as well as the degree of migratory pressure.[31] This portion of the fund does appear to be determined by a more needs-based approach and therefore should be welcomed. It is positive in that this portion of the funding will be distributed across countries and not within countries' existing allocations at the subnational level, as is the case with the mid term review of the European Regional Development Fund and its "performance reserve" scheme.[32] However, it does not necessarily compensate for the fact that the vast majority of the funding is not already being distributed in advance to those Member States that are having trouble meeting their obligations under EU and international regulations as a result of struggling asylum and reception systems. Furthermore, the fact that the funds would not be available until 2018 makes it debatable as to whether such a long time horizon would be able to sufficiently assist Member States that find themselves under particular strain as a result of "significant changes in migration flows" and "specific needs concerning their asylum and reception systems."[33]

Section 3: "Engaging with the Issue of Allocation of Responsibilities"

3.1 "The Dublin Regulation needs reform"

The first and most important discussion in section three of the 2011 Communication is unsurprisingly dedicated to a discussion of the need to reform the aforementioned Dublin Regulation. The Commission asserts that "a mechanism for determining responsibility for asylum applications remains necessary to guarantee the right to an effective access to the procedures for determining refugee status, without compromising the objective of rapid [sic] processing of asylum applications, and preventing abuse by the same person submitting multiple applications in several Member States". While the Commission has acknowledged repeatedly in the past that the Dublin system "was not devised as a burden sharing instrument",[34] it has defended the need for Dub-

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[28] The UK government decided to opt out of the revised procedures directive despite a parliamentary recommendation to opt in. The revisions involve several positive changes, including the ability to recognize women seeking refuge from gender related persecution.

[29] As highlighted in recent court cases as well as: UNHCR, (2007), *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*. UNHCR: Brussels; Odysseus Academic Network, (2006), *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in EU Member States*.

[30] European Commission, (2011b), pg. 6.

[31] This portion of the funding is separate from the more specific "emergency assistance" funding which will be available through the 20% of the fund that will be centrally managed and which amounts to €637 million. It is not specified, however, how much of the €637 million will be set aside for "emergency assistance," or how it will be decided as to what constitutes an "emergency."

[32] Thielemann, Eiko, (2002). "The Price of Europeanization: Why European Regional Policy Initiatives are a Mixed Blessing", *Regional and Federal Studies* 12(1): pg. 47.

[33] European Commission, (2011b), pg. 7.

[34] Commission of the European Communities, (2007), pg. 10; Commission of the European Communities, (2008a). *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*. Brussels, 17.6.2008 COM(2008) 360 final, pg. 8.

FIGURE 6 MULTIPLE ASYLUM APPLICATIONS LODGED BETWEEN JANUARY 2003 AND DECEMBER 2005

	No. EURODAC† registered asylum applications	No. of all multiple applications	Multiple applications/EURODAC registered asylum applications (%)
2003	238325	16429	6.89%
2004	232205	31307	13.48%
2005	187223	31636	16.89%

Source: Commission of the European Communities, (2007b), pg. 46.

† Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. OJ L316, 15/12/2000.

lin on the basis that it is required to prevent the phenomenon of "asylum shopping". However, in a report that the Commission itself produced in 2007, which evaluated the performance of the Dublin system, it was shown that the Dublin system had not actually successfully acted as a deterrent against multiple applications and "asylum shopping" as was expected. Instead, the instances of multiple applications actually increased quite substantially between 2003 and 2005 following the passing of the Dublin Regulation in 2003 (Figure 6).

As a result of continuing problems relating to the operation of the Dublin system, the Commission put forward a proposal to "recast" the Dublin Regulation in 2008 (the so-called Dublin III proposal).[35] In this proposal, the Commission advanced several amendments intended to improve protection levels and to improve the functioning and efficiency of the system. Some of the main amendments addressed involved extending the application of Dublin to beneficiaries of subsidiary protection; amending time limits; enhancing legal safeguards for asylum seekers; widening the definition of family; improving provisions for unaccompanied minors; and the introduction of a potential suspension mechanism of the Dublin rules in cases where the deficiencies of a Member State's asylum system would result in inhumane treatment and violations of international and EU law if a Dublin transfer were to be enacted. Dublin III did, however, defend the basis of the system and maintained that the underlying principles of Dublin should be preserved (namely, the "first country of entry" principle).

