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The Regulation on Asylum and Migration Management in the EU: A Step Toward Solidarity

Sarah Smith

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Editors: Siegfried Fina and Roland Vogl

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Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Sarah Smith received her J.D. from Stanford Law School in 2022. Before that, she received a B.A. in the Program of Liberal Studies from the University of Notre Dame and a PhD in English from the University of Virginia.

General Note about the Content

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Abstract

The Dublin Regulation, the European Union law that determines which Member State is responsible for processing an asylum seeker's claim, has long been criticized. Opponents argue that the Dublin System unfairly burdens border states, such as Italy and Greece, because it typically provides that the state an asylum seeker first entered is responsible for processing her application.

This paper evaluates the European Commission's proposed Regulation on Asylum and Migration Management. Introduced in September 2020, the proposed regulation seeks to reform Europe's asylum system by requiring "solidarity contributions" from all Member States. The paper begins by discussing Europe's current Dublin System and the criticisms levied against it. It then considers the Relocation Decisions of 2015, which required Member States to accept relocated asylum seekers from Italy and Greece at the height of the 2015 migrant crisis. This attempt at mandated solidarity failed, as many Member States refused to accept relocated asylum seekers. The essay finally turns to the proposed Regulation on Asylum and Migration Management and evaluates its likelihood of success, drawing lessons from the shortcomings of the Dublin System and the failures of the Relocation Decisions of 2015.

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I. Introduction

Over the past decade, debates over migration and asylum have divided the European Union. As millions of asylum seekers have arrived at Europe's shores, the bloc has debated how best to distribute the responsibility for housing asylum seekers and processing their claims. Southern Member States argue that the Dublin Regulation, the EU law that determines which Member State is responsible for handling an asylum seeker's claim, places a disproportionate burden on frontline states, because the regulation typically provides that the state the asylee first entered is responsible.[1] In the view of frontline states, the Dublin System fundamentally conflicts with Article 80 TFEU, which requires that the EU's policies on migration and asylum be governed by the principle of "solidarity and fair sharing of responsibility."[2] On the other hand, states further north have criticized frontline states for their failure to adequately monitor Europe's external borders and their inability to stop asylum seekers from moving to other states within the EU.

The migrant crisis of 2015, in which more than one million people applied for asylum in Europe, revealed in stark terms the inadequacies of Europe's common asylum system. The asylum systems in Italy and Greece were quickly overwhelmed, and those states were consequently unable to process applications in an efficient and humane manner. When the Council of the European Union tried to ease the burden on Greece and Italy by requiring other Member States to receive relocated asylees, it faced a strong backlash and was ultimately unsuccessful in relocating many migrants.[3] The European Commission, determined to show that it can provide a "European solution" to a common problem, proposed reforms to the Dublin System in September 2020.[4] One

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[1] *See* Part II, *infra*.
[2] Consolidated Version of the Treaty on the Functioning of the European Union art. 80, June 7, 2016, 2016 O.J. (C 202) 78 [hereinafter TFEU].
[3] *See* Part IV, *infra*.
[4] European Commission Press Release IP/20/1706, A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, (Sept. 23, 2020).

proposal, the Regulation on Asylum and Migration Management, would reform the Dublin System by requiring all Member States to make "solidarity contributions" in the event that a Member State is overwhelmed by an influx of asylum seekers.

This essay seeks to understand and evaluate the solidarity mechanisms proposed in the Regulation on Asylum and Migration Management. Part II explains the current Dublin Regulation, and Part III discusses common criticisms of the Dublin System. Part IV considers the relocation decisions of 2015, through which the Council attempted to achieve fair sharing of responsibility but failed. Part V turns to the Commission's proposal and, in light of the inadequacies of the Dublin System and the failures of the relocation decisions, assesses whether the solidarity mechanisms proposed are likely to provide meaningful solidarity to overwhelmed Member States.

II. The Dublin System

This section provides an overview of the Dublin System. It first explains the history of the Dublin Regulation and the policy goals it was meant to achieve. It then turns to the Dublin Regulation itself, explaining the criteria it sets out for determining which Member State is responsible for adjudicating an asylum seeker's claim and the procedures for transferring asylum seekers to the responsible Member State. It ends by discussing how the Dublin System operates in the European Union today.

A. Development and Purpose of the Dublin Regulation

The Dublin System originated in the Dublin Convention, a treaty signed by 12 Member States in 1990 that entered into force in 1997.[5] The Dublin Convention, which set out rules for

[5] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Aug. 19, 1997, 1997 O.J. (C 254) 1 [hereinafter Dublin Convention]. The original signatories in 1990 were Germany, France, Italy, Belgium, the Netherlands, Luxembourg, Denmark, Greece, Ireland, the United Kingdom, Portugal, and Spain.

determining which Member State would handle a given asylum claim, was adopted following the Schengen Agreement of 1985, which eliminated internal border controls among participating Member States.[6] Because an asylum seeker, once she entered the Schengen area, would be able to move freely amongst different states, it became necessary to provide clear rules as to which state would be responsible for handling her claim.[7] In 2003, the EU adopted the Dublin Regulation (known as Dublin II) as part of its Common European Asylum System.[8] It was revised in 2013 (the Dublin III Regulation).[9]

The Dublin Regulation was intended to make the processing of asylum applications more efficient and certain. By providing clear rules as to which Member State is responsible for an asylee's application, the Dublin Regulation aims to avoid situations in which an asylum seeker is shuttled between several Member States, each refusing to process her claim.[10] The regulation is also intended to prevent "asylum shopping" whereby asylum seekers flock to the Member States that provide the best benefits to newcomers or the greatest odds of receiving asylum.[11] Finally, the Dublin Regulation aims to reduce costs and inefficiencies by preventing asylum seekers from lodging claims in multiple Member States.[12] By clarifying which Member State is responsible for

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[6] Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, 2000 O.J. (L 239) 1; s*ee also* Dublin Convention, preamble (listing as a consideration for adopting the agreement the "joint objective of an area without internal frontiers in which the free movement of persons shall, in particular be ensured").

[7] SUSAN FRATZKE, NOT ADDING UP: THE FADING PROMISE OF EUROPE'S DUBLIN SYSTEM 4 (2015).

[8] Council Regulation 343/2003, preamble ¶¶ 1-3, 2003 O.J. (L 50) 1, (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-vountry national) [hereinafter Dublin II Regulation].

[9] Council Regulation 604/2013, 2013 O.J. (L 180) 31 (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) [hereinafter Dublin III Regulation].

[10] FRATZKE, *supra* note 7, at 4; *see also* Dublin Convention, preamble (explaining that the Dublin Convention was adopted to "ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum").

[11] FRATZKE, *supra* note 7, at 4.

