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The Proposed Asylum and Migration Management Regulation and the Dublin III Regulation: An Analysis of Asylum and Migration Law in the EU

Natascha Tanczos

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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

Natascha Tanczos is currently completing her bachelor’s degree in International Legal Studies at the University of Vienna. Having previously worked as a research assistant at the Roman Law Department of the University of Vienna, she has gained valuable insights into the world of academia. While many aspects of studying law strike her as fascinating, EU Law in particular sparked her interest. After attending the International and European Studies Summer Programme in Strobl (Austria), it was clear to her that she wanted to dedicate her first academic writing to that field.

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Abstract

In an era marked by distinct migration flows and shifting geopolitical landscapes, the European Union faces increasing pressure to establish a fair and cohesive asylum system. This paper delves into the complexities of EU asylum law, namely the transition from the Dublin III Regulation to the Asylum and Migration Management Regulation. Both legal acts determine which Member State is responsible for examining an application for international protection. The overarching question is in what way both regulations differ and what their similarities are. Through a meticulous comparative analysis, this thesis examines the key provisions of the legal acts and critically assesses the strengths and weaknesses of each norm. Drawing on CJEU case law, this paper also considers the application of asylum law in practice. By shedding light on the origins of some key principles within the context of international refugee law and the EU’s legislative history, it showcases the evolution of the concept of solidarity and the country-of-first-entry-principle. Additionally, past challenges of an equitable attribution of responsibility among the Member States are addressed and the legal standing of refugees is analysed, keeping in mind both advancements and potential setbacks.
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1 Introduction

As migration does not stop at borders and we live in an increasingly more globalised world, geopolitical shifts in recent years have underscored the need for a coherent and fair asylum system across the European Union. One of the cornerstones of European asylum law is the Dublin III Regulation which established the responsibility of a Member State for the examination of an application for international protection. However, the current legal framework of EU asylum law has been subject to criticism for placing disproportionate burdens only on a small number of Member States and hence lacking solidarity. Against this backdrop the proposed Asylum and Migration Management Regulation emerges as a potential remedy, trying to address the identified deficiencies. The subject of this Bachelor thesis will be exploring how the proposed AMMR differs from the Dublin III Regulation. With high numbers of refugees arriving in the European Union each year, the question of how asylum seekers’ rights are safeguarded by EU legislation becomes more pressing than ever. Looking into the matter further, in order to understand current developments in refugee law, one must question where certain provisions and concepts come from and how the Common European Asylum System has evolved over time.

In this thesis, I will answer these questions by comparing the main provisions of AMMR and Dublin III after establishing a common understanding of some key terms and taking a look at the predecessors of these legal acts. As the legislative process is ongoing at the time of writing (February 2024), I base my analysis on the Commission’s proposal of the AMMR, the European Parliament’s report on the proposal of the 14th of April 2023 by the Committee on Civil Liberties, Justice and Home Affairs under rapporteur Tomas Tobé and the Council’s general approach published on the 13th of June 2023. From my findings, I will establish which
shortcomings of the Dublin III system have been solved and in which areas there is still room for improvement.

The main methodology used in this thesis will be a detailed analysis of certain provisions of AMMR and Dublin III that takes into consideration the relevant case law of the Court of Justice of the European Union. Additionally, I will also look into academic literature and some empirical findings concerning this topic.

In Chapter 1, I will inter alia differentiate between refugee and subsidiary protection status and outline some key principles of international refugee law that serve as a framework for EU law. Then, in Chapter 2 I will go through the development of EU asylum law focusing on the Dublin system and explaining which principles existed in the initial legal act. Thirdly, Chapter 3 serves to illustrate at which stage of the ordinary legislative process the AMMR currently stands and includes a forecast of when we can expect the new act to be adopted. Finally, Chapter 4 showcases the similarities and differences between AMMR and Dublin III and references relevant CJEU case law.
2 Definition of key terms

Before delving deeper into the topic of EU asylum law, let me establish a common understanding of some key terms and provide an outlook on the material scope of the legislative instruments I will be discussing in this thesis.

2.1 International Protection

It is notable that neither the Dublin III Regulation nor the proposed Asylum and Migration Management Regulation use the terms “asylum” or “subsidiary protection” in their provisions despite “asylum” featuring prominently in the title of the new proposal. Instead, both legislative instruments refer to “international protection” which is defined in Article 2(a) of the Qualification Directive as refugee or subsidiary protection status in a Member State.¹

2.1.1 Asylum

The European Migration Network speaks of “asylum” when a state offers a form of protection on its territory based on the principle of non-refoulment and recognized refugee rights to persons that are unable to seek protection in their country of citizenship or residence.²

The principle of non-refoulment, first established in Article 33 of the Geneva Convention of 1951³, obliges a state to neither expel nor return refugees to the frontiers of their territories in cases where their lives or freedom would be endangered.⁴ It also prohibits a state from imposing

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¹ Cf. Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9, art 2.
any penalties on refugees that enter the country illegally and guarantees them a fair proceeding. While the EU itself isn’t party to the Geneva Convention, all its Member States are, and therefore it still has an effect on how EU law is interpreted and is often referenced.\(^5\) The principle of non-refoulment, however, does not preclude states from returning refugees to intermediate countries or so-called countries of first entry, if these countries are considered to be “safe”.\(^6\) Recital 3 of the Dublin III Regulation\(^7\) and Recital 33 of the AMMR\(^8\) proposal presume that generally all Member States are considered safe.

The given definition also implies that asylum is only granted if no internal flight alternative is available, which is often considered to be also implicitly mentioned in the Geneva Convention. The “internal flight alternative test” states that the risk of persecution must persist throughout the whole country.\(^9\)

2.1.2 Refugee

Refugee rights lie at the heart of the definition of asylum. Therefore, it makes sense to next examine which persons are considered refugees under EU law.

The Geneva Convention of 1951 defines a “refugee” in Article 1(2) as a person that “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and

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\(^6\) Cf. Goodwin-Gill (n 4) 898.

\(^7\) Cf. Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) OJ L180/31 rec 3.


is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The Qualification Directive to which the Dublin III Regulation as well as the proposed AMMR refer, follows the above definition, emphasizing that a refugee can only be a third-country national or a stateless person. This means that EU citizens as well as citizens of the Schengen Associates - Norway, Iceland, Switzerland and Liechtenstein, cannot be classed as refugees.

The term “well-founded fear” is not defined in more detail in EU law, leading to a shift of power to national authorities to legislate over the subjective element of fear.