This insistence on leaving the fundamental basis of the system unaltered prompted a critical response from entities such as the European Council for Refugees (ECRE) and the UNHCR. ECRE expressed concern that "while the Commission's proposal would introduce significant humanitarian reforms, it fails to address the system's underlying flaws" and asserted that "the Dublin system remains an impediment to an efficient, harmonized and humane Common European Asylum System".[36] More broadly, UNHCR objected on the basis that the "basic assumption underlying Dublin [has] not yet [been] fulfilled – namely, the premise that asylum-seekers are able to enjoy generally equivalent levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States".[37] The European Parliament also lamented that "whatever the political obstacles to change, such a single-minded preference for the status quo could only be defensible on the premise that the Dublin system worked by and large satisfactorily"[38] – a point which is clearly up for debate. Furthermore, the very fact that the 2007 Green Paper defends the basic principles of the Dublin Regulation but insists that consideration should "mainly be given to establishing 'corrective' responsibility sharing mechanisms that are complementary to the Dublin system"[39] itself implies that the distributional impact of Dublin requires "correcting".

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35 Commission of the European Communities, (2008b). *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)*. Brussels, 3.12.2008 COM(2008) 820 final.

36 ECRE, (2009). *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation*. ECRE, pg. 2.

37 UNHCR, (2009). *UNHCR comments on the European Commission's Proposal for a recast of the 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 ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)*. UNHCR, pg. 1-2.

38 Parliament (EC), *Evaluation of the Dublin system and on the Dublin III proposal (Reflection Note)*, PE 410.690, March 2009, p. 1.

39 Commission of the European Communities, (2007a), pg. 9.

In the 2011 Communication, the Commission acknowledges that recent case law has demonstrated some of the problems associated with the operation of the Dublin system in over-stretched countries and the ramifications for protection seekers.[40] The Commission consequently admits that improvements must be made to the operation of the system and to the safeguards in place for the protection of applicants. The Commission therefore proposes the introduction of safeguards to detect problems in asylum systems before they boil over by heightening monitoring mechanisms and by finding ways to facilitate early intervention once issues are detected. As a result of the central role that Dublin plays in the operation of the CEAS, the Commission also proposes a regular "fitness check" on the effects of Dublin, as well as a review of its principles and functioning. The details of these proposals, however, remain vague and non-specific. Does the acknowledgement of the need to review the principles of Dublin amount to a reconsideration of the 2008 decision to uphold the underlying distributive allocation principle? Does this then indicate a willingness to consider alternative possibilities that move away from the "first country of entry" principle somewhere down the line? How regularly would these "fitness checks" take place and who would be responsible for the operation of heightened monitoring mechanisms? What would "early intervention" entail? Ultimately, even with the early monitoring mechanism introduced, it will be forced to act as a bandage for the distributional effect caused by the underlying principles of Dublin, which are arguably at least partly responsible for creating the very strains and capacity problems that these mechanisms would be designed to detect.

It is worth noting that since the publication of the 2011 Communication, the Committee of Permanent Representatives (COREPER) "endorsed by a sufficient majority of delegations the text of the recast of the draft Dublin [III] Regulation" on 18 July 2012. This recently accepted text does make significant headway relating to the introduction of an early warning mechanism and the introduction of an essential safeguard in the form of a suspension mechanism that will bar transfers where there are "systemic flaws in the asylum procedure and reception conditions for asylum applicants in that Member State [primarily designated as responsible,] resulting in risk of inhuman or degrading treatment."[41] In fact, this safeguard mechanism has even more recently (as of 19 September 2012) received the approval of the European Parliament Civil Liberties Committee. If passed by plenary in December, this provision will become a part of EU law and will alter the application of the Dublin II rules on any applications made six months after its introduction.[42] Returning to the Dublin III recast, it also officially introduces the "fitness check" referenced above, which will amount to "an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights."[43] However, in the same Article, and unchanged from the original 2008 draft, it re-affirms the underlying principles of Dublin II. Thus, it can only be hoped that the commitment expressed in the 2011 Communication to review the principles of Dublin perhaps indicates a willingness to revisit the underlying foundations of the system at some point in the future beyond this latest "recast".

