

# **ECRE COMMENTS ON THE COMMISSION PROPOSAL FOR A REGULATION ON ASYLUM AND MIGRATION MANAGEMENT**

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## SUMMARY OF VIEWS

### **General remarks**

- **Failure to Align with EU and International law:** The proposed Regulation both introduces changes that diverge from legal obligations under international and EU law, including the jurisprudence of the European Courts, and fails to incorporate changes that would bring the EU's asylum *acquis* into closer conformity with EU and international law. When read in conjunction with evidence on Member State policy and practice, the proposed Regulation does not remove the risk of continued or new violations of EU and international law.
- **Discretion and Unpredictable Impact:** The Regulation allows considerable choice on implementation methods for both the Commission and the Member States, despite taking the form of a regulation. It is therefore hard to predict its impact. For example, the Commission and the Member States *could* decide on implementation that leads to better respect for rights or they could make choices on implementation that considerably reduce protection space in Europe.
- **Role of the Commission:** ECRE offers a cautious welcome to the increased role of the Commission because monitoring Member States' implementation of the CEAS and ensuring compliance with legal standards should be a higher priority. Nonetheless, there are also risks attached to an enhanced role for the Commission.
- **Common Framework (Part II):** ECRE finds it unwelcome that the most important legislative proposal on the future of asylum in Europe begins with a reference to the responsibilities of third countries rather than to those of EU countries. The introduction to this section and the order of the components, demonstrate the continued efforts at "externalisation" that are embodied in the Pact, as well as the continued intrusion of internal policy objectives into EU external affairs.

### **Part III Criteria and Mechanisms for Determining the Member State Responsible (Articles 8 to 44)**

- **Overall:** The rules on allocation of responsibility are very close to the current Dublin system whereas ECRE strongly recommends deeper reform in order to remove long-standing and widely acknowledged dysfunctions. Without a major overhaul, the limited positive amendments should be preserved and negative changes, including those imported from the Dublin IV proposal, should be removed, as summarised below.
- **Access to the procedure (Article 8):** Article 8(3) repeats the flaw of the Dublin IV proposal by not updating the legislation to reflect CJEU jurisprudence. As per the article, transfers are impossible when there are "substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights..." ECRE's position remains that reference to systemic flaws is an undue restriction on the Charter and European case law. The restriction should be removed to ensure full compliance with primary law and human rights law.
- **Obligations of the applicant and consequences of non-compliance (Article 9):** As in the Dublin IV proposal, the RAMM introduces or repeats obligations on the applicant and sets out the punitive consequences of non-compliance with these obligations. In general, ECRE reiterates its longstanding concerns about punitive approach to onward movement, especially when reasons for onward movement, including lack of compliance with required standards, are not addressed.

- **Procedural guarantees (Article 11 to 12):** On information provision, positive changes are introduced, including detailing the information that a Member State must provide to an applicant, and specifying that the information should be “drawn up in a clear and plain language” and where necessary also be provided orally. In addition, information should be provided “as soon as possible” and “at the latest when an application for international protection is registered”, a welcome clarification. Article 12 provides that the determining Member State shall conduct a personal interview with the applicant in order to facilitate the process of determining the Member State responsible but still does not include an obligation on the national authorities to proactively question the applicant about the presence of relatives or other elements that could trigger primary responsibility criteria. ECRE proposes amendment of Article 12 to that effect.
- **Guarantees for children (Article 13):** A Best Interests Assessment procedure and format for all Dublin transfers that is used across the EU, based on recommendations from the Committee on the Rights of the Child and UNHCR, should be developed.
- **Hierarchy of criteria (Article 14 to 23):**
  - **Unaccompanied Children (Article 15):** The first criterion in the hierarchy covers “Unaccompanied Minors” and notably fails to incorporate the relevant jurisprudence determining that the Member State responsible should be the one where the unaccompanied child is present unless this is found not to be in the best interests of the child.
  - **Family members (Articles 16 to 17):** ECRE supports the two changes to the family criteria: first, the definition of family member has been widened to include siblings; and, second, the evidential requirements to demonstrate family connection have been lowered. Widening the definition of family member will mean more people can be reunited with family members, which has multiple beneficial effects for people and also for their prospects for integration.
  - **Entry (Article 21):** The article serves to reinforce the “first entry criterion”. The country of entry will be responsible if none of the other criteria apply (or are applied), and the responsibility lasts for three years (extended from one year under the current rules). In the absence of the necessary deeper reform, the reinstatement of the cessation of responsibility clauses in Article 21 is necessary (see also Article 27).
- **Dependent persons (Article 24):** ECRE proposes amending these clauses to reintroduce the sibling relationship.
- **Obligations of the Member State responsible (Article 26):** ECRE strongly opposes expansion of the scope of the take back procedure to include beneficiaries of international protection and those who have arrived via resettlement under the proposed Union Resettlement Framework, which will unduly restrict the movement of beneficiaries of international protection through bringing them under the (post)Dublin system. Increased irregular movement is likely to follow.
- **Cessation of responsibilities and start of the procedure (Article 27 to 28):** The proposal does not incorporate the provisions currently in Dublin III Article 19(2) whereby responsibility ceases after a person has been absent from the territory for three months. Article 28(2) comprises an additional clause on continuation of responsibility, stating that the Member State where the application is first registered should continue the process of determining responsibility even if the applicant leaves the territory “without authorisation or is otherwise not available to the competent authorities of that Member State”. ECRE reiterates its concerns about rendering responsibility (near)permanent as it exacerbates unfairness for Member States situated at the external borders and for applicants alike. The proposals adds to the perverse incentives for Member States of first entry to refrain from fulfilling their identification and registration obligations and to avoid investing in reception systems. It is also likely to encourage asylum seekers to resort to irregularity so as to avoid being identified and confined to countries of arrival, rather than supporting the proposed intention of tackling absconding. ECRE proposes the reinstatement of cessation of responsibility clauses and the removal of articles on continuation of responsibility