[12] Kimara Davis, *The European Union's Dublin Regulation and the Migrant Crisis*, 19 WASH. U. GLOBAL STUD. L. REV. 261, 269 (2020).

a given asylum application, the Dublin Regulation was designed to guarantee that each application for asylum is reviewed adequately and efficiently.[13] The Dublin System was not, however, originally designed to ensure that the burden of processing asylum applications is equitably shared amongst Member States.[14]

B. The Dublin III Regulation

The Dublin III Regulation establishes a hierarchy of criteria for determining which Member State is responsible for adjudicating an asylum applicant's claim.[15] The most controversial criterion is found in Article 13, which considers which Member State the applicant first entered.[16] In addition to determining which Member State is responsible for a particular applicant's claim, the regulation also provides procedures for transferring the applicant to the responsible Member State.[17]

1. *Dublin Criteria*

Chapter III of the Dublin III Regulation lists a series of criteria for determining which Member State is responsible for processing an asylee's claim.[18] The criteria are to be considered in the order in which they appear.[19] The first set of criteria prioritize family unity. If an applicant has an immediate family member who has either been granted asylum or has an asylum application

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[13] *See* Dublin II Regulation, preamble ¶ 4 (explaining that the Dublin System is intended to "make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications").
[14] FRATZKE, *supra* note 7, at 4.
[15] Dublin III Regulation, art. 7.
[16] *Id.* art. 13.
[17] *Id.* arts. 20-25.
[18] *Id.* arts. 7-15.
[19] *Id.* art. 7.

pending in a Member State, that state is responsible for handling the applicant's claim.[20] The regulation also provides special rules to protect the well-being of unaccompanied minors.[21]

The second set of criteria consider the circumstances under which the applicant entered the European Union. If the applicant was granted a valid residence document or visa, the issuing Member State will be responsible for processing the applicant's claim.[22] If the applicant entered a member state "irregularly" from a non-EU country, Article 13 provides that the Member State entered shall be the responsible state.[23] However, that state's responsibility ceases 12 months after the date of the applicant's entry.[24] If the applicant entered a Member State that did not require a visa for entry, that Member State is responsible for handling her claim.[25] Finally, if an applicant files for asylum in the international transit area of a Member State's airport, that Member State is responsible.[26]

If no Member State is determined to be responsible based on these criteria, the Member State in which the applicant filed her claim is responsible.[27] The regulation also includes a "discretion clause" that permits a Member State to examine an application for asylum even if it would not otherwise be responsible.[28] Member States may also request that a fellow Member State

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[20] *Id.* arts. 9-10. For the purposes of Articles 9 and 10, "family members" are limited to spouses, minor children, and the parents of minor children. *Id.* art. 2(g).
[21] *Id.* art. 8. If an applicant is an unaccompanied minor, the member state responsible is, in the following order: 1) the state where the minor's immediate relative legally resides 2) the state where the minor's relative legally resides 3) the state where the minor filed her asylum claim.
[22] *Id.* art. 12. If, however, the applicant's residence document expired more than two years previously or the visa expired more than six months previously, then the member state where the applicant lodged her complaint is responsible. *Id.* art. 12(4).
[23] *Id.* art. 13(1).
[24] *Id.*
[25] *Id.* art. 14(1). This principle does not apply if the member state in which the applicant lodges her asylum application also permitted her to enter without a visa. *Id.* art. 14(2).
[26] *Id.* art. 15.
[27] *Id.* art. 3(2).
[28] *Id.* art. 17(1).

take responsibility for processing an asylum application if humanitarian reasons, such as family reunification, justify the transfer.[29]

2. *Take Charge and Take Back Procedures*

The Dublin III Regulation provides procedures for transferring asylum applicants from the Member State in which the applicant lodged her claim to the state that is ultimately responsible for processing her claim.[30] A Member State may issue a "take charge" request if it determines, based on the criteria above, that another Member State is responsible for processing the asylee's application.[31] A Member State may issue a "take back" request to another Member State if the applicant previously filed for asylum in the second Member State and the application is pending, was withdrawn, or was rejected.[32]

C. The Dublin System in Practice

The Dublin System plays a significant role in the processing of asylum claims across the European Union. In 2019, 142,204 take back or take charge requests were filed by Member States.[33] In that same year, 762,170 requests for asylum were lodged in Member States, meaning that 19% of asylum claims resulted in a take back or take charge request in 2019.[34]

Of the 142,204 take charge or take back requests filed in 2019, 106,203 were take back requests, meaning that the asylum applicant was found to have previously applied for asylum in

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[29] *Id.* art. 17(2).
[30] *Id.* arts. 18-25.
[31] *Id.* art. 18(a).
[32] *Id.* art. 18(b)-(d).
[33] Eurostat, "Incoming 'Dublin' requests by submitting country" [migr_dubri], updated Dec. 16, 2021, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubri&lang=en.
[34] Eurostat, "Asylum applicants by type of applicant, citizenship, age and sex—annual aggregated data [migr_asyappctza], updated Oct. 28, 2021, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en.

another Member State.[35] The remaining 36,001 take charge requests were based on application of the Dublin criteria.[36] The family reunification criteria accounted for 4,421, about 12%, of the take charge requests,[37] while 18,926, or 53%, of the take charge requests were sent because another Member State granted the asylum seeker a visa or residence permit or allowed her to enter its territory without a visa.[38] A substantial number of the take charge requests—10,130 or 28%—were sent pursuant to Article 13.[39] The relatively high proportion of take charge requests based on the applicant's irregular entry or the issuance of a visa is attributable to EURODAC and the Visa Information System (VIS), centralized databases that contain fingerprint data for individuals who have irregularly entered the EU or who have been issued visas by Member States, respectively.[40]

III. Criticisms of the Dublin System

The Dublin System has been criticized on many fronts; it has been derided as inefficient, ineffective, unfairly burdensome on some Member States, and harmful to asylum seekers. Some argue that the Dublin System is inefficient, because, under the Dublin Regulation, some countries send and receive roughly the same number of take back and take charge requests.[41] Switzerland, for example, sent 4,099 take back or take charge requests in 2019.[42] In that same year, it received

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[35] Eurostat, "Incoming 'Dublin' requests by submitting country" [migr_dubri], updated Dec. 16, 2021, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubri&lang=en.
[36] *Id.*
[37] *Id.* This number includes take charge requests filed pursuant to Articles 8, 9, 10, and 11 of the Dublin III Regulation.
[38] Id. This number includes take charge requests filed pursuant to Articles 12(1), 12(2), 12(3), 12(4), and 14 of the Dublin III Regulation.
[39] *Id.*
[40] The EURODAC system came into operation in 2003 pursuant to the EURODAC Regulation, passed in 2000. It is a centralized database that stores the fingerprint data of individuals who apply for asylum in the EU or who irregularly enter the European Union. *See* Council Regulation 2725/2000, 2000 O.J. (L 316) 1 (concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention). The VIS was established in 2008 and includes the biometric data of individuals who have applied for visas to participating Member States. *See* Council Regulation 767/2008, 2013 O.J. (L 218) 60 (concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas).
[41] FRATZKE, *supra* note 7, at 13.
[42] Eurostat, "Incoming 'Dublin' requests by submitting country" [migr_dubri], updated Dec. 16, 2021, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubri&lang=en.