3.2 "Further developing relocation of beneficiaries of international protection"

Another area of emphasis under the section on allocation of responsibilities in the 2011 Communication is the intention to further develop the use of internal relocation for beneficiaries of protection. The desire to bolster the use of internal relocation as a tool for improving responsibility sharing has been enhanced following an EU-wide pilot scheme called EUREMA (European Relocation Malta). In the first phase of this scheme, which ran from the summer of 2009 to the summer of 2011, ten Member States[44] pledged to voluntarily relocate beneficiaries of protection present in Malta to their own territories. Facilitated by UNHCR and IOM and funded by the ERF, the scheme saw 227 persons transferred from Malta to participating Member States. The scheme has since been extended and the second phase has seen pledges that would amount to the transfer of between 300-350 beneficiaries of protection. This scheme is perhaps one of the more promising displays of solidarity between countries. However, compared to Malta's relative "burden", these numbers remain low. While 227 persons were successfully transferred to other Member States, Malta received 4,380 asylum applications between 2009 and 2011. Given that in 2009 alone, Malta received 8.02 asylum applications per 1,000 members of its population that year (compared to Spain, which received a relative proportion of 0.08), it begs the question as to whether this is enough.

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40 See, 2011 M.S.S. vs. Belgium and Greece ruling of the European Court of Human Rights. Application no. 30696/09, 21.1.2011; Judgment of the Court of Justice of the European Union (CJEU) on 21 December 2011, N.S. vs. Secretary of State for the Home Department, United Kingdom, C-411/10.

41 Council of the European Union, (2012). *Revised Outcome of Proceedings of Permanent Representatives Committee on 18 July 2012 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) [First reading]*. Brussels, 27.07.2012 12746/2/12 REV 2 ASILE 105 CODEC 1944, Interinstitutional File: 2008/0243 (COD), pg. 31.

42 EU Observer, (2012). *EU lawmakers reinforce asylum seekers' rights*. 19 September 2012. Available from: http://euobserver.com/justice/117604.

43 *Ibid*., pg. 5

44 France, Germany, the UK, Portugal, Luxembourg, Hungary, Poland, Slovakia, Slovenia and Romania.

Amidst discussions on the wider use of internal relocation within the EU, a report on the "feasibility of establishing a mechanism for the relocation of beneficiaries of international protection"[45] was commissioned to highlight the political, legal and financial implications of the internal relocation of asylum seekers and refugees (which also built on an earlier report by the European Parliament entitled "What system of Burden Sharing between Member States for the Reception of Asylum Seekers?"[46]). In terms of political implications, the report raised several important questions: Would such a mechanism only apply to those with recognized refugee/subsidiary status and exclude asylum seekers? How would this system be reconciled with Dublin? Would Member States and the protection seeker be granted veto rights under such a system? Should the scheme be voluntary like EUREMA or contain some automatism? What would EASO's role be? Furthermore, there was concern raised over the "pull factor" problem in that the introduction of any fixed mechanism for internal relocation might spur an increase in applications to the EU. For example, there might be a heightened desire to go to Malta in the hope of being relocated to continental Europe.

With regards to legal implications, there are obvious problems in terms of transfers and standards of protection given the ongoing problems associated with the lack of complete harmonization of asylum systems. Financially speaking, concerns arise over incentive based funding and the reduction that such a system might have on the amounts allocated to national programmes or other funded activities for those countries which are unable to accept internal relocations as a result of existing capacity constraints. Furthermore, there is the issue of any fixed cost/compensation for accepting individuals, as the current baseline is not sufficient to cover all the costs involved. There is a high degree of variance in the costs associated with hosting beneficiaries of protection between Member States.