- **Submitting a take charge request and replying to a take charge request (Articles 29 to 30):** Shorter time limits are introduced “in order to speed up the determination procedure to grant swifter access of an applicant to the asylum procedure”. In the interests of increasing rather than reducing the number of successful take charge requests – given that they are both the basis for realisation of the right to family reunification and a tool for responding to humanitarian emergencies – ECRE proposes that the original deadlines are maintained. In order to further support family unity, the provisions that allow for an extension of the deadline in cases for unaccompanied children could be expanded to cover all family cases.
- **Remedies (Article 33):** The remedy will only assess “...whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights”. In light of CJEU jurisprudence, the right to be heard enshrined in Article 41 of the Charter must be ensured with respect to any measure liable to adversely affect an applicant. Therefore, ECRE recommends removal of limitations on the scope of the right to appeal a transfer decision. A remedy should also be available to challenge the rejection of take charge requests. ECRE believes that the deadline of two weeks for lodging an appeal is so short as to be unreasonable within the meaning of Article 47 of the Charter, and proposes four weeks. ECRE further recommends automatic suspensive effect of appeals which would bring the provision in line with the right to an effective remedy under Article 47 of the Charter.
- **Detention (Article 34):** ECRE recommends amending Article 34 to minimise the risk of breaching the provisions of the Charter<sup>1</sup> that provides that asylum seekers should not be detained purely for reasons of immigration policy and that detention during the determination of responsibility or when awaiting a transfer is not permissible (in the absence of other factors). It is only allowed for the purpose of “securing the fulfilment of an obligation prescribed in law”<sup>2</sup> and the obligation must be sufficiently clear and precise.<sup>3</sup> ECRE further recalls that children should never be detained. The ECtHR has ruled that a detention measure imposed without any consideration as to the best interests of the child, with no proportionality assessment and no use of alternatives to detention, is unlawful.<sup>4</sup>

#### Part IV Solidarity

- **Overall:** ECRE believes that the overall approach of the RAMM is flawed because (as with Dublin IV) it largely maintains the Dublin rules on responsibility sharing but adds “corrective” mechanisms for two situations. (These are 1) disembarkation following search and rescue (SAR) (Articles 49) and 2) migratory pressure (Articles 50-55)). A deeper overhaul of the criteria on sharing of responsibility is necessary: it is inherently paradoxical to maintain a system which generates unfairness that has to be corrected through solidarity mechanisms. Without a deeper reform, the far from perfect status quo is the preferable option. If reforms go ahead, ECRE makes the following recommendations to ensure that the solidarity mechanisms better correct the unfairness of the rules and render them workable.
- **SAR Solidarity Mechanism:** ECRE welcomes the introduction of a solidarity mechanism for the situation of disembarkation after SAR. It is unfortunate that this is needed, but without more ambitious reforms, it is the case and will remain the case. Nonetheless, the SAR solidarity mechanism could be improved as follows:

1 Article 6 of the Charter mirrors Article 5(1)(b) ECHR in that respect.

2 For an analysis, see ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015, available at: <http://goo.gl/gSCynS>. See also ECtHR, *OM v Hungary*, Application No 9912/15, Judgment of 5 July 2016.

3 See e.g. ECtHR, *Vasileva v Denmark*, Application No 52792/99, Judgment of 25 September 2003; *Ostendorf v Germany*, Application No 15598/08, Judgment of 7 March 2013; *OM v Hungary*, Application No 9912/15, Judgment of 5 July 2016.

4 ECtHR - *Rahimi v. Greece*, Application No. 8687/08, Judgment of 5 July 2011.

- **Types of solidarity:** Ideally, all Member States should offer solidarity in the form of relocation. Given that one of the objectives of solidarity is to mitigate the unfairness of the rules on allocation of responsibility for examination of applications, solidarity should logically involve assumption of responsibility for people. ECRE does not support return sponsorship as a solidarity option.
- **Amount of solidarity:** The mechanism does not guarantee that it will meet all the relocation needs of the benefitting country so should be adjusted.
- **Procedural concerns:** The mechanism is highly complex. ECRE recommends adjusting it so that there is only one opportunity for Member States to provide voluntary contributions and removal of the option of return sponsorship.
- **Migratory Pressure Solidarity Mechanism:** ECRE welcomes the migratory pressure solidarity mechanism, provided that some amendments are made. In particular, ECRE strongly urges removal of return sponsorship as a solidarity option. Return sponsorship distorts the idea of solidarity, which should be mutual support among Member States to meet the objectives of the EU asylum *acquis*. Increasing return rates is not central to making asylum systems function in Europe. Fundamental rights concerns arise. In the event that return sponsorship is retained, at very least, relocation and return sponsorship should not have equal weight, and a corrective mechanism should be added to ensure that all relocation needs are met.
- **Amendments to the Long Term Residence Directive:** ECRE welcomes the amendment to reduce the period of “legal and continuous” residence before acquisition of the long-term right to remain from five to three years for beneficiaries of international protection. The amendment enhances job prospects, as well as security and the prospect of a durable solution. ECRE notes however that it may not prove to be a sufficient disincentive to onward movement. For a functioning European asylum system, and to reduce onward movement, it is important to enable mobility between the Member States for beneficiaries of international protection.