4,676 requests.[43] In some cases, the Dublin System thus does not significantly alter how many asylum applications a state must process; it merely affects which asylum applications are processed by that state. At the same time, take charge and take back procedures impose administrative costs on the EU and individual Member States and delay the adjudication of asylum seekers' claims.[44]

Others have criticized the Dublin System as ineffective, because many Dublin transfers never take place.[45] Of the 142,204 take charge or take back requests filed in 2019, for example, only 24,251 resulted in transfers.[46] Many factors account for this disparity: some asylum applicants abscond before they can be transferred, Member States struggle to coordinate effectively, and some Member States refuse to accept a Dublin transferee without formal evidence, such as fingerprint data from EURODAC or, in the case of transfers based on family reunification, a DNA test.[47]

Finally, a major critique of the Dublin System—and the one whose solution is the focus of the remainder of this essay—is that it overburdens border states and thereby violates the principle of solidarity. Article 80 TFEU provides that the European Union's policies regarding asylum and immigration "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."[48] This requires Member States to approach the issue of asylum collectively and to share its burdens fairly.[49] Critics of the Dublin

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[43] Eurostat, "Outgoing 'Dublin' requests by receiving country" [migr_dubro], updated Dec. 16, 2021, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubro&lang=en. For other Member States, the Dublin System does significantly affect how many asylum applications the Member State must process. France, for example, submitted 47,048 requests in 2019 and received 10,464. *See id.*; Eurostat, "Incoming 'Dublin' requests by submitting country" [migr_dubri], updated Dec. 16, 2021, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubri&lang=en.

[44] *See* FRATZKE, *supra* note 7, at 15-16 (discussing the costs to Member States of Dublin transfers and the operation of the EURODAC system), 18-19 (discussing delays in the processing of asylum claims due to Dublin procedures).

[45] *Id.* at 11-13.

[46] Eurostat, "Incoming 'Dublin' transfers by submitting country" [migr_dubti], updated Jan. 10, 2022, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubti&lang=en.

[47] FRATZKE, *supra* note 7, at 12-13.

[48] TFEU art. 80.

[49] Eleni Karageorgiou, *The Law and Practice of Solidarity in the Common European Asylum System: Article 80 TFEU and its Added Value*, 14 EUR. POL'Y ANALYSIS 1, 4 (2016).

System argue that Article 13 violates this principle because, by placing responsibility for processing the asylum applications of irregular migrants on the Member State of entry, it burdens the states whose borders migrants must cross to enter the EU.[50] And while other Dublin criteria, such as the family reunification provisions, are given precedence over Article 13, they do little to shift the burden from border states.[51]

The data on take charge requests indicate that the Dublin System does indeed disproportionately burden border states. In 2019, for example, Italy received 8,728 take charge requests, which accounted for 20% of the take charge requests issued that year.[52] In that same year, Greece received 4,390 take charge requests.[53] By comparison, Sweden received 731 take charge requests in 2019, Switzerland received 778, and Denmark received 279.[54] It is important to note, however, that notwithstanding Article 13, many inland Member States, particularly France and Germany, receive a high number of asylum applications.[55] Moreover, in the view of many northern states, European solidarity and trust is broken by the apparent inability of border states to monitor Europe's external borders and prevent secondary movement by asylum seekers.[56]

In any case, there is no denying that the design of the Dublin System places an unequal burden on frontline states and that this imbalance impairs the EU asylum system as a whole. When border states' asylum systems are overburdened, as Italy's and Greece's were in 2011 and 2015,

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[50] Lillian M. Langford, *The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity* 26 HARV. HUM. RTS. J. 217, 217-18 (2013).
[51] *See supra* note 37 and accompanying text (describing the relatively small percentage of Dublin transfers made pursuant to Articles 8, 9, 10, and 11).
[52] Eurostat, "Outgoing 'Dublin' requests by receiving country" [migr_dubro], updated Dec. 16, 2021, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubro&lang=en.
[53] *Id.*
[54] *Id.*
[55] David Coffey, "France to push for sweeping reform of EU asylum system," RFI (Jan. 10, 2021), https://www.rfi.fr/en/europe/20211001-france-to-push-for-sweeping-reform-of-eu-asylum-system.
[56] Daniel Thym, "Secondary Movements: Overcoming the Lack of Trust among the Member States?" EU IMMIGRATION AND ASYLUM LAW AND POLICY BLOG (Oct. 29, 2020), https://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states//.

they are unable to meet acceptable reception conditions for asylum seekers or to process their claims appropriately.[57] This has several consequences. Some have argued that conditions in such states violate asylum seekers' rights to seek international protection, due to the conditions in which asylees are held, delays in processing, and low rates of asylum grants.[58] Moreover, the deficiencies of Italy's and Greece's asylum system are known to new migrants, leading some asylum seekers to elude authorities in order to avoid being fingerprinted, a phenomenon that decreases the effectiveness of EURODAC and undermines European security.[59] Relatedly, although Article 13 has been justified by its proponents as a means of encouraging effective border control, some have suggested that it creates an incentive for frontline states *not* to police the border so as not to register migrants for whom they would be responsible under Dublin.[60] Finally, the inadequate conditions in overburdened Member States have led some states to refuse to transfer asylum seekers to those states.[61] This became widespread in the case of Greece following the CJEU's 2011 ruling, *N.S. v. United Kingdom/ M.E. v. Ireland*.[62] In those cases, asylum seekers who entered Greece irregularly before lodging asylum claims in other EU states argued that they should not be transferred back to Greece considering the inadequacies of its asylum system.[63] The CJEU held for the asylum seekers, reasoning that Member States may not send asylum seekers to states where they "cannot be

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[57] Langford, *supra* note 50, at 238-46 (discussing the burden placed on Greece and Italy by Article 13(1) of the Dublin III Regulation and those states' consequent failure to satisfy EU directives concerning acceptable reception conditions and provisions of international law prohibiting *refoulment*); Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57, 82-95 (2016) (discussing the "demeaning and life-threatening" reception conditions for asylum seekers in Italy).

[58] Langford, *supra* note 50, at 238-46 (noting that in 2010, the average EU grant rate for Afghani nationals was 44.5% and for Iraqi nationals was 52.4%, whereas in Greece, the rates of asylum for those groups were 7.3% and 10.3%, respectively).

[59] Davis, *supra* note 12, at 279-80 (noting that migrants seeking to avoid being fingerprinted turn to human traffickers that are tied to criminal organizations).