2.1.3 Subsidiary Protection

Subsidiary Protection on the other hand is defined by the European Migration Network as a form of protection granted by a state to third-country nationals or stateless persons that do not qualify as refugees but who have shown substantial grounds for believing they would face a real risk of serious harm if they were to be returned to their country of origin or former residence respectively. Additionally, it is necessary that the persons in question have not

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committed any crimes listed in Article 17 of the Qualification Directive\textsuperscript{13} nor are able or willing to avail themselves of the protection of their country of origin or residence.\textsuperscript{14}

While subsidiary protection was not initially included in the subject matter of previous EU legislation about asylum, it was the Dublin III Regulation that added this form of international protection.\textsuperscript{15}

2.1.4  **Temporary Protection**

The EU provides another form of protection for people that do not qualify for asylum, namely “temporary protection”. This form of protection, which is neither encompassed by Dublin III nor by AMMR, is only available in the event of (imminent) mass influx of displaced persons if there is a risk that the asylum system will be unable to process this influx.\textsuperscript{16}

The EU strives to develop a common policy for all of these three forms of protection.\textsuperscript{17}

\textsuperscript{13} Cf. Directive 2011/95/EU (n 1), art 17.
2.2 Migration

The EU speaks of migration as a person newly establishes their usual residence in an EU Member State for at least 12 months, or reversely, ceases to have their usual residence in the EU for at least 12 months.18

It is important to distinguish between asylum and migration because immigration laws apply to migrants while asylum seekers are protected by asylum law which is heavily influenced by EU legislation and provides for a higher level of protection. Furthermore, migrants per definition choose to leave their homes voluntarily and are often in search of a better quality of life - be it a better job, better education or simply reuniting with their family, whereas asylum seekers flee from a direct threat or persecution.19

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3 Historical development

While the Treaty of Rome\textsuperscript{20} initially did not include the matter of asylum in its provisions, the need for harmonising legislation affecting aliens was first acknowledged by its members in the Paris Summit of 1974. However, the implementation of asylum and immigration laws was only seriously pursued when the abolition of internal borders became a reality following the Schengen Agreement in 1985\textsuperscript{21} and not on an EU level but via an intergovernmental approach.\textsuperscript{22}

The first predecessor of the current Dublin III Regulation and the AMMR proposal can be seen in the Dublin Convention of 1990\textsuperscript{23} which was adopted after a working group was tasked with coming up with a common policy to eliminate asylum abuse back in 1986. The Convention that entered into force in 1997 not only rewrote some provisions of the Schengen Implementation Convention but also focused on establishing which state is responsible for examining an application for asylum. However, the Convention itself was an international agreement outside the scope of EU law.\textsuperscript{24}

In the Treaty of Maastricht\textsuperscript{25}, the EU identified asylum as a matter of common interest within its newly established third pillar about Justice and Home Affairs and the issue became part of the EU’s institutional framework. But still, in 1993 governments continued to cooperate outside

\begin{itemize}
  \item \textsuperscript{20} Cf. Treaty establishing the European Economic Community [1957].
  \item \textsuperscript{22} Cf. Vincent Chetail, ‘The Common European Asylum System: Bric-à-Brac or System?’ in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), Reforming the Common European Asylum System (Brill Nijhoff 2016) 5.
  \item \textsuperscript{23} Cf. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [1997] OJ C254/1.
  \item \textsuperscript{24} Cf. Cherubini (n 5) 136ff.
\end{itemize}
the Treaties. At this moment in time, the CJEU lacked jurisdiction over issues pertaining to asylum and it was the Council that was responsible for associating the Commission to its work and reported to Parliament about its asylum initiatives.26

Only after asylum shifted to the first pillar and the community integration method in the Treaty of Amsterdam27, was the harmonisation process of asylum law prompted on EU level. Article 63 TEC laid down a programme about measures that should be adopted in the next five years, a transition period in which both the Commission and Member States could initiate the legislative process. Decisions on asylum matters were initially made by unanimity in the Council after consultation with Parliament. The CJEU gained jurisdiction in this period of time. After the transition period, the Council adopted its decisions by qualified majority. Measures include inter alia mechanisms to determine which Member State is responsible for examining an application for international protection and minimum standards on procedures in Member States. In this period Regulation No. 343/2003, also known as Dublin II Regulation28 was passed and in practice mostly replaced the Dublin Convention. However, the Dublin Convention did not become completely irrelevant just yet because Denmark opted out of Title IV of the TEC in a special protocol and also the UK and Ireland which were parties to the Dublin Convention are generally not bound by Title IV of the TEC or secondary acts of legislation pursuant to it.29 While the UK and Ireland can decide to take part in the adoption and application of proposed measures under Title IV according to the protocol signed by them, there is no such provision in Denmark’s protocol. As both the UK and Ireland decided to opt

29 Cf. Cherubini (n 5) 138ff.
in on Dublin II and also an agreement between the European Community and the Kingdom of Denmark was reached in 2005 stating that the communitarised Dublin system should also apply to Denmark, the validity of the Dublin Convention eventually ended. I will come back to the special status of Ireland and Denmark later when analysing the implications the new adoption of the AMMR would have on the relationship between these countries and the remaining Member States.

Even though some argue that the Common European Asylum System has its origins in the Treaty of Amsterdam, it was really the Tampere Conclusion by the European Council of 1999 that served as the founding act of the CEAS, of which Dublin III, as well as the proposed AMMR are part of. There were two steps foreseen in which this new system should be established: the short-term goal to adopt minimum standards for the asylum procedure, and the long-term aim that provided for a uniform status for those who are granted asylum in the EU. The first period of the CEAS ranged from 1999 to 2004, the second stage of development can be seen between 2005 and 2013 and what can be seen as a third stage is considered to have started in 2016. Until 2005, five other legislative instruments besides the aforementioned Dublin II Regulation were adopted, namely the Eurodac Regulation on the comparison of fingerprints, the Temporary Protection Directive regulating temporary protection in case of a mass influx of asylum seekers, the Reception Conditions Directive that laid down a minimum standard for the reception of asylum seekers, the Qualification Directive that established standards of eligibility for refugee and subsidiary protection status and the Asylum Procedures Directive for granting and withdrawing refugee status.31

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31 Cf. Chetail (n 22) 10ff.
The second phase of the CEAS was initiated by the Hague Programme in November 2004 which called for second-phase instruments to be adopted by the end of 2010, a deadline that was postponed until 2012 in the European Pact on Asylum and Migration four years later.\textsuperscript{32} The European Pact on Asylum and Migration was introduced as a reaction to criticism the EU faced even though a large number of legislation had already been passed in the first period. Complaints were based on the fact that as a result of the minimum standards set out, there were huge disparities between the individual Member States, especially when it came to the rate of refugee status recognition and the chances of an individual to be granted international protection.\textsuperscript{33}

In this second phase, the Treaty of Lisbon\textsuperscript{34} which came into force in 2009 played an important role in streamlining reforms of the already existing legislation. Article 63 TEC was replaced by Article 78 TFEU\textsuperscript{35} and the notion of the Common European Asylum System was no longer a general policy objective but rather a specific legal duty. Additionally, Article 80 TFEU\textsuperscript{36} introduced the principles of solidarity and fair sharing of responsibility into the Treaties, reaffirming, the shift from minimum standards in the asylum procedure to a uniform process.\textsuperscript{37} Article 78(2)(g) TFEU\textsuperscript{38} also introduced into legislation the aim of partnership and cooperation with third countries. Furthermore, Article 6(1) TEU\textsuperscript{39} gave the Charter of Fundamental Rights of the European Union the status of EU primary law and hence anchored refugee rights even

\textsuperscript{32} Cf. Sandu (n 17).
\textsuperscript{33} Cf. Chetail (n 22) 16ff.
\textsuperscript{36} Cf. ibid, art 80.
\textsuperscript{37} Cf. Sandu (n 17).
\textsuperscript{38} Cf. Consolidated Version of the Treaty on the Functioning of the European Union (n 35), art 78.
deeper in EU law. While Article 18 CFR\(^{40}\) provides for a right of asylum with reference to the Geneva Convention, Article 19 CFR\(^{41}\) lays down the principle of non-refoulment.\(^{42}\)

Before the “second wave of legislation” was finalised by reforms of the Qualification Directive, the Eurodac Regulation, the Receptions Conditions Directive, the Asylum Procedures Directive and the Dublin III Regulation in 2013, a new agency was established, namely the European Asylum Support Office.\(^{43}\)

The current European Asylum System is still based on the interplay between the acts of legislation from this era.