## **STRUCTURE OF THE PROPOSAL FOR REFERENCE**

Explanatory Memorandum

### **Part I – Scope and Definitions**

### **Part II – Common Framework for Asylum and Migration Management**

### **Part III – Criteria and Mechanisms for Determining the Member State Responsible**

Chapter I General Principles and Safeguards

Chapter II Criteria for Determining the Member State Responsible

Chapter III Dependent Persons and Discretionary Clauses

Chapter IV Obligations of the Member State Responsible

Chapter V Procedures

Section I Start of the Procedure

Section II Procedures for Take Charge Requests

Section III Procedures for Take Back Notifications

Section IV Procedural Safeguards

Section V Detention for the Purposes of Transfer

Section VI Transfers

Chapter VI Administrative Cooperation

Chapter VII Conciliation

### **Part IV – Solidarity**

Chapter I Solidarity Mechanisms

Chapter II Procedural Requirements

Chapter III Financial Support Provided by the Union

### **Part V – General Provisions**

### **Part VI – Amendments to Other Union Acts**

### **Part VII – Transitional Provisions and Final Provisions**

## INTRODUCTION

As part of the package on migration and asylum launched with the New Pact on Migration (“the Pact”) in September 2020, the European Commission published the proposal for a regulation on asylum and migration management, under its full title:

***Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], including COM(2020) 610 Final and 2020/0279 (COD).***

The Regulation on asylum and migration management (here the shorthand RAMM or “the proposed Regulation” will be used) is a central pillar of the Pact and thus of the reformed Common European Asylum System (CEAS) should the legislation pass. The Pact sets out the vision of the European Commission for the future of asylum and migration in Europe; it creates a new overall framework to “relaunch” the CEAS and either replaces, integrates or amends the proposals that were part of CEAS reform package of 2016 and those presented in the interim.

This ECRE Comments paper covers issues in the RAMM related to international protection. Issues related to information sharing, data protection and administrative law are dealt with separately. It focuses on the three most important elements in the RAMM:

- The concept of “Common Framework” (Part II of the RAMM)
- The mechanisms for determining responsibility for asylum claims (Part III) and
- The solidarity mechanisms (Part IV)

In line with its mission and expertise, ECRE assesses the legislative proposals, including the RAMM, with a view to assessing, first, conformity with European and international commitments on refugee protection and human rights more broadly, and, second, wider impact of the proposed changes on the rights of forcibly displaced people in Europe and/or affected by Europe’s policies.

Whereas there are positive elements in the proposals, ECRE also presents critiques including:

(1) The proposed Regulation introduces changes that diverge from legal obligations deriving from international and EU law, including the jurisprudence of the European Courts, or it fails to incorporate changes that would bring EU law into closer conformity with EU and International law.

(2) When read in conjunction with evidence on Member State policy and practice, the proposed Regulation does not mitigate risks of continued or new violations of EU and international law.

(3) The proposed Regulation increases the role of the European Commission and, despite being a regulation, provides for considerable choice in implementation for the EC and the Member States. It is therefore hard to predict the impact on protection and rights, which will follow from the choices of these actors. Thus, the Commission and the Member States *could* decide on implementation that leads to better respect for rights (better in the sense of compared to the status quo or to the alternatives possible at any juncture) or they could make choices on implementation that considerably reduce protection space in Europe. Given the political situation in Europe, and the stated objectives of the Pact, the latter seems more likely.

(4) The “comprehensive” approach is less than comprehensive. Major gaps in the functioning of asylum systems in Europe are neglected in favour of increasing the responsibilities of countries outside Europe. In particular, the RAMM attempts to codify and expand the use of EU external policies and funds to prevent the movement of refugees and migrants.

While these Comments focus on legal questions, ECRE acknowledges and refers when necessary to the multi-layered politics of asylum and migration in Europe. The RAMM, of all the legislative proposals, represents continued efforts to resolve political conflicts and the deep-seated lack of trust between the Member States through the use of law. The 2016 CEAS reform package also embodied a similar attempt to use law to resolve political conflict, and in both cases highly complicated legal instruments were produced. ECRE also provides various alternative recommendations at some points in order to respond to different political scenarios.

## PURPOSE AND SCOPE

### ***The Coomprehensive Approach***

The RAMM proposes a “common framework” for asylum and migration management at EU level, which in turn contributes to the “comprehensive approach to migration management” embodied in the Pact. A second aim is to promote mutual trust between the Member States. It is “based on” and seeks to give expression to the principles of solidarity and fair sharing of responsibility. It replaces the Dublin Regulation (Regulation (EU) 604/2013 – “Dublin III”) and also the proposed recast of the Dublin Regulation (COM(2016) 270 final – “Dublin IV”). It also includes (light) amendments to Long Term Residence Directive (2003/109/EC) and the proposal for an instrument creating the Asylum and Migration Fund (2020/0279), in order that EU funding support the new approach.

### ***Allocation of responsibility and solidarity***

The rules on allocation of responsibility for examination of asylum applications is a major source of conflict between Member States, along with subsidiary conflicts concerning perceived lack of fairness in the Dublin system, the poor implementation of the rules and related humanitarian consequences, and proposals for compensatory solidarity mechanisms. All these issues proved to be the largest obstacles in the negotiations on the 2016 proposals. Whereas Dublin IV preserved the basic rules on allocation but added a “corrective” solidarity mechanism to be triggered in certain circumstances, under the RAMM, Articles 14 to 23 also preserve the same basic rules for the allocation of responsibility, and Part IV also introduces corrective solidarity mechanisms, all of this is subsumed into the “comprehensive approach” becoming elements among a set of other provisions.

Thus, the RAMM also covers international cooperation, return and readmission, integration, and wider management of the asylum system, with the implicit suggestion that the direct conflicts between the Member States can be alleviated by widening the range of options when it comes to sharing responsibility, and based on the premise that Member States are more likely to agree on rules for sharing responsibility if they are collectively responsible for fewer people. Finally, it also creates new structures and mechanisms including new provisions on governance of asylum which entail an expanded role for the Commission.

### ***Structure and legal status***

The RAMM proposal should itself be read as a package – a small package within a package. Published in the same document, there are four main elements. First, an Explanatory Memorandum, which has the legal form and weight of a Commission Communication. It provides context, background and the rationale for the proposal, but also describes the key elements in some detail (and adds up to 26 pages). Second and third elements are the draft regulation for analysis, negotiation and amendment by the co-legislators. It can be read in two sections: the articles of the Regulation are preceded by an uncharacteristically long introduction of 84 paragraphs over 14 pages. As a regulation, if passed it will apply automatically in all EU Member States and be binding in its entirety, although the recitals in the introduction are more general and may give rise to more scope for interpretation by courts.