[60] European Parliamentary Research Service, "The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment," PE 694 210, at 24 (2021).

[61] FRATZKE, *supra* note 7, at 11.

[62] Joined Cases C-411/10 & C-493/10, N.S. v. Sec'y of State for the Home Dep't and M.E. v. Refugees Application Commissioner, 2011 E.C.R. 865.

[63] *Id.* at ¶¶ 34-52.

unaware that systemic deficiencies in the asylum procedure and in reception conditions. . . in that Member State amount to substantial grounds" for believing that the asylum seeker would likely face inhumane and degrading treatment.[64] While halting Dublin transfers to Greece is salutary from a human rights perspective, some have argued that allowing Member States to scrutinize one another's asylum systems undermines the trust that Member States must have in one another for the European Union to succeed.[65] In recognition of the serious problems created by Article 13 and the unequal burden it places on border states, the European Commission has, on several occasions, proposed to amend the Dublin System so that it better distributes the burdens of processing asylum claims in accordance with Article 80 TFEU.[66]

IV. Relocation Decisions of 2015

Before turning to the Commission's most recent proposal to amend the Dublin System, it is useful to consider a previous attempt by the European Union to ease the burden on frontline states. At the height of the migrant crisis in 2015, the Council of the EU adopted two decisions that mandated the relocation of asylum seekers in Italy and Greece to other Member States.[67] The decisions were unsuccessful for two principal reasons: Member States treated the relocation quotas

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[64] *Id.* at ¶ 94.

[65] Langford, *supra* note 50, at 248-49 (noting that, in their responses to the CJEU in the *N.S.* decision, the British and Irish governments, along with other EU Member States, had argued against a finding that would require Member States to monitor one another's compliance with human rights law as such a ruling would violate the "principles of mutual trust and cooperation underpinning the EU").

[66] *See, e.g.*, *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*, COM (2016) 270 final, (Apr. 5, 2016) (proposing to revise the Dublin III Regulation by creating a "corrective allocation mechanism" that would be automatically activated when one Member State confronts a disproportionate number of asylum seekers); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, at 5, COM (2020) 609 final (Sept. 23, 2020) [hereinafter New Pact on Migration and Asylum] (proposing to revise the Dublin System to include new solidarity mechanisms "so that the real needs created by the irregular arrivals of migrants and asylum seekers are not handled by individual Member States alone, but by the EU as a whole").

[67] Council Decision 2015/1523 of 14 September 2015, 2015 O.J. (L 239) 146; Council Decision 2015/1601 of 22 September 2015, 2015 O.J. (L 248) 80.

as voluntary, rather than obligatory, and some Member States viewed the decisions as illegitimate mandates from Brussels that violated their sovereignty.

A. The Relocation Decisions: Background and Implementation

In 2015, a record 1.3 million people—the majority from Syria, followed by Afghanistan and Iraq—applied for asylum in the European Union, Norway, and Switzerland.[68] While Germany, Hungary, and Sweden were the most popular destinations for asylum seekers, the majority—around 850,000 migrants—first entered the European Union via Greece, followed by Italy.[69]

The asylum systems in Greece and Italy were overwhelmed by this surge, and so in September of 2015, the Council adopted two decisions mandating the relocation of 160,000 asylum seekers from Italy and Greece to other Member States.[70] The decisions were adopted by a majority vote, with Hungary, Slovakia, the Czech Republic, and Romania voting against and Finland abstaining.[71] Because the Council wanted to avoid relocating asylum seekers who would ultimately not be permitted refuge in the EU, it limited eligibility for relocation to asylees from nations whose claims were granted at a rate of 75% or higher.[72] Additionally, to be considered for relocation, a migrant must have lodged an application in Greece or Italy.[73] Those states were also responsible for processing migrants before they were relocated, including identifying, registering,

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[68] PEW RESEARCH CENTER, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, (Aug. 2, 2016), https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/#rapid-increase-in-the-number-of-asylum-seekers-from-non-european-and-european-countries-alike-between-2013-and-2015.

[69] *Id.*

[70] Council Decision 2015/1523 of 14 September 2015, art. 4, 2015 O.J. (L 239) 146 (requiring the relocation of 40,000 asylum seekers); Council Decision 2015/1601 of 22 September 2015, art. 4, 2015 O.J. (L 248) 80 (requiring relocation of 120,000 asylum seekers).

[71] Senada Šelo Šabić, Friedrich Ebert Stiftung, "The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear," 5 (Oct. 2017).

[72] Council Decision 2015/1523 of 14 September 2015, preamble ¶ 20, 2015 O.J. (L 239) 146; Council Decision 2015/1601 of 22 September 2015, preamble ¶ 25, 2015 O.J. (L 248) 80.

[73] Council Decision 2015/1523 of 14 September 2015, art. 3(1), 2015 O.J. (L 239) 146; Council Decision 2015/1601 of 22 September 2015, art. 3(1), 2015 O.J. (L 248) 80.

and fingerprinting the asylum seekers.[74] The Council allocated the 160,000 migrants amongst Member States according to each state's GDP, population, unemployment rate, and the number of asylum seekers and resettled refugees in that state.[75] The relocations were intended to be mandatory; Member States could refuse to relocate an applicant "only" if there were "reasonable grounds" to suspect that he or she was a danger to "national security or public order."[76]

The Council decisions provided that the 160,000 migrants would be relocated over a span of two years.[77] The Council was, however, required to adjust the number of relocations to 98,255, as fewer migrants satisfied the eligibility requirements for relocation than expected.[78] But, even with this drastically reduced target, only 30% of relocations took place, resulting in the relocation of 29,401 asylum seekers.[79] Some states relocated nearly all the migrants they were obliged to accept, such as Finland (95%), Ireland (92%), and Malta (113%).[80] Others participated, but fell far short of their obligation, such as Germany (30.8%), France (22.7%), and Spain (13.7%).[81] Finally, some states, including Austria (0.8%), the Czech Republic (0.4%), Hungary (0%), Poland (0%), and Slovakia (1.8%) essentially refused to comply with the scheme.[82]

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[74] Council Decision 2015/1601 of 22 September 2015, art. 5(5), (9), 2015 O.J. (L 248) 80.
[75] *Id.* at Annex I (Allocations from Italy) and Annex II (Allocations from Greece); *see also* Elspeth Guild et al., "Implementation of the 2015 Council Decisions Establishing Provisional Measures in the area of International Protection for the Benefit of Italy and Greece," Study for the European Parliament LIBE Committee, PE 583 132, at 22, (2017).
[76] Council Decision 2015/1523 of 14 September 2015, art. 5(7), 2015 O.J. (L 239) 146; Council Decision 2015/1601 of 22 September 2015, art. 5(7), 2015 O.J. (L 248) 80. Member States could also refuse to relocate asylum seekers if there were "serious reasons" for applying the exclusion provisions in Articles 12 and 17 of Directive 2011/95/EU, 2011 O.J. (L 337) 9. *Id.* Those provisions allow states to refuse protection to individuals suspected of war crimes, crimes against humanity, or other serious crimes.
[77] Council Decision 2015/1523 of 14 September 2015, preamble ¶ 17, 2015 O.J. (L 239) 146; Council Decision 2015/1601 of 22 September 2015, preamble ¶ 22, 2015 O.J. (L 248) 80.
[78] Šelo Šabić, *supra* note 71, at 5.
[79] *Id.* at 6.
[80] *Id.*
[81] *Id.*
[82] *Id.*