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\(^{41}\) Cf. ibid, art 19.

\(^{42}\) Cf. Chetail (n 22) 19ff.

\(^{43}\) Cf. Sandu (n 17).
After facing migratory pressure, the Commission issued a European Agenda on Migration in 2015, in which the so-called “Hotspot Approach” was introduced that saw the European Border and Coast Guard Agency, together with Europol, quickly identify, register and fingerprint arriving migrants. Additionally, the Hotspot Approach helped implement the emergency relocation mechanism proposed by the Commission – although far fewer relocations took place than expected.  

In 2016 and what can be seen as third phase of the CEAS, a package of seven pieces of legislation on asylum was proposed by the Commission to improve identified shortcomings after the refugee crisis. While the Eurodac Regulation, the Reception Conditions Directive and the Qualification Regulation were reformed in 2017, Council and Parliament could not reach common ground regarding the Asylum Procedure Directive and what would have been the Dublin IV Regulation. The Commission proposed reforms of the Dublin system such as the introduction of an automated relocation system once a threshold of 150% of an asylum seeker quota for a certain country had been exceeded (Article 34 ff). A punitive financial solidarity system for Member States that did not take part in these relocations was also introduced which provided payments of 250.000,- € for each applicant that would have otherwise been allocated to that Member State (Article 37). However, these foreseen innovations were politically unenforceable.

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44 Cf. ibid.
46 Cf. European Commission, ‘Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’ COM/2016/0270 final/2, art 34ff.
47 Cf. COM/2016/0270 final/2, art 37.
On the 23rd of September the Commission under Ursula Von der Leyen issued a proposal for a new Pact on Migration and Asylum, which also includes the AMMR. With this new proposal, the initial attempt to reform Dublin III from 2016 was withdrawn. Apart from a reform of the Dublin system, the Temporary Protection Directive is to be replaced by the Crisis and Force Majeure Regulation, the Eurodac Regulation shall be reformed again, a Pre-entry Screening Regulation is to be introduced and the Asylum Procedure Directive shall finally be replaced by a Regulation.49

The fact that the Commission opted to call this legislative proposal a “pact” is seen as misleading by some, including Sergio Carrera who is the head of the Justice and Home Affairs Programme at the Centre for European Policy Studies and a Professor at the Migration Policy Centre and the European University Institute, because it is not an international treaty concluded by different parties.50 I would argue, however, that the Commission deliberately chose to speak of “pacts” in recent legislation to facilitate the adoption by non-EU countries of some principles of EU legislation in their own jurisdiction such as it was the case with principles of the GDPR. After all, the Pact on Migration and Asylum is not the only pact proposed under Ursula Von der Leyen; for instance she also initiated the AI Pact.

The Pact on Migration and Asylum sets out to establish a comprehensive approach to migration management and aims to strike a balance between responsibility and solidarity to improve some

49 Cf. Sandu (n 17).
shortcomings of the past.\textsuperscript{51} As President Von der Leyen stated herself: “The old system no longer works. The Commission's Package on Migration and Asylum […] offers a fresh start.”\textsuperscript{52}

\textsuperscript{51} Cf. COM/2020/610 final (n 8), 1.
4 Stage of AMMR

Since the matter of asylum is subject to the ordinary legislative procedure according to Article 77(2) TFEU Parliament and Council must reach consensus on a final version of the proposed legislative act of the Commission before the AMMR comes into existence.53

The Commission submitted a proposal for the Asylum and Migration Management Regulation on the 23\textsuperscript{rd} of September 2020 which is, as mentioned above, set to replace the existing Dublin III Regulation.54

The matter of asylum is not an exclusive EU competence but rather falls under the shared competence in the area of freedom, security and justice according to Article 4 TFEU. Because the Member States have historically been reluctant to lose their competences completely in a sphere as sensitive as the matter of immigration, the EU must also involve the Member States in the legislative process.55 The Commission cooperates with Member States through the subsidiary control mechanism which enables national parliaments to evaluate whether new legislative proposals comply with the principle of subsidiarity and through the political dialogue, an exchange of information and opinions. The political dialogue is mostly carried out through opinions issued by national parliaments on Commission documents such as the AMMR proposal and replies of the Commission to such opinions within three months.56 Five national parliaments have issued their opinions on the Commission’s AMMR proposal,  

namely Spain, Germany, Greece, Portugal and Romania. Three countries made use of the subsidiary control mechanism and issued their reasoned opinion on the AMMR proposal. While Italy regretted that the country-of-first-entry principle was still preserved, Hungary complained that the new pact ignored the unique national identities and constitutional traditions of each Member State. Slovakia had reservations regarding the distribution key and the suggested solidarity contributions.

Additionally, the European Economic and Social Committee issued a report on the AMMR proposal on the 24th of February 2021 in which it voiced concerns about the new voluntary and selective solidarity mechanism’s viability. The Committee claimed that Member States would have no incentive to participate in relocation. Also, the European Committee of Regions provided their opinion on the 19th of March 2021 in which they pointed out that the countries on the EU’s external borders would once again be in charge of arrival and registration, and that the local and regional dimension had not been given enough consideration. It criticised the maintenance of the first-entry criterion as well.

On the 14th of April 2023, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament adopted a report on the Parliament’s stance for the first reading on which I will later elaborate. As the Council finally agreed on a negotiating position on the 8th of June 2023, the AMMR proposal is currently in the stage of the trialogue. As of the 20th of December 2023 it has been announced that Parliament and Council negotiators have informally

58 Cf. Radjenovic (n 54), 7.
59 Cf. ibid, 7.
60 Cf. COD 2020/0279 (n 57).
reached consensus on the five key regulations of the new Pact on Migration and Asylum. The adoption of the AMMR is planned for 2024 and should take place before the 2024 EU elections.

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5 Dublin III and proposed AMMR

In this subsection I will examine how the proposed AMMR differs from the Dublin III Regulation and which principles stay essentially the same. I will do so by comparing the key provisions of both legislative acts.