It variously adds to, replaces or amends the legal obligations of the Member States under the CEAS and also those of the European Commission. At the same time, there are implications for relationships with third countries and with other EU Institutions, which arise from the provisions on partnership and cooperation in Articles 3, 4 and 7.

The fourth element is a legislative financial statement, a standard tool which includes information on proposed timeline, responsibilities for implementation and financial impact.

These ECRE Comments will analyse the key provisions in the articles of the proposed regulation but will refer extensively to the Introduction to the Regulation (paragraphs 1-84) and to the Explanatory Memorandum, the legislative financial statement, the other proposals that are part of the Pact, and the 2016 proposals and negotiations, since the RAMM proposal cannot be understood in isolation. ECRE’s assessment and recommendations will be provided, with different alternative recommendations where relevant.

# ANALYSIS OF KEY PROVISIONS

## Part II Common Framework for Asylum and Migration Management

### **Article 3: The Comprehensive Approach**

The Article sets out provisions that make up the comprehensive approach to asylum and migration which is described in the introduction and Explanatory Memorandum. Article 3 requires that the Union and Member States take actions on the basis of a comprehensive approach which should address the entirety of the “migratory routes that affect asylum and migration management”. A list of the fourteen components of the comprehensive approach then follows at points 3(a) to (n).

By far the most notable of these components is (a), concerning relations with third countries, discussed below. While it briefly mentions legal pathways for third country nationals as well, in ECRE’s view, it is unwelcome that the most important legislative proposal on the future of asylum in Europe begins with a reference to the responsibilities of third countries rather than to those of EU countries. While widely predicted, the introduction to this section and the order of the components, demonstrates the continued efforts at “externalisation”<sup>5</sup> that are embodied in the Pact, as well as the continued intrusion of internal policy objectives into external affairs. The focus of these efforts is irregular migration, rather than a concerted effort to address displacement and seek global solutions to the plight of refugees worldwide, which would constitute a better approach and one which takes into account the interests and concerns of other states, as well as of people who have been forcibly displaced. The codification of these elements via a Regulation constitutes a material change, and one not informed by evidence on effective global approaches to displacement.

Of the other components in Article 3, some reiterate legal obligations that form part of the CEAS or related EU laws or that appear elsewhere in the reform package: (c) visa policy; (g) asylum procedures; (h) determination of responsibility; (i) reception; (j) return and deportation; (m) EU agencies and information systems; and (n) crisis preparedness.

Then, component (f) refers to the obligations under European and international law on sea rescue. Component (k) refers to incentives for and support to integration, not an EU competence, so not part of the EU’s legal order but an area where it has policy and provides support and funding to the Member States. Component (e) covers management of the external borders in line with the Schengen agreement, with component (l) covering irregular migration and illegal employment. ECRE considers that grouping together existing legal obligations under EU and international law with non-legally binding commitments risks undermining the former.

Component (b) covers “close cooperation and mutual partnership” between EU institutions and bodies, Member States and international organisations. A related point arises in Article 4(1) on “the coherence of ... the internal and external components of those policies”.

On the intra-EU question, these articles should be read as a continuation of the approach set out in the largely moribund Partnership Framework of 2017, whereby objectives that are set by internal affairs policy makers are supposed to be adopted and implemented by all other parts of the EU. It is generally typical of the internal-external nexus in migration or security policy that it is a one-way process, meaning that, as well as objectives, concepts and approaches are defined on the internal “side”, but that implementation, through actions, operations, political demarches or funding, should carry through to the external “side”. There is little reciprocity: for instance, no reference to or expectation that the internal affairs policy-makers, institutions or funding streams should be deployed to implement objectives defined by external affairs actors.

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5 ECRE defines externalisation as a process whereby the EU attempts to transfer to countries outside its borders the responsibility for international protection (in law or political terms); the actual provision of international protection; and the people affected themselves, be they asylum-seekers, refugees or with other statuses or none.

In addition, the title of Article 4 is “Principle of integrated policy-making”, which gives the misleading impression that there is a there is a corresponding principle with a legal basis in EU law, especially when juxtaposed with the title of Article 5, which covers the “Principle of solidarity”, which is set out in the EU Treaties, as described below. To avoid reinforcing the idea that there is such a legally rooted principle or indeed that the approach described in the RAMM represents a suitable expression of integrated policy-making, ECRE suggests amending the title of the article.

### **Articles 3, 4 and 7 – External cooperation: the details**

The content of Article 3(a) concerning relations with third countries relates back to the reference in the introduction to the “entirety of the migratory routes” and the references during the Pact preparation and from the Commission to a “whole of route” approach. It explains that management of asylum and migration involves managing the whole process from the countries of origin to arrival and presence in the EU as follows:

***(a) mutually-beneficial partnerships and close cooperation with relevant third countries, including on legal pathways for third-country nationals in need of international protection and for those otherwise admitted to reside legally in the Member States addressing the root causes of irregular migration, supporting partners hosting large numbers of migrants and refugees in need of protection and building their capacities in border, asylum and migration management, preventing and combatting irregular migration and migrant smuggling, and enhancing cooperation on readmission;***

In Article 7 one specific element of cooperation with countries – return and readmission – is set out. Here, the Commission is given a role to submit a report to the Council when third countries are not cooperating “sufficiently” on readmission, in which it should identify measures to improve cooperation, “taking into account the Union’s overall relations with the third country”. Although not stated, it can be assumed that what is intended is the threat to use other parts of the EU’s cooperation with the country in order to increase readmission, thus going beyond the potential restrictions foreseen under the revised visa code.<sup>6</sup> This risks giving the EU’s own interest in readmission priority over the needs and interests of the country in question, which should instead be the focus of the EU’s development and trade policies.