B. Assessing the Relocation Decisions of 2015

There are many reasons for the failure of the relocation scheme. Constraints on eligibility for relocation—such as the requirements that migrants first lodge an asylum application in Italy or Greece and that migrants be from countries with asylum grant rates of 75% of higher—limited the number of people who could be relocated.[83] The relocation scheme also did not give relocated migrants any choice as to where they would be relocated, leading some to avoid the system so as not to be sent to a country where they did not wish to live.[84] Additionally, the decisions placed the burden of registering and fingerprinting migrants prior to their relocation on Italy and Greece at a time when their asylum and reception capacities were overwhelmed, which delayed the process of relocating individuals.[85] The scheme also suffered from a lack of adequate housing in some reception countries.[86]

But the chief reason for the failure of the relocation scheme is that Member States refused to receive their share of asylum seekers.[87] This reluctance is attributable in large part to the rise of anti-migrant and anti-asylum sentiment across Europe during the 2015 migrant crisis.[88] Several European leaders characterized the incoming asylum seekers as economic and security threats—sometimes using blatant anti-Muslim language—and consequently resisted any relocations.[89] Terrorist attacks in Paris and Brussels in 2015 and 2016, respectively, led to even greater resistance

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[83] Guild, *supra* note 75, at 19.
[84] John Henley, *EU refugee relocation scheme is inadequate and will continue to fail*, THE GUARDIAN (March 4, 2016), https://www.theguardian.com/world/2016/mar/04/eu-refugee-relocation-scheme-inadequate-will-continue-to-fail.
[85] Šelo Šabić, *supra* note 71, at 9.
[86] Henley, *supra* note 84.
[87] Guild, *supra* note 75, at 42.
[88] *Id.* at 29.
[89] Šelo Šabić, *supra* note 71, at 10; Henley, *supra* note 84 (quoting Hungary's prime minister Viktor Orbán as stating that Hungarians "do not want a large number of Muslim people in our country"); Vince Chadwick, *Robert Fico: 'Islam has no place in Slovakia,'* POLITICO (May 26, 2016), https://www.politico.eu/article/robert-fico-islam-no-place-news-slovakia-muslim-refugee/ (quoting Slovakia's prime minister Robert Fico as opposing migration to Slovakia because "Islam has no place in Slovakia").

to relocations, as some leaders insisted that members of ISIS could enter Europe posing as asylum seekers.[90]

While the resistance to relocation on the part of many Member States was driven by anti-migrant sentiment, the design of the relocation decisions made it possible for Member States to evade their obligations. While the decisions were intended to make relocations obligatory, each Member State was responsible for "pledging" a certain number of relocation spaces each month and, as discussed above, many Member States did not pledge enough relocation spaces to fulfill their obligation, with some states not pledging any spaces at all.[91] The pledging process—while salutary insofar as it allowed Member States to control the pace of relocation and ensure they had adequate space and support for relocated migrants—allowed Member States to treat relocations as discretionary rather than obligatory.[92] Additionally, the provision allowing Member States to refuse a relocation on national security grounds appears to have been used in a questionable manner. Italy and Greece reported that, on many occasions, Member States refused to take a relocated migrant, but provided no individualized reasons for why the asylum seeker posed a national security threat, which, if such reasons existed, should have been shared with Italy or Greece.[93]

Another weakness of the relocation decisions is that they were perceived by some Member States as an illegitimate mandate from Brussels that infringed on national sovereignty. The decisions were adopted by qualified majority vote, and Member States who voted against the

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[90] Griffin Shiel, The *Emergency Relocation Scheme: A Burden Sharing Failure,* NEXTUK Policy Paper Series at 18-19 (March 2021) (quoting Poland's prime minister Beata Szydlo as stating that "in the face of the present terrorist threat related to people of Muslim denomination, I cannot see any possibility for Poland to receive any migrants presently" and Slovakia's prime minister Robert Fico as claiming that "terrorists and Islamic State fighters are entering Europe with migrants").
[91] Guild, *supra* note 75, at 27.
[92] *Id.* at 66.
[93] *Id.* at 34-35.

decisions consequently viewed them as unlawful,[94] with Hungary and Slovakia even challenging the decisions before the CJEU.[95] The outright refusal of states like Hungary and Poland to participate in the relocation scheme also had knock-on effects, as Member States who had been contributing felt "abandoned in their efforts to help refugees."[96] In Member States that were initially supportive of relocation efforts, like Germany and Sweden, public opinion toward migrants shifted in the years following 2015 as voters started "to believe that their countries had taken on too much of a burden" compared to other Member States.[97]

The relocation decisions of 2015 thus offer two main lessons that should inform future attempts to amend Dublin. First, any solidarity mechanism must effectively bind states. The relocation decisions of 2015, by relying on voluntary pledges and permitting Member States to refuse relocations on vague national security grounds, gave Member States multiple avenues to evade their obligations. Second, the Commission must seek buy-in from all Member States. In 2015, several Member States resisted what they viewed as an illegitimate imposition on their sovereignty, and their refusal led to frustration from participating states, who felt that the burden of relocation was not being equitably shared. For a solidarity mechanism to succeed, it must be agreed to by the Member States, not imposed by Brussels.

V. Current Proposal to Reform the Dublin System: The New Pact on Migration and Asylum

On September 23, 2020, the Commission proposed a series of reforms to the EU's migration and asylum system, called "The New Pact on Migration and Asylum."[98] The New Pact

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[94] Shiel, *supra* note 90, at 16-17.
[95] Katerina Linos et al., *Hungary and Slovakia challenged Europe's refugee scheme. They just lost badly.* WASHINGTON POST (Sept. 8, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/08/hungary-and-slovenia-challenged-europes-refugee-scheme-they-just-lost-badly/.
[96] Maciej Duszczyk et al., *From mandatory to voluntary. Impact of V4 on the EU relocation scheme,* 21 EUR. POL. & SOC'Y 470, 483 (2020).
[97] *Id.* at 477-79.
[98] New Pact on Migration and Asylum.

includes a proposed Regulation on Asylum and Migration Management, which would replace the Dublin III Regulation and institute new solidarity mechanisms to assist overburdened frontline states. [99] Unlike the 2015 relocation decisions, however, contributing Member States would be permitted to choose amongst various forms of solidarity, not just relocations.[100] This section first explains the Commission's proposal, and then surveys the reactions of Member States. It concludes by evaluating the proposal's consistency with Article 80 TFEU.