5.1 Recitals

Both legal acts guarantee adherence to key principles of international refugee rights, Dublin III does so in Recitals 3 and 21, and the AMMR in Recitals 33 and 60. The later Recital stays the same word for word. Additionally, both legislative texts confirm that the EU is to be

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64 Cf. Regulation (EU) 604/2013 (n 7), rec 3.
65 Cf. ibid, rec 21.
66 Cf. COM/2020/610 final (n 8), rec 33.
67 Cf. ibid, rec 60.
bound by relevant case law of the European Court of Human Rights in Recital 32 (Dublin III)\textsuperscript{68} and 69 (AMMR proposal) respectively.\textsuperscript{69}

5.2 Subject matter

The subject matter set out in Article 1 of the discussed legislative acts varies with the AMMR having a broader scope. While Dublin III only lists establishing criteria and mechanisms to ascertain which Member State is responsible for reviewing an application for international protection in Article 1\textsuperscript{70}, this aim is only the third mentioned subject matter listed in Article 1(c) of the AMMR proposal. The AMMR also more generally seeks to provide a common framework for the management of asylum and migration and additionally wants to establish a mechanism for solidarity. It is notable that the AMMR proposal highlights the principle of solidarity and fair sharing of responsibility laid down in Article 80 TFEU\textsuperscript{71} already in its first Article. \textsuperscript{72} This does not come as a surprise after the CJEU identified the lack of solidarity as one of the major shortcomings of Dublin III.\textsuperscript{73}

The question arises, however, of what “solidarity” means in the context of asylum. On the one hand, the UN-General Assembly defines solidarity as meaning that costs and burdens of global challenges should be distributed fairly. It is important to ensure that those who suffer get help from those who benefit.\textsuperscript{74} The CJEU on the other hand interpreted the term solidarity in Cases C-715/17, C-718/17 and C-719/17 as meaning that burdens entailed by the amount of

\textsuperscript{68} Cf. Regulation (EU) 604/2013 (n 7), rec 32.
\textsuperscript{69} Cf. COM/2020/610 final (n 8), rec 69.
\textsuperscript{70} Cf. Regulation (EU) 604/2013 (n 7), art 1.
\textsuperscript{72} Cf. COM/2020/610 final (n 8), art 1.
\textsuperscript{73} Cf. Joined Cases C-411/10 and C-493/10 N.S. v United Kingdom and M.E. v Ireland [2011].
applications for international protection submitted should be divided equally between all the
Member States and referenced Article 80 TFEU because there is no provision in Dublin III that
explicitly governs this aspect.75

The demand for more solidarity that triggered this new reform increased after the EU faced an
influx of over 1.2 million asylum applications in 2015, because the Member States were
affected very unevenly by the wave of refugees.76 In fact, between 2008 and 2017 90% of the
asylum seekers in the EU were hosted by only one-third of all Member States. Under the current
system disproportionate burden is especially placed on southern countries such as Greece, Italy
and Spain as regular countries of first entry. Meanwhile, Germany recorded by far the largest
number of applications for international protection. As a result, some Member States stopped
applying the Dublin III Regulation.77

It is also striking that both the AMMR78 as well as the TFEU79 speak of responsibility-sharing
rather than burden-sharing, making use of a euphemism to describe the concept that monetary
and non-monetary costs should be split equally. Non-monetary costs include possible threats
to national security and the labour market as well as a possible ascent of far-right parties.80

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75 Cf. Joined Cases C-411/10 and C-493/10 N.S. v United Kingdom and M.E. v Ireland [2011].
76 Cf. Will Jones, Alexander Teytelboym and Dalibor Rohac, ‘Europe’s Refugee Crisis: Pressure Points and
January 2024.
January 2024.
78 Cf. COM/2020/610 final (n 8), art 1.
C326/47, art 80.
80 Cf. María Hierro, Adolfo Maza and José Villaverde, ‘Asylum burden-sharing within the EU revisited: are we
5.3 Definitions

The first definition, namely the definition of “third-country national” differs slightly between AMMR and Dublin III. While the Dublin III Regulation speaks of persons not being EU citizens nor nationals of states that concluded an international agreement to participate in this regulation,\(^{81}\) the AMMR speaks of non-EU citizens and persons not enjoying the right to free movement according to Article 2(5) of the Schengen Borders Code\(^{82}\) and hence has a broader scope.\(^{83}\)

The Commission proposed furthermore that persons granted immediate protection pursuant to the regulation addressing situations of crisis and force majeure in the field of asylum and migration should be included in the definition of “applicant”,\(^{84}\) a stance which was followed by the Council.\(^{85}\) However, the Parliament opted to keep the current definition of applicant and deleted this amendment in its report, so it remains to be seen what the outcome of the trialogue will look like.\(^{86}\)

A more significant variation is seen in the definition of “family members”: The AMMR extends the meaning of family member to also encompass families formed in transit, i.e. families formed after leaving the country of origin but before arriving in the territory of one Member

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81 Cf. Regulation (EU) 604/2013 (n 7), art 2.
83 Cf. COM/2020/610 final (n 8), art 2.
84 Cf. ibid, art 2.
State. The Commission also proposed the inclusion of siblings\(^{87}\) which is accepted by the Parliament.\(^{88}\) However, the Council deleted this part of the provision in its latest negotiating version, which means that it is unclear which way trialogue negotiations will go and whether or not siblings will be included in the final adapted version.\(^{89}\)

Additionally, the Commission proposed to add new definitions such as “relocation” and “sponsoring Member State” with regard to proposed solidarity measures, as well as the definition of “migratory pressure”.\(^{90}\)

5.4 Common Framework for Asylum and Migration Management

The second part of the proposed AMMR deals with a completely new aspect compared to Dublin III, namely the aim to establish a general common framework for asylum and migration management and to facilitate an interplay between the other pillars of the CEAS. The goal is for all migratory routes to be addressed on the basis of a comprehensive approach consisting of, inter alia, partnerships and cooperations with third countries and effective management of the external borders.\(^{91}\)

Following this, the principles of integrated policy and the principle of solidarity and fair sharing of responsibility are written down.\(^{92}\)

The Commission, the Parliament and the Council all provide for the Commission to draw up an annual written forecast which anticipates the possible developments of migratory flows.

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87 Cf. COM/2020/610 final (n 8), art 2.
90 Cf. COM/2020/610 final (n 8), art 2.
91 Cf. ibid, art 3ff.
92 Cf. COM/2020/610 final (n 8), art 4f.
While the Commission speaks of a “Migration Management Report” that shall be established,\(^93\) the Council calls the instrument “European Migration Management Report” and wants the Commission to adopt a decision about whether a particular Member State is under migratory pressure during the upcoming year together with that report.\(^94\) Meanwhile, the Parliament uses the term “delegated act” and specifies that it should be adopted together with an annual situational report which analyses the migratory situation of the previous year.\(^95\)

Additionally, Member States are incentivised to have national strategies in place that would ensure the implementation of an effective asylum and migration management.\(^96\)

The Council introduced the idea of a Permanent EU Migration Support Toolbox, consisting of a non-exhaustive list of measures available for Member States which face migratory pressure in Article 6a. One of these measures allows for derogations from the ordinary requirements of asylum law if this helps the Member State in question to react to specific migratory challenges.\(^97\) This concept of “flexible responsibility” has attracted criticism, firstly because it was rejected in the Instrumentalisation Regulation only a little over one year ago, and secondly, because of a fear that it could undermine the complete concept of solidarity. It remains to be seen whether or not this provision will be included in the final AMMR version after the triologue.\(^98\)

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\(^93\) Cf ibid, art 6.
\(^94\) Cf. Council of the European Union, 2020/0279(COD) (n 85), art 7a.
\(^95\) Cf. European Parliament, A9-0152/2023 (n 86), art 4c.
\(^96\) Cf. COM/2020/610 final (n 8), art 6.
\(^98\) Cf. Felix Peerboom, ‘Flexible Responsibility or the End of Asylum Law as We Know It?’ (Verfassungsblog, 26 April 2023) <https://verfassungsblog.de/flexible-responsibility-or-the-end-of-asylum-law-as-we-know-it/> accessed 2 January 2024.
5.5 General Principles and Safeguards

Article 3(1) Dublin III\textsuperscript{99} which is essentially reproduced in Article 8(1) AMMR\textsuperscript{100} firstly defines the scope of application for the regulation to apply as follows: an application for international protection must be lodged on the territory of one Member State, including at their borders or in transit zones. This means applications for international protection filed abroad (for example in embassies) are excluded from the scope.\textsuperscript{101}