Thus, as well as using a definition of a “comprehensive approach” to asylum and migration which places too much responsibility on other countries, rather than tackling the weaknesses and implementation gaps in Europe, Articles 3 to 7 also establish mechanisms that will enable intrusion into foreign affairs of domestic policy-makers, based on an extremely narrow view of global affairs.

Asylum and migration are global issues and thus important elements of EU and wider European external affairs, as is already recognised in external policies, such as the EU’s Global Strategy<sup>7</sup> and the “Lives in Dignity” Communication of 2016.<sup>8</sup> However, external policies have their own objectives, principles, and working methods. There is a wide body of evidence about the counterproductive and damaging effect of allowing narrowly defined internal security objectives to dominate external policies. There is also a long tradition of efforts to use a “comprehensive approach” to dominate other policy areas. This is often presented as an attempt to address the well-documented and genuine “coherence” problem (the multiplicity of actors in external affairs). Here, changes are more likely to increase incoherence by adding to the EU actors present in or cooperating with third countries.

6 Article 25, Regulation (EU) 2019/1155 of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), available at: <https://bit.ly/3jl8JLE>

7 See: EEAS, EU Global Strategy, available at: <https://bit.ly/2Mn4NgG>.

8 Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions: Lives in Dignity: from Aid-dependence to Self-reliance, COM(2016) 234 final, April 2016, available at: <https://bit.ly/3c9N7Ak>.

## Recommendations:

### Article 3

ECRE recommends clarifying that numerous elements listed under Article 3 are legal obligations that all EU Member States must comply with by amending it as follows:

The Union and the Member States shall take actions in the field of asylum and migration management on the basis of **compliance with its existing commitments under international and EU law and** a comprehensive approach.

ECRE strongly recommends removal of Article 3(a).

If Article 3(a) is maintained, it should be amended as follows:

- (a) ~~mutually-beneficial partnerships and close~~ cooperation with relevant third countries, **including in particular** on legal pathways for third-country nationals in need of international protection and for those otherwise admitted to reside legally in the Member States, addressing the root causes of irregular migration, supporting partners hosting large numbers of migrants and refugees in need of protection and building their capacities in border, asylum and migration management, preventing and combatting ~~irregular migration and migrant~~ **smuggling and human trafficking**, and enhancing cooperation on readmission, **in full respect of international law and the objectives set out in Article 21 TEU, as well as the Global Compact on Refugees and Global Compact for Safe Orderly and Regular Migration.**

### Article 4

Amend as follows:

#### Article 4

*Principle of **Better** integrated policy-making*

1. The Union and Member States shall ensure coherence of asylum and migration management policies, including both the internal and external components of those policies, in consultation with and with full respect for the competencies of the EU and Member State institutions and agencies responsible for external policies.

### Article 7

ECRE recommends removal of Article 7.

If Article 7 is maintained, it should be amended as follows

*Cooperation with third countries to facilitate return and readmission*

1. Where the Commission, on the basis of the analysis carried out in accordance with Article 25a(2) or (4) of Regulation (EU) No 810/2009 of the European Parliament and of the Council<sup>57</sup> and of any other information available, considers that a third country is not cooperating sufficiently on the readmission of illegally staying third- country nationals, and without prejudice to Article 25(a)(5) of that Regulation, it shall submit a report to the Council including, where appropriate, the identification of any measures which could be taken to improve the cooperation

of that third country as regards readmission, taking into account **and without prejudice to the Union's overall relations with the third country and in consultation with all relevant Commission services and the European External Action Service.**

2. Where the Commission considers it appropriate, it shall also identify in its report measures designed to promote cooperation among the Member States to facilitate the return of illegal staying third-country nationals.
3. On the basis of the report referred to in paragraph 1, the Commission and the Council, within their respective competencies, shall consider the appropriate actions taking into account the Union's overall relations with the third country, **including respect for the objectives of external policies as elaborated in Article 21 TEU and assessment of the impact of actions may have in the fields of migration, peace and security, development and poverty eradication.**
4. The Commission shall **consult** ~~keep~~ the European Parliament **during the preparation of the report** and **keep it** regularly informed of the implementation of this Article.

### **Article 5 – Preventing irregular migration**

Article 5(1)(b) suggests that, as part of sharing responsibility, Member States should take measures to reduce and prevent irregular migration to the EU in cooperation with third countries. The same concerns about externalisation set out above apply to this provision. In addition, incentivising Member States to reduce the number of people arriving in the EU has significant implications for the ability of people to access asylum in Europe, and may promote increased use of harmful measures, including detention, ill-treatment and even *refoulement* in the EU's partnerships with third countries. In many cases, people seeking asylum have to travel irregularly due to the lack of regular routes available. The ambition of preventing irregular migration may undermine the right to asylum in the EU and exacerbate risks for people moving irregularly.

The rest of Article 5 includes definitions and the commitments that follow in Part III, so is not covered in detail here.

#### **Recommendations:**

ECRE recommends removal of Article 5(1)(b).

If Article 5(1)(b) is maintained, it should be amended as follows:

take ~~all~~ measures necessary and proportionate **and in full compliance with the legal obligation to provide access to asylum** to reduce ~~and prevent~~ irregular migration to the territories of the Member States, in close cooperation and partnership with relevant third countries, including as regards the prevention and fight against the smuggling **of migrants and human trafficking, while protecting the rights of smuggled and trafficked people, in compliance with the applicable international definitions and laws;**

### **Article 6 – Governance and monitoring**

The articles on governance provide for three additional outputs:

- the Member States should prepare annual national strategies (Art. 6(3));
- the Commission will prepare a European Asylum and Migration Management Strategy (Art. 6(1); hereafter “the Strategy”); and

- the Commission will adopt a Migration Management Report each year (Art. 6(4)).

In a theme that runs through the proposed Regulation, an expanded role for the Commission in governance and management of asylum and migration is put in place.