A. The Regulation on Asylum and Migration Management

1. *Criteria for Determining Responsibility*

The Regulation on Asylum and Migration Management (RAMM) purports to abolish and replace the Dublin III Regulation.[101] The proposed regulation, however, would hew closely to Dublin. Like the Dublin III Regulation, the RAMM provides a hierarchy of criteria for determining which state is responsible for processing an asylum seeker's application.[102] The hierarchy of criteria proposed by the RAMM largely follow that of Dublin III, though the RAMM would slightly broaden the definition of "family member" to include siblings,[103] and it also proposes a new criterion that considers whether the asylum applicant received a degree or qualification in any Member State.[104]

Crucially, the RAMM would retain the much-criticized Article 13 (renumbered as Article 21 in the RAMM), which considers which Member State the applicant first entered.[105] In fact, the RAMM would likely enhance the importance of this criterion. Under Dublin III, the first state of

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[99] *Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management*, Explanatory Memorandum, 1.2, COM (2020) 610 final (Sept. 23, 2020) [hereinafter Regulation on Asylum and Migration Management].
[100] *Id.* Explanatory Memorandum, 1.1.
[101] *Id.* Explanatory Memorandum, 1.2.
[102] *Id.* arts. 14-23.
[103] *Id.* art. 2(g)(v).
[104] *Id.* art. 20.
[105] *Id.* art. 21.

entry is no longer responsible for processing an applicant's claim 12 months after her irregular entry or after she has resided in another Member State for three months.[106] Under the RAMM, the state of first arrival remains responsible for three years after the applicant's entry and its responsibility does not cease if the applicant moves to a different Member State unless the applicant was relocated.[107] The Commission justified these changes on the grounds that they are necessary to "incentivize persons to comply with the rules and apply in the first Member State of entry" and thereby limit unauthorized secondary movements.[108]

2. *Solidarity Mechanisms*

The RAMM, however, departs significantly from Dublin III by creating solidarity mechanisms designed to "ensure a fair sharing of responsibility and a balance of effort between Member States."[109] In response to many Member States' opposition to mandatory relocations, the RAMM would allow Member States to choose from different forms of solidarity.[110] Member States could accept relocated asylum seekers, sponsor the return of third-country nationals who are not legally authorized to remain in the EU, or provide financial support in order to increase reception capacity in frontline states.[111] The option to sponsor the return of migrants was proposed in light of the European Union's struggle to return migrants who have no legal right to stay in the EU.[112] Only about one-third of migrants in this category are returned due to bureaucratic and

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[106] Dublin III Regulation, arts. 13(1), 19(2).
[107] Regulation on Asylum and Migration Management, art. 21(1), (3); *see also* preamble ¶ 54 ("In order to limit the possibility for applicants' behaviour to lead to the cessation or shift of responsibility to another Member State, rules allowing for cessation or shift of responsibility where the person leaves the territory of the Member State for at least three months during examination. . . should be deleted.").
[108] *Id.* preamble ¶ 54.
[109] *Id.* preamble ¶ 16.
[110] *See* Alexandra Brzozowski & Sarantis Michalopoulos, "Mandatory relocation still point of contention in new EU migration pact," EURACTIV (Sept. 16, 2020), https://www.euractiv.com/section/justice-home-affairs/news/mandatory-relocation-still-point-of-contention-in-new-eu-migration-pact/ (reporting the Commission's proposal to allow Member States to choose amongst alternative forms of solidarity in light of some Member States' strong opposition to mandatory relocations).
[111] Regulation on Asylum and Migration Management, art. 45.
[112] New Pact on Migration and Asylum, 7-8.

logistical obstacles.[113] Member States opting to sponsor returns would be responsible for facilitating the migrant's return by liaising with the applicant's home country and providing other support.[114] If the contributing state fails to successfully return the migrant within eight months, the migrant would be transferred to the contributing state.[115]

The RAMM proposes a complicated set of procedures for triggering solidarity contributions from Member States. States may provide any of the solidarity contributions on a voluntary basis if they so choose.[116] The RAMM would require mandatory solidarity contributions in two circumstances: when a Member State experiences recurring arrivals from Search and Rescue missions and when a Member State faces "migratory pressure."[117]

To share the burden of processing applications lodged by asylum seekers rescued via Search and Rescue missions, the Commission will create an annual Migration Management Report that estimates the number of asylum seekers who will be rescued and the share of solidarity contributions expected from each Member State, which is determined by each state's GDP and population.[118] Member States are then invited to make solidarity pledges to a "solidarity pool," which is drawn upon throughout the year as necessary.[119] The Commission may adjust Member

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[113] *Id.*
[114] Regulation on Asylum and Migration Management, art. 45; *see also id*., Explanatory Memorandum, 5.2 (explaining that a Member State providing return sponsorship would provide "counselling on return and reintegration to illegally staying third-country nationals, assist the voluntary return and reintegration of irregular migrants,. . . lead or support the policy dialogue with third countries for facilitating readmission of irregular migrants, . . . and ensure the delivery of a valid travel document").
[115] *Id.* art. 55(2).
[116] *Id.* art. 56(2).
[117] *Id.* arts. 47-49 (search and rescue cases), arts. 50-53 (migratory pressure); *see also Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and* force majeure, COM (2020) 613 final, Explanatory Memorandum, 1.1 (Sept. 23, 2020) (altering the solidarity mechanisms established by the RAMM in the event that a Member State faces a "crisis," which it defines as "exceptional situations of mass influx of third-country nations or stateless persons arriving irregularly in a Member State," such that it would render the Member State's asylum system non-functional).
[118] Regulation on Asylum and Migration Management, arts. 6(4), 47(2)-(3).
[119] *Id.* arts. 47(2), 49.