It is also held that the Dublin III Regulation furthermore excludes beneficiaries of international protection who move within the Union without authorisation and then file their application in a different Member State than the Member State initially responsible.\textsuperscript{102} However, the AMMR proposal clearly states in Recital 38 (as well as Article 26) that those beneficiaries shall also be included in its scope in order to limit unauthorised movement.\textsuperscript{103}

Although being relatively short, the first paragraph of Article 3 Dublin III\textsuperscript{104} and Article 8 AMMR\textsuperscript{105} respectively offer a lot of content to discuss. In its last sentence stating that only one Member State at a time is responsible for examining an application for international protection, the EU’s combat to “asylum shopping” can be regarded as reaffirmed. “Asylum shopping” means filing for international protection in more than one Member State simultaneously to benefit from the most favourable outcome.\textsuperscript{106} According to this “one-chance only” principle,

\textsuperscript{99} Cf. Regulation (EU) 604/2013 (n 7), art 3.
\textsuperscript{100} Cf. COM/2020/610 final (n 8), art 8.
\textsuperscript{102} Cf. ibid, 1653.
\textsuperscript{103} Cf. COM/2020/610 final (n 8), rec 38.
\textsuperscript{104} Cf. Regulation (EU) 604/2013 (n 7), art 3.
\textsuperscript{105} Cf. COM/2020/610 final (n 8), art 8.
the number of so called “refugees in orbit” that unsuccessfully proceed from one Member State to the next shall be reduced.107

The main principle for determining the Member State responsible for examining an application for international protection if no other higher-ranking criteria is fulfilled is the so called “country-of-first-entry-principle” in both Dublin III and AMMR. This default responsibility criterion stating that an application for international protection has to be filed in the country of the applicants’ first irregular entry into the EU has its legal basis in Article 3(2)(1) Dublin III108 and Article 8(2) AMMR.109 This principle was established in the 1980s in the first predecessors of the legislative acts. However, at that time it was not intended to be purely an objective rule but should also include the asylum seeker’s perspective in some form.110

Article 3(2) and Article 3(3) of the Dublin III Regulation111 as well as Article 8(3) of the AMMR proposal respectively address situations in which it is impossible to transfer applicants because of systemic deficiencies in the Member State that would be responsible for examining the application for international protection.112 This principle stems from the CJEU cases N.S. and others (C-411/10, C-493/10) in which the CJEU explained in a preliminary ruling that Member States must not transfer applicants to another Member State in cases in which they cannot be unaware of systemic deficiencies in the asylum procedure or the reception conditions in that Member State, because this would lead to a violation of the rights set out in the CFR.

109 Cf. COM/2020/610 final (n 8), art 8.
111 Cf. Regulation (EU) 604/2013 (n 7), art 3.
112 Cf. COM/2020/610 final (n 8), art 8.
Consequently, transfers to Greece were suspended at that point in time.\textsuperscript{113} So, while the whole Dublin system generally operates on the presumption that all Member States are “safe” for applicants (Recital 3 Dublin III, Recital 33 AMMR), this presumption is rebuttable on the basis of systemic flaws in the asylum procedure and the reception conditions which could lead to inhuman or degrading treatment. If a state comes to the conclusion that a transfer to another Member State would be impossible, it shall continue to examine the hierarchy criteria to see whether or not another Member State can be designated as responsible and only if this is not the case becomes responsible itself. This rather complex procedure can be avoided if the determining state decides to adopt the sovereignty clause, which I will introduce a little later.\textsuperscript{114}

The next subsection of Article 8 of the AMMR proposal deals with the different outcomes of the security check foreseen under the Screening Regulation which is already at the stage of being adopted. The mandatory security check shall determine whether an applicant poses a threat to national security or public order, before an applicant can be transferred. If an applicant is considered to pose such risk, the Member State carrying out the evaluation shall be the Member State responsible for examining the application for international protection.\textsuperscript{115}

The last part of the provisions about general principles reserves any Member State the right to transfer applicants to a safe third country.\textsuperscript{116}

Next, the AMMR introduces an article detailing the obligations of the applicant and another on the consequences of non-compliance to ensure that national authorities have access to all the information necessary to determine a responsible Member State. Applicants must apply in the

\textsuperscript{113} Cf. Joined Cases C-411/10 and C-493/10 (n 75).
\textsuperscript{114} Cf. Hruschka and Maiani (n 101), 1654ff.
\textsuperscript{115} Cf. COM/2020/610 final (n 8), art 8.
\textsuperscript{116} Cf. ibid, art 8.
country of their first irregular entry or legal stay and then be present in and cooperate with the national authorities of that Member State.\(^{117}\) The Council also proposed that applicants shall have to submit their identity documents and cooperate with national authorities in collecting their biometric data. Non-compliance of these legal obligations would lead to the applicant facing procedural consequences such as information unjustifiably submitted too late not being taken into consideration.\(^{118}\)

Article 4 Dublin III\(^{119}\) and Article 11 AMMR\(^{120}\) respectively provide for the applicants’ right to information as a central piece of procedural fairness, whereby the scope of information is widened under the AMMR. Applicants must be made aware of the key principles of the respective regulations, like its objective, the criteria and course of the procedure, the personal interview, a possible family reunification, the possibility to challenge a transfer decision, data being exchanged between the Member States and data protection.\(^{121}\) The AMMR also foresees that applicants must be educated about the right to be granted legal assistance free of charge on request (the Council only wants this in case of an appeal or a review\(^{122}\)), the role and responsibilities of the representative of an unaccompanied minor and the relocation procedure.\(^{123}\)

Thereafter comes a provision about the personal interview in Article 5 Dublin III\(^{124}\) and Article 12 AMMR respectively. The in-person interview helps to expedite the process of identifying the Member State responsible by facilitating the collection of all relevant data. However, when

\(^{117}\) Cf. ibid, art 9.


\(^{119}\) Cf. Regulation (EU) 604/2013 (n 7), art 4.

\(^{120}\) Cf. COM/2020/610 final (n 8), art 11.

\(^{121}\) Cf. Hruschka and Maiani (n 101), 1659.

\(^{122}\) Cf. Council of the European Union, 2020/0279(COD) (n 85), art 11.

\(^{123}\) Cf. COM/2020/610 final (n 8), art 11.

\(^{124}\) Cf. Regulation (EU) 604/2013 (n 7), art 5.
Guarantees for minors are listed in the next Article - Article 6 Dublin III\(^{127}\) and Article 13 AMMR respectively - which highlights that the best interest of the child should be the primary consideration for Member States. The AMMR stipulates that any decision that unaccompanied minors shall be transferred has to be preceded by an assessment of their best interests by qualified staff.\(^{128}\) In my opinion, the fact that the highest-ranking criteria for determining which Member State shall be responsible to examine an application for international protection is the one for unaccompanied minors also shows the legislators awareness that these vulnerable persons are in need of special protection.

5.6 Criteria for determining the Member State responsible

Even though the country-of-first-entry-principle prevails in the AMMR proposal, it might still come to a different Member State’s responsibility compared to Dublin III because the hierarchy criteria is slightly modified.