ECRE offers a cautious welcome to the increased role of the Commission that is envisaged here (and throughout the RAMM): ECRE has argued for the Commission to take a more active role in monitoring and evaluating Member States' implementation of the CEAS; ECRE also argues that compliance with existing standards should be higher priority, given the ongoing, unpunished and flagrant violations of EU law that are happening across the EU. To illustrate, the European Commission has initiated five asylum related infringement proceedings against Hungary since 2015. In the meantime, Hungary has not only failed to remedy said violations, but has introduced additional violations through successive amendments to its Asylum Act.<sup>9</sup>

Nonetheless, there are also risks attached to an enhanced role for the Commission. The EU's overall strategy, taken up and shaped at times by DG Home, has been focused on certain aspects of asylum and migration policy at the expense of others. The Pact continues this trend with a strong focus on return, restricting movement and borders, with limited references to other elements of asylum policy, including important areas covered by the asylum *acquis*.

The risk of a disproportionate focus on certain areas of the *acquis* at the expense of or combined with the neglect of others is increased by the reference in Article 6 to the "principles set out in this Part" (i.e. Part II of the Pact) as the framework for the Strategy that the Commission will prepare, rather than – for example – the principles set out in EU primary legislation, and by the partial list of sources that should be taken into account in the preparation of the Strategy.

Although the status and importance of the Strategy is not clear, if it is intended, as one would assume from the title, to guide European asylum and migration policies, then it should give appropriate weight to all elements of the asylum *acquis*. This would require a widening of the principles to be applied and the sources to be used. Otherwise, "asylum and migration management" becomes a separate policy that operates in parallel to or seeks to be excluded from the principles that govern EU law and policy on asylum and migration.

***ECRE proposes the following amendments to Article 6:***

1. The Commission shall adopt a European Asylum and Migration Management Strategy setting out the strategic approach to managing asylum and migration at Union level and on the implementation of asylum and migration management policies in accordance with the principles set out in this Part ***and in EU primary legislation and applicable international law***. The Commission shall transmit the Strategy to the European Parliament and the Council.
2. The European Asylum and Migration Management Strategy shall take into account the following:
  - a. the national strategies of the Member States referred to paragraph 3 of this Article, ***and their compliance with EU and international law***;
  - b. information gathered by the Commission under the Commission Recommendation No XXX on an EU Migration Preparedness and Crisis Management Mechanism hereinafter referred to as Migration Preparedness and Crisis Blueprint; the reports issued under that framework as well as the activities of the Migration Preparedness and Crisis Management Network; ***information gathered by the Commission and the EU Asylum Agency on implementation of the asylum acquis***;

<sup>9</sup> ECRE, Hungary: Facing Fifth Infringement Procedure Related to Asylum Since 2015, 6 November 2020, available at: <https://bit.ly/39gRck8>.

- c. relevant reports and analyses from Union agencies;
- (d) information gathered in the course of evaluations undertaken in the Schengen evaluation and monitoring mechanism in accordance with Article 4 of Regulation (EU) No 1053 ;
- (e) relevant reports and analyses from international organisations and independent bodies ;
- (f) the evolving jurisprudence of the European courts.

## Part III Criteria and Mechanisms for Determining the Member State Responsible

The third part of the Regulation covers the allocation of responsibility in Articles 8 to 44 inclusive, which are divided into seven chapters:

- Chapter I General Principles and Safeguards
- Chapter II Criteria for Determining the Member State Responsible
- Chapter III Dependent Persons and Discretionary Clauses
- Chapter IV Obligations of the Member State Responsible
- Chapter V Procedures
- Chapter VI Administrative cooperation
- Chapter VII Conciliation

Only the most important changes and additions will be discussed here, along with articles which incorporate the language or provisions of the existing legal framework where there are opportunities for improvement through amendment.

### ***Scope of the responsibility sharing system***

A positive change compared to the Dublin IV proposal is the removal of provisions in Article 3 Dublin IV, which created the “pre-Dublin” inadmissibility checks, which ruled claims inadmissible on the basis of the first country of asylum and safe third country concepts. Instead, Article 8(5), incorporates the provisions of Dublin III stating that Member States “retain the right to send an applicant to a safe third country”. ECRE has commented extensively<sup>10</sup> on the legal and political flaws in the use of these concepts and in particular the proposal to make their use as a basis for admissibility mandatory, which was a major sticking point in the 2016 reform package. ECRE welcomes this change, which is also more consistent with CJEU jurisprudence, and notably the *Mirza* judgment.<sup>11</sup>

The scope of application of the rules is limited by the Screening Regulation and by the amended Asylum Procedures Regulation (APR) as certain applicants are filtered out. This occurs first

10 ECRE, Policy Note: Debunking The “Safe Third Country” Myth, November 2017, available at: <https://bit.ly/3qU8IGv>; ECRE, Comments on the Proposal of an Asylum Procedures Regulation, 2016, available at: <https://bit.ly/376x3Mw>.

11 CJEU, Judgment of the Court (Fourth Chamber) of 17 March 2016, *Shiraz Baig Mirza v Bevéndorlási és Állampolgársági Hivatal*, C-695/15 PPU, ECLI:EU:C:2016:188. It finds that the right of a Member State to send an applicant to a safe third country in Article 3(3) DRIII is not limited in time, operates subject to the requirements of the recast Asylum Procedures Directive, and can be exercised by any Member State, whether responsible pursuant to DRIII or otherwise. The wording of Article 33(1) rAPD does not restrict this right. As such, acceptance of responsibility for examining a claim for international protection in the context of a ‘take charge’ request does not preclude the responsible MS from deeming the claim inadmissible and sending the applicant to a safe third country. Article 18(2) DRIII also does not restrict the scope of Article 3(3) and allows a responsible MS to refrain from an examination of the substance of a claim. A different interpretation of this would unjustifiably introduce an exception to Article 3(3), as well as putting an applicant who is taken back after absconding before the examination of his claim in a better position than an applicant who remains. This would risk encouraging secondary movement.

when the pre-screening determines whether the outcome for the person should be a refusal of entry, a return procedure, or channelling into an asylum procedure (Screening Regulation, Article 14). The fourth possible outcome is “relocation” (Screening Regulation, Article 17), whereby the authorities carrying out the screening already determine that another Member State is responsible and contact the authorities.