The 2011 Communication consequently does not consider it appropriate at this time to introduce any specific proposal or mechanism for internal relocation. Instead, it encourages the continuation and further use of voluntary schemes, such as the one operating in Malta, and has accordingly allocated resources in the AMF proposal for such activities and have given EASO the mandate to facilitate these activities. Beyond the implications listed above, however, a purely voluntary arrangement of internal relocation is most unlikely to be a sufficient enough "corrective" responsibility sharing mechanism to supplement the effects of an unchanged Dublin system and to adequately lighten the "burden" of overstretched Member States. And while the EUREMA project seems to have enjoyed moderate success (though on a small scale), it might not be unreasonable to expect that the operation of a purely voluntary system might run the risk of inevitable "pledging fatigue".

3.3 "Investigating the feasibility of joint processing of applications on the Union's territory"

The idea of introducing a system for the joint processing of asylum applications on EU territory was first raised in the 2005 Hague Programme, which invited a study on the implications, appropriateness and feasibility of joint processing. The 2010 Stockholm Programme followed up on this by requesting that the Commission finalize its feasibility study. The joint processing of asylum applications is seen to be an important potential tool for achieving enhanced solidarity between Member States as it could "assist Member States under pressure in reducing backlogs of cases, thus accompanying the Dublin system" and it could also be a way to "disseminat[e] best practice and sharing techniques, again with a view to harmonizing asylum systems by increasing trust in each others' asylum systems".[47] If administered correctly, joint processing could indeed be beneficial and, unlike several other proposals, has not yet been sufficiently explored. Following the proposal for joint processing in the Hague Programme, ECRE affirmed that it would be in full support of "further exploration of a system of joint processing comprising a single EU determining authority with decentralized offices in each Member State provided it guaranteed full respect for asylum seekers' rights under international law".[48] ECRE did stress, however, that issues relating to the legal and financial basis for joint processing must be resolved first along with considerations of democratic control and accountability and asserted that it "opposes any system that involves the forced transfer of asylum seekers to centralized joint processing centres or the unnecessary and disproportionate use of detention".[49]

In line with ECRE's concerns regarding the need to answer certain questions before such a system could be viably introduced, the Commission acknowledges in its 2011 Communication that legal issues including compatibility with EU law, the status of persons subject to joint processing, authority over decision-making and interaction with the Dublin system are all crucial questions that must be clarified along with financial con-

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45 European Commission, (2010). *Study on the feasibility of establishing a mechanism for the relocation of beneficiaries of international protection*. Final report July 2010. JLX/2009/ERFX/PR/1005.

46 European Parliament, (2010). *What system of burden sharing between Member States for the reception of asylum seekers?* European Parliament, Brussels.

47 European Commission, (2011a), pg. 9

48 ECRE, (2005). *The way forward - Europe's role in the global refugee protection system: Towards fair and efficient asylum systems in Europe*. ECRE, pg. 8.

49 *Ibid*., pg. 8.

siderations and practical issues such as the question of where joint processing might take place. While it fails to acknowledge the limitations of a voluntary scheme, it stresses that any efforts to expedite joint processing without full consideration of these issues would run the same risks and encounter the same problems as the introduction of the Dublin Regulation has prior to the achievement of full harmonization, as it was introduced before the basis for its legitimacy (harmonious standards of protection across all Member States) had been achieved. On the basis of these unresolved concerns, the Commission states that it will commence a study to address these questions and that it should be available at the end of 2012.