Article 7 Dublin III\(^{129}\) and Article 14 AMMR\(^{130}\) start the chapter on the topic of determining the responsible Member State by introducing the so called “freezing rule”. According to this rule, the situation to be taken into account for applying the hierarchy criteria is the situation that exists at the time when the application for international protection is first registered with a

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\(^{125}\) Cf. COM/2020/610 final (n 8), art 12.
\(^{126}\) Cf. Case C-517/17 Milkiyas Addis v Bundesrepublik Deutschland [2020].
\(^{127}\) Cf. Regulation (EU) 604/2013 (n 7), art 6.
\(^{128}\) Cf. COM/2020/610 final (n 8), art 13.
\(^{129}\) Cf. Regulation (EU) 604/2013 (n 7), art 7.
\(^{130}\) Cf. COM/2020/610 final (n 8), art 14.
Member State. The *ratio legis* of this principle is to avoid ambiguities stemming from the fact that factual circumstances might change in the course of examination (e.g. applicants turning 18) and to not incentivise applicants to influence their application through their own actions (such as marrying someone during the application process).\(^\text{131}\) Article 7 Dublin III provides a separate subsection stipulating which evidence is to be taken into account in case of family reunification.\(^\text{132}\)

As mentioned above, the highest-ranking criteria for determining a Member State responsible is the one for unaccompanied minors of Article 8 Dublin III\(^\text{133}\) and Article 15 AMMR\(^\text{134}\) respectively. The two provisions are essentially the same, stating that first and foremost the Member State responsible for the unaccompanied minor is the one where a family member (or sibling) is legally present. The AMMR proposal does not explicitly speak of siblings because it understands the term “family member” as including siblings. Notably, the Council in its negotiating version does specifically again include the term sibling because of its different definition of “family member”. As mentioned before, families formed in transit are also considered “family members” in the AMMR unlike in Dublin III. In the case of a married minor whose spouse is not legally present in a Member State’s territory, responsibility shall be with the Member State in which a parent, guardian or sibling is legally present. Otherwise, the Member State in which a relative that can take care of the applicant is legally present becomes the responsible one. The best interest of the child must, of course, be taken into consideration. Seemingly the only major difference between the two provisions lies in the default rule applicable if the unaccompanied minor does not have family members or relatives who are legally present in any Member State, while Dublin III simply speaks of the responsibility of a

\(^\text{131}\) Cf. Hruschka and Maiani (n 101), 1666f.
\(^\text{133}\) Cf. Regulation (EU) 604/2013 (n 7), art 8.
\(^\text{134}\) Cf. COM/2020/610 final (n 8), art 15.
Member State in which an application for international protection was lodged, the AMMR clarifies it must be the Member State in which the application was first registered. This deviation might only be small, however, it establishes a deviation from CJEU case law. In the MA judgement (C-648/11) the CJEU had previously adjudicated that unaccompanied minors are particularly vulnerable and as a rule therefore should not be transferred to another Member State. Now, transfers to another Member State might be necessary if more than one application was launched.

Before setting out rules for family procedures, both legislative acts provide norms for the responsibility of the Member State in which a family member enjoys international protection or has applied for international protection (Articles 9 and 10 Dublin III, Articles 16 and 17 AMMR). The family procedure stipulates that applications for international protection shall be conducted together if several members of a family submitted applications for international protection in the same Member State, thus trying to preserve family unity. Responsibility lies firstly with the Member State responsible for the largest number of applications and secondly with the Member State responsible for examining the application of the oldest of them.

The next criterion allocates responsibility to a Member State after issuing a residence document or visa. Article 12 Dublin III and Article 19 AMMR stipulate that the Member State responsible for the applicant’s presence in the Dublin area is also the one that is responsible for examining an application for international protection. The period in which expired documents

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135 Cf. Peers and others (n 15), 357ff.
136 Cf. Case C-648/11 The Queen, on the application of MA and Others v Secretary of State for the Home Department [2013].
137 Cf. Regulation (EU) 604/2013 (n 7), arts 9f.
138 Cf. COM/2020/610 final (n 8), arts 16f.
139 Cf. Regulation (EU) 604/2013 (n 7), art 12.
140 Cf. COM/2020/610 final (n 8), art 19.
lead to a Member States responsibility will likely be enhanced under the AMMR, making shifts of responsibility between Member States less likely. While Dublin III speaks of a Member States responsibility two years after a residence permit has expired and six months after a visa has expired if the applicant hasn’t left EU territory, the Commission has suggested a harmonised period of less than three years for both documents. The Council, however, divides the time periods as in Dublin III and considers that a shift in responsibility takes place for residence documents having expired less than three years and visas having expired less than 18 months before the application was launched. The Parliament stipulates that a Member State is responsible after an applicant has legally resided in it for more than two years with a residence permit, but does not give a time period for expired visas.

It is notable that residence permits have been accepted by the UNHCR as a strong link which justifies attribution to that Member State, but visas have not.

Next, the Commission introduced a completely new criterion, specifically about a Member State’s responsibility if the applicant has obtained a diploma or other qualification issued by an education establishment in that Member State, to ensure that their applications are examined by the Member State in which they have meaningful links. However, this provision was completely deleted in both the Council’s and the Parliament’s negotiating versions, making it seem rather unlikely that such a provision will be included in the adapted version of the AMMR.

141 Cf. Peers and others (n 15), 363f.
142 Cf. COM/2020/610 final (n 8), art 19
145 Cf. Hruschka and Maiani (n 101), 1667.
146 Cf. COM/2020/610 final (n 8), art 20.
Then, the legal texts illustrate that a Member State assumes responsibility after an applicant has entered from a third country illegally in Article 13 Dublin III\textsuperscript{148} and Article 21 AMMR respectively. In the AMMR proposal, the provision for irregular stay is deleted because of its difficulty to apply in practice, but a provision is added that clarifies that the rule of irregular entry also applies in cases where the applicant was disembarked on the territory following a search and rescue operation.\textsuperscript{149} While responsibility ceases 12 months after the irregular border crossing under Dublin III,\textsuperscript{150} this period is increased to three years in the AMMR proposal of the Commission and two years by the Council.\textsuperscript{151} The AMMR additionally also foresees that this principle shall not apply to an applicant that has been relocated.\textsuperscript{152} The UNCHR describes this criterion as wholly inappropriate because an irregular border crossing can’t create a meaningful link between an applicant and a Member State.\textsuperscript{153}

The next Articles on visa waived entry and applications in international transit areas of an airport do not play a big role in the Dublin system.\textsuperscript{154}

5.7 Dependent persons and discretionary clauses

Article 16 Dublin III\textsuperscript{155} and Article 24 AMMR\textsuperscript{156} respectively establish another binding responsibility criterion that outranks the hierarchy criteria mentioned above. Because of its placement in a separate chapter the freezing rule does not apply, making it possible that even

\textsuperscript{148} Cf. Regulation (EU) 604/2013 (n 7), art 13.
\textsuperscript{149} Cf. COM/2020/610 final (n 8), art 21.
\textsuperscript{150} Cf. Regulation (EU) 604/2013 (n 7), art 13.
\textsuperscript{151} Cf. Council of the European Union, 2020/0279(COD) (n 85), art 21.
\textsuperscript{152} Cf. COM/2020/610 final (n 8), art 21.
\textsuperscript{153} Cf. Hruschka and Maiani (n 101), 1679.
\textsuperscript{154} Cf. ibid, 1682.
\textsuperscript{155} Cf. Regulation (EU) 604/2013 (n 7), art 16.
\textsuperscript{156} Cf. COM/2020/610 final (n 8), art 24.
situations arising after an application for international protection was filed, fall under this proviso’s scope.\textsuperscript{157}