For applicants channelled into the border procedure for examination of applications for international protection, the rules for determining responsibility in the RAMM “may” be applied by the Member State (Art. 41(7)). The Article means that Member States have discretion as to whether to examine the criteria under the RAMM (so long as they do so within the deadlines set out for the border procedure). It is impossible to know whether Member States will choose to regularly use this discretion. The discretionary nature of the provision creates uncertainty and also the risk of unfairness. The uncertainty derives from the fact that an applicant may not know whether the RAMM criteria are to be applied or not – any particular Member State may or may not use their discretion to examine whether another Member State is responsible, and they may have a policy on this or may decide on a case-by-case basis. Unfairness arises because for some applicants the RAMM criteria will be examined and for some not and the consequences can be significant. The right to family reunification will depend on these criteria being examined, for instance. Recent evidence gathered by ECRE on the implementation of the Dublin III Regulation has already shown great inconsistency and divergence of Member States in the use of the responsibility criteria, and that in some countries the use of Dublin procedures decreased or remained stable despite an increase in applications, while in other countries the opposite trend can be noted.<sup>12</sup>

In addition, if the divergences between the Member States when it comes to protection rates persists, the implications of being transferred following determination that another Member State is responsible are significant. For example, in 2019 the recognition rate of Afghan citizens at first instance ranged from 2% in Hungary to 93% in Italy. This range is even wider than it was in 2018. The European Commission confirmed that the differences in recognition rates undermine the coherence of the EU’s asylum system.<sup>13</sup>

In the amended APR, it is also suggested that after a relocation under the RAMM a border procedure can be used. In its Comments on the APR ECRE has recommended removing this provision.<sup>14</sup>

The Regulation on situations of crisis and force majeure provides for the granting of immediate protection to some categories of applicants and Recital 37 of the RAMM specifies that they will be treated as applicants and fall within the scope of the process of determination of responsibility.

In order to ensure clarity and fairness, ECRE urges revision of the RAMM and/or the APR to clearly delimit the scope of the obligation to use the criteria for determination of responsibility of Member States.

### **Article 8 – Access to the procedure for examining an application for international protection**

Under Article 8(2), the default principle of “country of first arrival” is maintained. When no Member State can be designated on the basis of the criteria (explained below), “the first Member State in which the application for international protection was registered shall be responsible for examining it”. The criteria that follow in Chapter II describe more situations in which countries other than the one of first registration will be responsible than under the current Dublin III regime, nonetheless, the fundamental principle does not change. This is reinforced by Article 21 on “Entry” in the section on criteria, below.

<sup>12</sup> ECRE/AIDA, The Dublin system in 2019 and during COVID-19, August 2020, p.3-5, available at: <https://bit.ly/39sJ7rm>.

<sup>13</sup> European Commission, Statistics on migration to Europe, September 2020, available at: <https://bit.ly/2LQ87Rm>. See also: ECRE, *Asylum statistics in Europe: Factsheet*, June 2020, available at: <https://bit.ly/2XQhaoh>.

<sup>14</sup> ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures, COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>

which states that the responsibility applies unless the application is registered three years after entry.

Article 8(3) repeats the flaw in the Dublin VI proposal by not updating the legislation to reflect CJEU jurisprudence. As per the article, transfers are impossible when there are “substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights...”

As ECRE noted in its assessment of Dublin IV, two issues arise.

First, the wording again incorporates the ratio of the CJEU’s *N.S./M.E.* ruling, referring to “systemic flaws” triggering risks of a violation of Article 4 of the Charter as the threshold for preventing a Dublin transfer.<sup>15</sup> In fact, *non-refoulement* may also arise in relation to violations of Article 3 ECHR and Article 4 of the Charter even when these are not a result of systemic flaws. As the ECtHR clarified in *Tarakhel v Switzerland*,<sup>16</sup> the source of the risk is irrelevant to the level of protection guaranteed by human rights law; this is also echoed in Article 19(2) of the Charter. *Tarakhel* clarifies that the orthodox assessment for *non-refoulement* in relation to inhuman or degrading treatment is a “real risk of a serious violation”. The correct human rights test, as elaborated by the ECtHR has further been confirmed by the CJEU in *C.K.* in 2017, where it was held that risks may relate to a person’s medical condition,<sup>17</sup> and in *Jawo* in 2019, where the Court elaborated on the violation of human dignity as a result of extreme material poverty.<sup>18</sup> Article 8(3) should be adjusted accordingly.<sup>19</sup>

In practice, individuals have been protected from deportation when other fundamental rights are at risk of being gravely violated,<sup>20</sup> such as the right to a fair trial (Article 47 of the Charter and Article 6 ECHR). Other grounds for *non-refoulement* protection acknowledged by the ECtHR are flagrant breaches of the prohibition of slavery under Article 4 ECHR (Article 5 of the Charter),<sup>21</sup> the right to liberty under Article 5 ECHR (Article 6 of the Charter),<sup>22</sup> the right to private life under Article 8 ECHR (Article 7 of the Charter),<sup>23</sup> and freedom of religion under Article 9 ECHR (Article 10).<sup>24</sup>

Second, the Article does not cover beneficiaries of international protection as the wording “applicant” refers only to asylum seekers. They are though explicitly covered by the proposal because Article 26 expands the scope of the take back procedure to include beneficiaries of international protection and those who have arrived via resettlement under the proposed Union Resettlement Framework. ECRE is strongly opposed to this proposal to restrict the movement of beneficiaries of international protection through expanding the scope of the (post)Dublin system. However, if beneficiaries of international protection were to be included in the RAMM, they should at least benefit from the

15 CJEU, *N.S.*, para 94.

16 ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014, para 104.