4 Looking further ahead (in light of recent research)

When trying to establish an effective responsibility sharing system, an essential issue for consideration is whether such a system should try to address the causes or the effects of the disproportionate distribution of responsibilities. The current operation of the CEAS would certainly seem to favour addressing the latter as opposed to the former. This pursuit has not necessarily been successful, however, as the majority of the EU responsibility sharing initiatives that have been introduced to date have been argued to be largely ineffective and potentially even counter-productive.[50] Despite this, the 2011 Communication demonstrates a continued apprehensiveness and unwillingness to revisit the foundations of the system. Instead of exploring how the system might be reoriented to better prevent the uneven distribution of "burdens" in the first place, the preference seems to be to continue to compensate for the resulting disparities. However, while a focus on addressing the causes of inequality would be desirable, this will not always be possible. Given strong variations in structural pull factors (geography, networks, historical ties, language, etc.) and the reinforcement of such imbalances through the Dublin system, there is a continued need to address effects by establishing mechanisms that can adequately compensate for the inequalities resulting from the continued operation of this system. To that end, there have been several recent studies that have explored the most effective and feasible avenues for improving solidarity with regard to both financial and physical responsibility sharing mechanisms.

In an effort to better understand "what system of burden sharing" should be adopted at the EU level, the aforementioned 2010 European Parliament report extensively reviewed the large discrepancies in asylum related costs borne by different Member States before presenting potential policy options for achieving a more even distribution of costs. The authors ultimately identified four main policy options: "do nothing"; policy harmonization, centralization and capacity building via EASO; financial compensation; and internal relocation. The report argues that the only fully effective policy option capable of achieving an equalization of both the explicit and implicit financial and physical costs associated with asylum responsibilities is the fourth option of relocation.

In yet another recently produced report by the European Parliament (2011) on the implementation of Article 80 TFEU on solidarity and fair sharing of responsibility,[51] the authors note that the achievement of solidarity seems to unfortunately be at an impasse, and that this is largely a result of disagreements over issues relating to the potential introduction of internal relocation schemes and joint processing, many of which have already been mentioned above. However, another issue that was raised in interviews with various senior level officials from across the Member States was the fear that somehow a system for relocation would represent a "reward" for those countries that are unable to manage the processing of asylum seekers according to already legislated directives or for those Member States who would prefer to have persons relocated as opposed to improving their capacity for integration.[52] This clearly validates the Commission's assertion that a higher level of "mutual trust" is also a requirement for improved solidarity. The report therefore proposes that solidarity might be better achieved by the development of experience-based schemes instead of a continued reliance on ad hoc, voluntary solutions, and on that basis introduces two proposed "sharing" schemes.

The first scheme would apply to situations where the stretched capacity of a Member State, as a result of too many asylum applications, results in an inability to implement the minimum standards directives, which can consequently lead to asylum seekers engaging in secondary movements and invoking the Dublin Regulation in a situation where the return is problematic. In such a situation, the overstretched Member State would rely on the help of other Member States and their asylum officers to process claims according to strictly pre-arranged procedures, which would be overseen by EASO. The original country would be obligated to adequately host a certain percentage of the claimants while the majority would be accepted by the assisting countries on the basis of a distribution key.

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[50] Thielemann, Eiko, (2004).

[51] European Parliament, (2011). *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration*. European Parliament, Brussels.

[52] *Ibid*., pg. 104.

The second scheme would apply to situations where the asylum system itself is not in question, but where a Member State is responsible for more accepted protection seekers than they are capable of integrating. A EUREMA-type scheme could apply in such a situation. However, resources would also be designated to improving integration capacity for the future while limiting the number of individuals requiring relocation.[53] Unfortunately, regardless of the recommendation and general feeling in this report that a continued reliance on ad hoc, case-by-case solutions should be avoided as this is unlikely to improve the state of solidarity among EU Member States, the 2011 Communication has remained conservative on this front and has shied away from any fixed commitments.

The strong reluctance to engage in any fixed commitments was already readily apparent in the aforementioned 2010 Commission study on the feasibility of establishing a system for internal relocation. For the purpose of this study, two potential "systems" for relocation were presented to multiple Member State representatives as well as selected international organizations.

The first option was a relocation mechanism that would be adopted through EU legislation and which would create a quota for each Member State on the basis of per capita GDP and population density. While there would be distinct criteria for each, the proposal was to include beneficiaries of international protection as well as asylum seekers. EASO would help to determine destinations and the ERF would be responsible for funding, with a fixed rate set to compensate for the individual as well as a flat rate for each Member State.