The aim of this provision is to keep or bring together applicants and their family members in situations of dependency such as pregnancy, having a new-born child, serious illness, severe disability, trauma or old age. In the new AMMR proposal it suffices that the family ties exist before the arrival in a Member State.\textsuperscript{158} This is new compared to Dublin III which speaks of family ties already existing in the country of origin.\textsuperscript{159} Further conditions that must be fulfilled are that the persons taking care of the dependent applicant must be legally resident in a Member State and that they are able to take care of the dependent person. The persons concerned additionally must express their desire in writing.\textsuperscript{160}

Thereafter, Article 17(1) Dublin III\textsuperscript{161} and Article 25(1) AMMR\textsuperscript{162} – also known as the “sovereignty clause” - provide for an opportunity to override all the ordinary rules. All Member State can decide to examine an application for international protection even if they would not normally be the Member State responsible. The exercise of this option is not subject to any particular condition as the CJEU highlighted.\textsuperscript{163} Recitals 17 Dublin III\textsuperscript{164} and 52 AMMR\textsuperscript{165} stress that this clause shall be applied especially on humanitarian and compassionate grounds. Sometimes not applying the sovereignty clause might be a human rights violation and against Article 7 CFR.\textsuperscript{166}

\textsuperscript{157} Cf. ibid, 1683ff.
\textsuperscript{158} Cf. COM/2020/610 final (n 8), art 24.
\textsuperscript{159} Cf. Regulation (EU) 604/2013 (n 7), art 16.
\textsuperscript{160} Cf. COM/2020/610 final (n 8), art 24.
\textsuperscript{161} Cf. Regulation (EU) 604/2013 (n 7), art 17.
\textsuperscript{162} Cf. COM/2020/610 final (n 8), art 25.
\textsuperscript{163} Cf. Peers and others (n 15), 366.
\textsuperscript{164} Cf. Regulation (EU) 604/2013 (n 7), rec 17.
\textsuperscript{165} Cf. COM/2020/610 final (n 8), art 52.
\textsuperscript{166} Cf. Hruschka and Maiani (n 101), 1689ff.
The second paragraph of this provision is also called the “humanitarian clause” and can be seen as the counterpart to paragraph one. It regulates that the responsible Member State may request another Member State to take over the application in order to bring together any family relations. Here, applicants are required to give their consent in writing before a transfer of responsibility can take place.\textsuperscript{167} So far, this clause has only rarely been used.\textsuperscript{168}

5.8 Obligations of the Member State Responsible and Procedures for Taking Charge and Taking Back

As it would go beyond the scope of this thesis to elaborate on every single provision of the new AMMR proposal and compare it to the Dublin III Regulation, this section will only provide an overview of some provisions of the next parts of the legal texts.

Member States have an obligation to accept their responsibility after it is determined according to the criteria set out above and must process the application for international protection according to standards of international and European law according to both Dublin III and AMMR. If the application is rejected or withdrawn, the responsible Member State must also ensure that the applicant leaves its territory unless another Member State grants a residence permit or makes use of the sovereignty clause.\textsuperscript{169}

In order to expedite the determination process and provide quicker access to the actual asylum procedure, the AMMR sets shorter time limits for various parts of the procedure such as take

\textsuperscript{167} Cf. Peers and others (n 15), 366.
\textsuperscript{169} Cf. Hruschka and Maiani (n 101), 1697ff.
charge requests generally having to be made within two months instead of within three months and responses to them only being allowed to take one month instead of two. Unaccompanied minors are excluded from these time limits insofar as the determining Member State may continue the procedure for determining another Member State’s responsibility despite the time limit having elapsed.\textsuperscript{170} Also, the take back request foreseen under Article 24 Dublin III\textsuperscript{171} has been transformed into a take back notification under Article 31 AMMR and now gives the notified Member State only a short period of time to object to the notification.\textsuperscript{172}

Furthermore, the expiry of deadlines only less frequently leads to a shift in responsibility under the AMMR. This is due to the fact that the rule that leads to a change in responsibility when a time limit for sending a take back notification has expired, has been deleted as well as the norms leading to a shift due to the applicant’s behaviour.\textsuperscript{173}

5.9 Solidarity

The biggest innovation of the AMMR is the introduction of a mandatory solidarity mechanism in Part IV. As mentioned earlier, improving the responsibility-sharing between the Member States was one of the main incentives why the Commission came up with this new legislative proposal.

The hope is that this mechanism will work better than attempts in the past to promote solidarity such as the quota mechanism introduced by Jean-Claude Juncker back in 2015, that did not lead to the desired effect because the Visegrád Member States did not respect it. The

\textsuperscript{170} Cf. COM/2020/610 final (n 8), arts 29ff.
\textsuperscript{171} Cf. Regulation (EU) 604/2013 (n 7), art 24.
\textsuperscript{172} Cf. COM/2020/610 final (n 8), art 31.
\textsuperscript{173} Cf. ibid, part III ch 5.
Commission learned from the mistakes of the past and made sure that in the AMMR relocation is not mandatory but just one of several forms of cooperation.174

There are currently different ideas on how the solidarity mechanism should look. The Parliament somewhat adopted the Commission’s initial proposal, but made major changes, whereas the Council deleted all of the Commission’s initial provisions to come up with an entirely new draft in their negotiating version. For the sake of clarity, I will not specify the proposed Article and paragraph in which a principle is regulated, but rather focus on its content because the structure of the AMMR’s IVth part will probably be completely different after the triilogue negotiations.

The Commission came up with a concept of flexible solidarity for the benefit of a Member State under migratory pressure or subject to disembarkations after search and rescue operations, and proposed the following types of solidarity: relocation, return-sponsorship, and capacity-building measures.175 The close interplay of the mechanisms can be seen in Article 55 AMMR that wants Member States to transfer persons onto their own territory after committing to return sponsorship if said returns are not carried out within 8 months which then effectively equals relocations.176

Migratory pressure is defined as a situation in which many applicants arrive or a risk of such arrivals exists because of the geographical location of a Member State and a development in another country that generates migratory movements which would burden even well-prepared

175 Cf. COM/2020/610 final (n 8), art 45.
176 Cf. ibid, art 55.
asylum and reception systems and hence need immediate action in Article 2(1)(w) AMMR. 177 Disembarkations after search and rescue operations are not mentioned in the chapter about solidarity in the Council’s negotiating version.178

Whether or not a Member State is under migratory pressure will be determined by the Commission, after making an assessment based on multiple different parameters such as the number of asylum seekers, beneficiaries of international protection or migrants staying illegally as well as the amount of return decisions and returnees removed and a needs assessment of the benefitting Member State. The degree of cooperation in the area of return and readmission also plays a role in the decision. As opposed to the Commission’s proposal of 2016, figures such as population and GDP are not taken into consideration.179 The beneficiary Member State may request such an assessment directly from the Commission.180

It is notable that the concept of return sponsorships has been dropped by both the Council and the Parliament, leaving physical solidarity through relocation, as well as other alternative measures, as possible options. The Council also introduces the option for (direct) financial contributions to specific projects related to migration, border management, asylum or projects in third countries that directly influence migration flows at the external borders or improve the asylum system in the third country.181

Relocation is defined in Article 2(1)(u) AMMR as a transfer from the territory of the benefitting Member State to the territory of the contributing Member State. Applicants of international

177 Cf. ibid art 2.
179 Cf. De Bruycker (n 63).
180 Cf. COM/2020/610 final (n 8) 20.
181 Cf. De Bruycker (n 63).
protection or beneficiaries of international protection can both be subject to such transfers, if international protection has only been granted less than three years ago.  