States' solidarity contributions if there are insufficient pledges of solidarity.[120] In the case of Search and Rescue, contributing states may choose to contribute via relocations, financial support, or by working with third countries to prevent migratory flows.[121]

The RAMM establishes a different set of procedures to assist Member States experiencing "migratory pressure." The Commission, at the request of an affected Member State or on its own accord, will assess whether a Member State faces "migratory pressure" by considering circumstances in that state over the preceding six months.[122] The Commission will create a Report on Migratory Pressure stating whether the affected Member State faces migratory pressure, and if so, the report will identify the types of solidarity contributions needed from Member States.[123] Contributing Member States are then invited to submit plans indicating what type of solidarity they intend to provide,[124] and the Commission may adjust Member States' contributions where necessary to meet the needs of the benefiting state.[125] In the case of migratory pressure, contributing Member States will generally provide either relocations or return sponsorships, but in cases where the Commission's Report indicates that the benefiting Member State requires financial support, contributing states may assist in that way.[126]

The New Pact also includes a proposed Regulation Addressing Situations of Crisis and *Force Majeure*, which, in times of extreme migratory pressure that rise to the level of a "crisis,"

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[120] *Id.* art. 48(2).
[121] *Id.* art. 47(4). Article 48(2) provides that where the Commission is required to alter solidarity contributions due to a shortfall of pledges, some Member States will be required to satisfy 50% of their share of contributions through relocation *or* return sponsorships. Thus, although Member States may not initially pledge return sponsorships to satisfy their solidarity requirement in a Search and Rescue operation, their solidarity contribution might take this form in certain circumstances. The purpose of this provision is to ensure that Member States are given a choice between relocations and return sponsorships.
[122] *Id.* art. 50.
[123] *Id.* art. 51.
[124] *Id.* art. 52(3).
[125] *Id.* art. 53(2).
[126] *Id.* art. 52(1)-(2).

would limit solidarity contributions to relocation and return sponsorships and would increase the number of migrants eligible for relocation.[127] Additionally, in a crisis, Member States sponsoring returns would have four months to successfully return the migrant, as opposed to eight months, before the migrant was transferred to the contributing state.[128]

B. Response of Member States

Days before the New Pact on Migration and Asylum was announced, European Commissioner Ylva Johansson acknowledged that "no one will be satisfied" with the proposal.[129] Instead, the Commission sought through its proposal to balance Member States' conflicting views and priorities, but as predicted, the result has been a fair amount of grumbling amongst Member States.[130] Frontline states, such as Italy, have criticized the RAMM for not mandating relocations, with the Italian Minister of Interior, Luciana Lamorgese, insisting upon "concrete signs of solidarity."[131] On the other hand, Hungary, the Czech Republic, and Poland—though they successfully convinced the Commission not to propose mandatory relocations—have criticized the New Pact for, in their view, managing rather than stopping migration to Europe.[132] Germany,

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[127] *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and* force majeure, COM (2020) 613 final, art. 2(1), (5), (Sept. 23, 2020).
[128] *Id.* art. 2(7).
[129] Eszter Zalan, "Commissioner: No one will like new EU migration pact," EUOBSERVER (Sept. 18, 2020), https://euobserver.com/migration/149475.
[130] Donatienne Ruy & Erol Yayboke, "Deciphering the European Union's New Pact on Migration and Asylum," CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Sept. 29, 2020), https://www.csis.org/analysis/deciphering-european-unions-new-pact-migration-and-asylum (reporting that the New Pact "offers no values proposition" and quoting European Commission vice president Margaritis Schinas as stating that, in the Commission's view, "no one's concerns are more legitimate than others").
[131] Christopher Hein, "Looking for pact-makers: the debate on the deadlocked EU Migration and Asylum Pact," HEINRICH BÖLL STIFTUNG (Nov. 12, 2021), https://eu.boell.org/en/2021/11/12/looking-pact-makers-debate-deadlocked-eu-migration-and-asylum-pact.
[132] Alexandra Brzozowski, "In Brussels, Visegrad countries reject the EU's migration plan," EURACTIV (Sept. 24, 2020), https://www.euractiv.com/section/justice-home-affairs/news/in-brussels-visegrad-four-reject-the-eus-migration-plan/.

France, and other northern states, which are principally concerned with halting irregular, secondary movements by asylum seekers, have cautiously welcomed the plan.[133]

The Commission, for its part, is eager to achieve an agreement on migration and asylum in order to show that Europe can unite to solve a common problem.[134] European Commission President Ursula von der Leyen introduced the New Pact as a "European solution, to rebuild trust between Member States and to restore citizens' confidence in our capacity to manage migration as a Union."[135] The migration crisis of 2015 fueled Euroscepticism in many Member States, and it fractured European unity, most concretely when several Member States imposed border controls within the Schengen zone.[136] Moreover, the devastating fire at the Moria migrant camp in Lesbos, Greece, just weeks before the Commission announced the New Pact, crystallized the need for asylum reform.[137] In the Commission's view, it is essential that Europe show the world that it is capable of handling an influx of migrants in an efficient, but humane, manner.[138] At this time, negotiations are at a standstill, though members of the European Commission have expressed optimism that progress will be made after the French presidential elections in spring 2022.[139]

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[133] David M. Herszenhorn & Jacopo Barigazzi, "On migration pact, EU may finally try to 'break-it to make-it' strategy," POLITICO (June 8, 2021), https://www.politico.eu/article/on-migration-pact-eu-may-finally-try-break-it-to-make-it-strategy/; David Coffey, *supra* note 55 (reporting that French Interior Minister Gérald Darmanin praised the new pact and called for greater "European solidarity" in the handling of asylum applications and deportations); Hein, *supra* note 131 (explaining that Germany has "wholeheartedly" welcomed the New Pact with a few reservations).

[134] Sarantis Michalopoulos, "EU Commissioner: Deal on migration pact expected after French elections," EURACTIV (Sept. 19, 2021), https://www.euractiv.com/section/politics/short_news/eu-commissioner-deal-on-migration-pact-expected-after-french-elections/.

[135] European Commission Press Release, *supra* note 4.

[136] Ian Traynor & Helena Smith, "EU border controls: Schengen scheme on the brink after Amsterdam talks," THE GUARDIAN (Jan. 26, 2016), https://www.theguardian.com/world/2016/jan/25/refugee-crisis-schengen-area-scheme-brink-amsterdam-talks.

[137] European Commission Press Release, *supra* note 4 (quoting Commission vice-president Margaritis Schinas as saying that "Moria is a stark reminder that the clock has run out on how long we can live in a house half-built").

[138] *Id.*

[139] Hein, *supra* note 131 (quoting Commission vice president Margaritis Schinas as stating that he is "optimistic, that immediately after the French elections we will enter into a very rapid process of convergence and final agreement").

C. Evaluating the Proposed Regulation on Asylum and Migration Management

As the preceding section indicates, the RAMM proposal strives to balance Member States' divergent views and priorities when it comes to addressing migration and asylum. In certain ways, the RAMM proposal can be viewed as an improvement upon the current Dublin System and the 2015 relocation decisions, but several of its features threaten to undermine solidarity amongst Member States.

As noted in Section III, a primary critique of the Dublin System is that it unfairly burdens frontline states due to Article 13. The proposed RAMM includes some measures, such as the expanded definition of "family member" and the education criterion, that would theoretically diminish the importance of the first country of entry criterion.[140] However, the RAMM retains the country of first entry criterion and, on balance, is likely to increase its importance, because the RAMM would make the first country of entry responsible for processing an asylum application for three years—as opposed to 12 months—after the applicant entered the EU and its responsibility would not cease if the asylum seeker moved to another Member State.[141] As noted above, these alterations are intended to discourage secondary movements by asylum seekers, but their effect will be to make frontline states responsible for more asylum seekers, not fewer.