The second option would see the relocation of recognized beneficiaries of international protection, and potentially asylum seekers, on an ad hoc basis through a mechanism of voluntary pledging. Each Member State would be expected to make a pledge on an annual basis on the heels of a needs-based assessment conducted by EASO. Funding would again be through the ERF and a fixed amount per person relocated would be allocated to the relevant Member State.

Faced with these two options, it is perhaps not surprising that Member State representatives were overwhelmingly in favour of the second option. However, what is particularly problematic is the fact that at least half of the Member States explicitly rejected the suggestion that asylum seekers be included in either scenario. This resistance is troubling because, as mentioned previously, internal relocation has been earmarked as the most promising policy initiative in terms of redressing or compensating for the distributional inequalities created by the Dublin system, which of course only applies to asylum seekers. Furthermore, much of the problem in terms of capacity issues and the inequitable distribution of "burdens" relates to the costs incurred by Member States *during* the processing of an application for asylum (every one of which could represent a legitimate beneficiary of international protection), which in turn jeopardizes the ability of an overstretched country to uphold their obligations under international and EU law. If Member States are indeed unwilling to consider the inclusion of asylum seekers in any system of internal relocation, this policy option ceases to be a viable "compensatory mechanism" for the distributional effects of Dublin, which takes things back to the proverbial drawing board.

Another issue that received a strong response from Member State representatives was that of an asylum seeker's and refugee's choice of host country. Member States have resisted any suggestion involving the individuals subject to relocation having any degree of choice in terms of selecting their host country. A recently produced study by Moraga and Rapoport[54] looks at this issue from a global perspective and argues that migrant preferences should be taken into account when determining the host country. In their paper, they model a market with tradable immigration quotas determined by proportionality, which provides migrants with the ability to choose their destination country and which provides incentives for "under-burdened" destination countries to take on their fair share of responsibilities. While it is not likely to be feasible that complete preference matching in a relocation system designed for beneficiaries of international protection or asylum seekers will be achieved, some level of consideration should be given to identifying the preferences of candidates for relocation, as this would reduce incentives to misrepresent preferences or to engage in secondary movements. Furthermore, the 2010 European Parliament Report mentioned above also found that refusing to allow any level of choice for asylum seekers increases the costs involved as a result of detention, the determination of state responsibility under Dublin, and any subsequent transfers that ensue.[55]

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[53] *Ibid*., pg. 104-5.

[54] Moraga, Jesus Fernandez-Huertes and Hillel Rapoport, (2011). *Tradable Immigration Quotas*. Institute for the Study of Labor, Discussion Paper No. 5765, June 2011.

[55] European Parliament, (2010), pg. 146.

There are also lessons that can be learned from the various dispersal and relocation schemes that have been introduced nationally within EU Member States. In order to counteract the unavoidable pull of London, the United Kingdom's dispersal scheme makes financial support and the provision of social housing conditional on the willingness of an asylum seeker to be dispersed. The decision on where to relocate them to is then based on several indicators relating to integration, such as the availability of housing, ethnic diversity, employment opportunities, etc. The system also employs a cap in terms of the maximum number of asylum seekers that should be located in any given region relative to the native population, as well as an administrative cap in terms of the number of caseloads permitted per region.[56] In Germany, asylum applicants are initially held in central reception centers while their claims are determined before they are distributed between Länder on a distribution key largely based on population size. Asylum seekers have no say in where they are relocated to and once assigned to a Länder, that Länder uses its own distribution key to determine which district the asylum seeker will be sent to (though this is also largely population driven).[57] The system that was introduced in the Netherlands resembles that used in Germany, as asylum seekers are also hosted in reception centers until a determination is made where they are distributed among municipalities where responsibility is then transferred to local government. Again, asylum seekers are not permitted any level of choice in this system.[58]