The Parliament adds that beneficiaries of international protection furthermore must request or consent to such a relocation.

Under alternative measures one can subsume services, staff support, facilities and technical equipment apart from capacity building measures already mentioned by the Commission.

While the Commission initially forces Member States to cover up to 50% of their contributions through relocations or return sponsorship in case the foreseen other measures wouldn’t suffice, the Council speaks of all solidarity measures having equal value and gives the Members States full discretion regarding the form of solidarity they provide. The Parliament also does not follow the Commission’s proposal, but speaks of relocations having to be prioritised as primary measure of solidarity at times.

The Commission wants Member States to indicate the type of contributions they will provide in a so-called “Solidarity Response Plan”. This approach is mostly followed by the Parliament which also emphasised the role of a Solidarity Forum that shall be convened at least twice a year. The Council, however, does not speak of a solidarity response plan at all, but rather mentions a “High-Level EU Migration Forum” comprising senior-level officials.

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182 Cf. COM/2020/610 final (n 8), art 2.
184 Cf. Bloj and Buzmaniuk (n 174).
185 Cf. COM/2020/610 final (n 8), art 48.
189 Cf. COM/2020/610 final (n 8), rec 28.
191 Cf. ibid, art 46.
representatives of the Member States which should be convened to come up with concrete solidarity contributions.191

Member States’ solidarity contributions are managed in a Solidarity Pool to which they contribute according to a distribution key that is based 50% on population, 50% on GDP. It also takes the benefitting Member State into consideration.192

The Council wants the Solidarity Pool to comprise at least 30,000 relocations and 600,000,000,-€ for direct financial contributions193 and suggests the introduction of a Technical Level EU Migration Forum to ensure the smooth functioning and operationalism of the Solidarity Pool.194 As mentioned before, in addition to the Solidarity Pool the Council also provides for the Permanent EU Migration Support Toolbox as a separate mechanism available for Member States under migratory pressure.

Furthermore, if a certain threshold of solidarity measures of the Solidarity Pool has been used, there will be the possibility to increase the number of available solidarity measures. The Commission195 and the Parliament196 speak of a Solidarity Forum that shall be convened to adjust Member States’ contributions whereas the Council sees itself responsible for reconvening the High-Level EU Migration Forum to request additional solidarity contributions from the Member States.197

191 Cf. Council of the European Union, 2020/0279(COD) (n 85), art 7d.
192 Cf. De Bruycker (n 63).
194 Cf. ibid, art 44e.
195 Cf. COM/2020/610 final (n 8), art 48.
197 Cf. Council of the European Union, 2020/0279(COD) (n 85), art 44g.
5.10 Territorial scope

Article 43 Dublin III\(^{198}\) and Article 66 AMMR\(^{199}\) respectively regulate the territorial scope of the Regulation by explicitly excluding the French overseas territories from its application. However, as international agreements for the extension of the territorial scope of Dublin III were concluded with the EFTA states Iceland, Liechtenstein, Norway and Switzerland, such agreements would also be needed after the conclusion of the AMMR in order for it to have the same territorial scope as Dublin III. Because of its “special status” an international agreement between the EU and Denmark must also be concluded and Ireland must use its option to opt in.\(^{200}\) Not all these states participate in the enactment of any legislation that modifies or expands upon the Dublin acquis, and the respective already-concluded international agreements will be terminated, unless these states notify the Commission of their decision to accept the new act. Because of the broader scope of the AMMR, said states might also decide to only join Part II, V and VII of the AMMR and not participate in the solidarity mechanisms.\(^{201}\)

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\(^{198}\) Cf. Regulation (EU) 604/2013 (n 7), art 43.

\(^{199}\) Cf. COM/2020/610 final (n 8), art 66.

\(^{200}\) Cf. Hruschka and Maiani (n 101), 1758.

\(^{201}\) Cf. COM/2020/610 final (n 8), 8f.
6 Conclusion

In the introduction, I mentioned that I would answer the question of how the proposed AMMR differs from the Dublin III Regulation. I have answered this question by pointing out that the AMMR introduces a new solidarity mechanism that combines mandatory solidarity with flexibility by allowing the Member States to choose how they want to contribute. At the time of writing of this thesis (February 2024) it remains to be seen what exactly the solidarity mechanism will look like, but it is certain that it will be the most comprehensive mechanism to this day. I additionally showcased the impact of the enhanced definition of the term “family member”. Nonetheless, I also mentioned that the country-of-first-entry-principle as well as most hierarchy criteria responsible for determining the responsibility of a Member State are still preserved, meaning that it remains to be seen how innovative the AMMR will prove to be.

I started by examining how the roots of the infamous country-of-first-entry-principle can be traced back to the Dublin Convention, making this principle more than 30 years old. I also highlighted how the Treaties have given more power to the EU on the matter of asylum over time and how the legislative process changed to the ordinary legislative process we have today.

This paper furthermore dealt with the question of which implications the AMMR would have on the rights of applicants. On the one hand, applicants’ rights have been strengthened through the AMMR also including families formed in transit in its definition of “family member” and remedies are taken to speed up the whole determination process. On the other hand, it remains rather unlikely that a completely new criterion that takes into account a meaningful link of the applicant with a Member State based upon some sort of education will be introduced and, in the future, play a role when determining the Member State responsible for examining an application for international protection after the Council and the Parliament deleted the
Commission’s proposal in their negotiation drafts. Furthermore, it is now possible for unaccompanied minors to be transferred to another Member State if they launched more than one application for international protection, which weakens their position.

It is still uncertain whether the AMMR really will be passed in 2024 before the upcoming EU elections and if so whether enough solidarity is established towards countries at the external borders with all Member States contributing to the solidarity mechanism or whether some Member States will decide to not respect the legislative act in times of migratory pressure as in 2015. However, after Parliament and Council negotiators informally reached consensus on the AMMR in December 2023, the path for implementation seems to be paved.

In conclusion, it can be said that while the EU took a step in the right direction with this new legislative act, there is still room for improvement concerning the empowerment of applicants’ rights and guaranteeing that no Member State will bear disproportionate burdens. However, taking into consideration that populist, protectionist and anti-immigration sentiments are currently on the rise in many EU Member States, it is remarkable that better and stronger asylum laws have been agreed upon in this era.
7 References

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7.3 Legal texts


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Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [1990] OJ L239/19


Council Regulation (EC) 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 [2003] OJ L50/1

Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted’ [2011] OJ L337/9

European Commission, ‘Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’ COM/2016/0270 final/2


Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31

Treaty establishing the European Economic Community [1957]

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1


8 List of Figures and Tables


Figure 2: Main principles of the Dublin system, (Scherrer A, ‘Dublin Regulation on International Protection Applications: European Implementation Assessment’ (Directorate General for Parliamentary Research Services, February 2020) <https://data.europa.eu/doi/10.2861/49145> accessed 26 December 2023, 5)