Given the Commission's choice to maintain—and indeed to strengthen—the country of first entry criterion, the RAMM's proposed solidarity mechanisms must be effective enough to overcome the distributive inequalities caused by this criterion if the RAMM is to succeed where Dublin has failed. On the one hand, the RAMM is an improvement simply because it would provide a predictable system of mandated solidarity, which Dublin lacks. Instead of creating ad hoc measures, like the relocation decisions, in the midst of a crisis, the RAMM provides a plan for

[140] *See infra* notes 103-104 and accompanying text.
[141] *See infra* notes 105-108 and accompanying text.

solidarity in advance. The RAMM should also be commended for offering a "flexible" vision of solidarity that gives Member States some choice over how they contribute. Given the experience of the relocation decisions, this approach is more sensitive to Member States' sovereignty and will, one hopes, be more acceptable to Member States because, though solidarity is mandated, Member States retain some choice over how to fulfill their obligations.

There are, however, several weaknesses in the current RAMM. First, it is uncertain whether return sponsorships will offer true solidarity in a way that meaningfully reduces the burden on frontline states. A Member State undertaking a return sponsorship is required to facilitate the migrant's return via counselling, integration support, and dialogue with the migrant's home country, while the migrant remains in the benefiting state.[142] While assisting with returns may help the EU's migration policy overall, it is not clear that these measures—which may take place over the span of eight months—will provide the sort of immediate help required by a Member State facing migratory pressure. Moreover, the RAMM provides that if the contributing Member State fails to return the migrant within eight months, the migrant shall be transferred to the contributing Member State.[143] But, given that return sponsorships were proposed as an alternative for Member States strongly opposed to relocation, it is doubtful that such states will agree to accept more migrants onto their territory, especially if previous attempts to return the migrant were unsuccessful. Indeed, Austria and Hungary have criticized return sponsorships on precisely these grounds, calling them "relocations 'through the back door.'"[144] On the other hand, if this provision—which functions as a "stick" to motivate contributing states to act upon their

[142] *See infra* note 114 and accompanying text.
[143] *See infra* note 115 and accompanying text.
[144] Olivia Sundberg Diez & Florian Trauner, "EU return sponsorships: High stakes, low gains?" EUROPEAN POLICY CENTRE, at 7 (Jan. 19, 2021), https://www.epc.eu/content/PDF/2021/EU_Return_Sponsorships_v3.pdf.

commitments to sponsor returns—is removed from the RAMM, return sponsorships are less likely to provide meaningful solidarity.

Secondly, the RAMM's design poses a substantial risk that Member States will pledge an insufficient number of relocations, which is the form of solidarity Mediterranean states most desire. As discussed above, the RAMM is designed such that Member States always have the choice between relocations or return sponsorships. While this may avoid a political backlash like that which followed the relocation decisions, it may ultimately limit the effectiveness of the RAMM if Member States do not provide the type of solidarity frontline states have, again and again, insisted that they need.[145]

Finally, the procedures for triggering mandatory solidarity are complex, and consequently, it is unclear whether the RAMM will provide prompt solidarity to a Member State in need. Indeed, in many respects, the Commission appears to have reacted to the relocation decisions by privileging Member States' autonomy and preferences over the need to provide solidarity in a timely manner. For example, if the Commission determines that offered support falls short of what the benefiting Member State requires, before adjusting contributions on its own accord, the Commission will convene a "solidarity forum" and invite Member States to adjust their contributions.[146] While laudable insofar as it gives choice and agency to individual Member States, this procedure delays the finalization of a plan to assist the affected Member State and increases the time in which Member States are uncertain about how and how much they will contribute. One reason that the 2015 relocation decisions failed is that the relocation scheme did not effectively

[145] *Id.* (quoting Malta's Home Affairs Minister, who complained that the New Pact "does not go far enough on solidarity" because relocations are purely voluntary as well as a joint letter from leaders of Malta, Spain, Italy, and Greece which demanded that mandatory relocation be the "main solidarity tool" in Europe).
[146] Regulation on Asylum and Migration Management, arts. 47(5) (search and rescue), 52(4) (migratory pressure).

bind states, and so Member States treated the relocation quotas as optional, rather than obligatory. The RAMM, by keeping each state's obligations flexible and in flux, may create similar problems.

In sum, the RAMM marks a meaningful step toward solidarity. To ensure that return sponsorships provide meaningful solidarity, the Commission should retain Article 55(2), which provides that a migrant who is not returned within eight months will be transferred to the Member State sponsoring his return. The Commission should also be sensitive to frontline states' repeated calls for assistance in the form of relocations. Although, as discussed above, a strength of the RAMM is that it gives contributing states a choice amongst forms of solidarity, the Commission could revise the RAMM to nudge states to choose relocations over return sponsorships. Under the current proposal, a Member State will receive EUR 10,000 per relocation, a sum that should be increased.[147] The Commission should also consider shortening the time period for return sponsorships from eight months to four to encourage more states to choose relocations. Finally, the Commission should consider ways to streamline the process for determining each state's contribution, so as to provide more certainty and predictability to benefiting and contributing Member States.

VI. Conclusion

The RAMM, though flawed in many respects, is nevertheless a significant step toward fulfilling the mandate of solidarity and fair sharing of responsibility set out in Article 80 TFEU. The war in Ukraine and the refugee crisis that Europe now faces may, one hopes, provide momentum for cooperation and compromise. Indeed, the current crisis thus far has largely united the European Union, while previous migrant crises have caused division. And, interestingly, the Member States who have historically been most resistant to solidarity in the form of relocations—

[147] *Id.*, Explanatory Memorandum, 5.2.

Poland, Hungary, and Slovakia—have taken in large numbers of Ukrainian refugees and are now asking their fellow Member States to help by receiving and hosting refugees.[148] It remains to be seen whether the Ukrainian crisis will prompt Member States to adjust any of their stances on migration and asylum, but the past five weeks have already shown that Europe can unite to solve a common problem, and it has reminded its Member States—and the world—of the benefits of a united Europe.

[148] By virtue of the Temporary Protection Directive passed by the European Commission, Ukrainians may live and work anywhere in the European Union for three years, but the majority currently remain in Poland. Aline Barros, "European Union Grants Temporary Protection to Ukrainians," VOA NEWS (Mar. 15, 2022), https://www.voanews.com/a/european-union-grants-temporary-protection-to-ukrainians-/6486080.html. The Polish government has asked the EU to provide funding to encourage the movement of refugees to other Member States. Daniel Tilles, "Poland pushes for EU funds to support countries taking Ukraine refugees," NOTES FROM POLAND (Mar. 30, 2022), https://notesfrompoland.com/2022/03/30/poland-pushes-for-eu-funds-to-support-countries-taking-ukraine-refugees/.