Alternatively, the approaches to dispersal in Finland, Sweden and France are somewhat less deterministic. In Finland, there is no dispersal scheme as such, but municipalities offer to voluntarily accept asylum seekers based on agreed contracts with the central government, and receive financial compensation in turn. However, this system has proven problematic in the face of significant changes in the influx of asylum applicants and also because the level of financial compensation is not proportional to actual costs incurred. The Swedish system for dispersal is only invoked if the asylum seeker is unable to choose a municipality themselves, which they are otherwise free to do. In such cases, dispersal is determined by negotiations between regional governments and municipalities based on national statistics and ratios relating to status recognition and refusal. The asylum seeker will then be assigned a municipality on the basis of vocational or educational background and their likelihood for entering the labor market. The independence of Swedish municipalities, however, means that there are still significant discrepancies in numbers between regions despite these regional agreements. The French system also allows asylum seekers to choose where they would like to settle. A triennial budgeting process allocates money from a state fund to the different regions, which allows for the discrepancies in the number of asylum seekers across regions to be regularly taken into account. Furthermore, there is active oversight and monitoring of capacity related issues carried out by a designated government office.[59]

While the operation of these systems demonstrates some of the problems associated with purely voluntary systems and indicates that financial compensation is not singularly adequate for effective responsibility sharing, there are several positive lessons that can also be derived from these schemes, some of which have been integrated at the EU level, and some of which have not. The importance of integration indicators, the consideration of capacity (including both physical and social capacity measures), the need for adequate and proportional financial compensation, the desirability of choice and the importance of regular oversight and monitoring are all important features of the aforementioned systems and could serve as useful considerations in the further development of an EU-wide dispersal/relocation scheme.

The current system actually represents a significant departure from the original sharing system proposed by the German Presidency in 1994, which asserted that the distribution of refugees should be based on various indicative measures that would result in a quota system. The proposed criteria for distribution amongst Member States, all of which were to be given equal weight, included: the size of the population as a proportion of the whole Union; the size of the national territory as a proportion of the whole Union; and GDP as a proportion of the whole Union. The draft proposal also allowed for consideration of alternative methods of contribution, in that the system would allow for shortfalls by any country that was contributing significantly to foreign and security policy efforts through peace-making or peacekeeping efforts, by ensuring that less involved countries would compensate for this shortfall by higher levels of contributions themselves.[60] This proposal, however, did not receive the support of other key Member States, and

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[56] *Ibid*., pg. 51-52.
[57] *Ibid*., pg. 52.
[58] Vaughan Robinson, Roger Andersson and Sako Musterd, (2003). *Spreading the "Burden"? A Review of Policies to Disperse Asylum Seekers and Refugees*. Bristol: The Policy Press, pg. 40.
[59] European Parliament, (2010), pg. 54.
[60] For an exploration of this dynamic of contribution trading, see Thielemann, Eiko R. and Torun Dewan, (2006). "The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing", *West European Politics*, 29(2): pg. 351-369.

as shown above, similar recommendations and proposals for systems involving quotas according to proportional distribution keys have remained controversial. Thus, we are faced with a stalemate when it comes to advancing this policy area.

Ultimately, there remains an urgent need to improve the system for responsibility sharing in the EU. Although significant developments have been made in recent years, the current operating state of the CEAS is not sufficient to adequately ensure a fairer distribution of asylum costs and responsibilities or to ensure a consistent standard of protection across the EU. While many of the recommendations made by the Commission in the 2011 Communication should be encouraged, this paper has demonstrated that those proposed action points are unlikely to be sufficient due to several crucial deficiencies. The 2011 Communication fails to reconsider the distribution key for financial responsibility sharing. It fails to sufficiently acknowledge the importance of relative "burdens" and relative capacity in the operation of the Dublin system. It also fails to consider more seriously binding (rather than merely voluntary) mechanisms for internal relocation. Thus, in the light of some of these shortcomings, this latest push by the Commission to improve intra-EU solidarity fails to adequately address the structural and institutional features of the system that are perpetuating existing inequalities and is therefore unlikely to produce the improvements required by the current system. Ultimately, improved solidarity is contingent on an improved system of responsibility sharing; however, the achievement of an improved system of responsibility sharing is equally, if not more, contingent on already existing solidarity. It would seem that this is where the problem lies.