17 CJEU, Case C-578/16 *PPU C.K. and others*, Judgment of 16 February 2017.

18 CJEU, Case C-163/17 *Jawo*, Judgment of 19 March 2019.

19 In that regard it should be noted that the EP had already suggested amending the wording of Article 3 (2) of the 2016 Commission’s to include the real risk of a serious violation of the applicant’s fundamental rights as a reason to suspend a transfer, see : European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), 6 November 2017.

20 For a detailed discussion, see Cathryn Costello, ‘The Search for the Outer Edges of Non-Refoulement in Europe: Exceptionality and Flagrant Breaches’ in Bruce Burson and James Cantor (eds), *Human Rights and the Refugee* (Brill 2016), 180-209.

21 ECtHR, *Ould Barar v Sweden*, Application No 42367/98, Judgment of 19 January 1999. This provision could be relevant to victims and potential victims of trafficking. See ECtHR, *Chowdhury v Greece*, Application No 21884/15, Case Communicated on 9 September 2015.

22 ECtHR, *Tomic v United Kingdom*, Application No 17387/03, Judgment of 14 October 2003.

23 ECtHR, *F v United Kingdom*, Application No 17341/03, Judgment of 22 June 2004.

24 ECtHR, *Z and T v United Kingdom*, Application No 27034/05, Judgment of 28 February 2006. Notably, this case is cited by Advocate-General Bot in Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, Judgment of 5 September 2012, para 71 on the concept of persecution for reasons of religion.

same safeguards, especially considering that the existence of a protection status may not automatically guarantee dignified living standards. The CJEU has ruled that an application for international protection may not be rejected as inadmissible on the ground that the applicant has been previously granted international protection by another Member State, if the living conditions in the Member State that granted protection could expose the beneficiary to inhuman or degrading treatment.<sup>25</sup>

ECRE's position remains that setting out in legislation a limit on the scope of the rights that should be taken into consideration when assessing whether there are grounds for prevention of a Dublin transfer is an undue restriction on the Charter and European case law. The restriction should be removed to ensure full compliance with primary law and human rights law.

ECRE proposes the following amendments to Article 8(3):

Where it is impossible for a Member State to transfer an applicant ***or a beneficiary of international protection*** to the Member State primarily designated as responsible because there are substantial grounds for believing that there ~~are systemic flaws in the asylum procedure and in the reception conditions~~ ***is a real risk of a serious violation of fundamental rights*** for ~~the~~ applicants ~~or the beneficiary of protection~~ in that Member State, ~~resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union~~, the determining Member State shall continue to examine the criteria set out in Chapter II of Part III in order to establish whether another Member State can be designated as responsible.

Article 8(4) refers to the security checks that should be carried out under the Screening Regulation. If that security check has not been carried out, the first Member State in which the application for international protection was registered shall examine whether there are reasonable grounds to consider the applicant a danger to national security or public order of that Member State as soon as possible after the registration of the application, and before applying the criteria for determining the Member State responsible. This constitutes a further postponement of access to the Member State's determination process and subsequently to effective and swift access to asylum.

If the security check was carried out during the screening, but the first Member State in which the application for international protection was registered has justified reasons for examining whether there are reasonable grounds to consider the applicant a danger to national security or public order of that Member State, it shall carry out the examination as soon as possible after the registration of the application, before applying the criteria for determining the Member State responsible. This begs the question as to whether authorities are allowed to search, for instance, mobile phones of the persons concerned, which, in turn, raises concerns regarding the right to respect for private life laid down in Article 7 of the EU Charter. The security check will entail queries with relevant national and EU databases, which in itself raises fundamental rights concerns.<sup>26</sup>

It should be noted that Article 11 of the Screening Regulation only refers to "a threat to internal security", whereas the security check under Article 8(4) is broader, referring to a danger to "national security or public order". In its Comments on the Screening Regulation, ECRE has recommended clarification of "a threat to internal security", to be understood as a threat to the functioning of institutions and essential public services and the survival of the population.<sup>27</sup> According to the CJEU's case law the threat has to be genuine, present and sufficiently serious,<sup>28</sup> while the assessment of such a situation should

25 CJEU, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 Ibrahim, Judgment of 19 March 2019; See also, CJEU, Case C-517/17 Addis, Judgment of 16 July 2020, paras. 50-52.

26 ECRE, Working Paper: Transforming Eurodac from 2016 to the New Pact From the Dublin System's Sidekick to a Database in Support of EU Policies on Asylum, Resettlement and Irregular Migration (written by Dr. Niovi Vavoula), January 2021, available at: <https://bit.ly/39S90m9>

27 ECRE, ECRE Comments On The Commission Proposal For A Screening Regulation, COM (2020) 612, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612, 23 September 2020, available at : <https://bit.ly/39ilmm5>.

28 CJEU, C-18/19 WM, Judgment of 2 July 2020, paras. 46.

be proportionate in the sense of not going beyond what is necessary to safeguard public policy.<sup>29</sup> To ensure consistency among EU instruments, the relationship between these different concepts should be clarified.

If there are reasonable grounds to consider the applicant a danger to national security or public order of the Member State carrying out the security check, that Member State should be the Member State responsible.

### **Articles 9 and 10 – Obligations of the applicant and Consequences of non-compliance**

As in the Dublin IV proposal, the RAMM introduces or repeats obligations on the applicant and sets out the punitive consequences of non-compliance with these obligations. Applicants should make an application in the country of first entry unless they are in possession of a valid resident permit or visa, in which case the application should be made and registered in the issuing country. If they are in possession of an expired permit or visa, they should apply in the country where they are present.

The applicant is required to cooperate and to provide the “elements” and “information” available to him or her and relevant to determining responsibility. Finally, applicants are obliged to be present in the Member State where they have registered during determination of responsibility and in the responsible Member States thereafter. They should further comply with transfer decisions.

The Explanatory Memorandum justifies the measures as part of efforts to limit unauthorised movements, referring to the consequences as “proportional material consequences” and “proportional procedural consequences” for these movements.<sup>30</sup>

ECRE notes that the scope of cooperation is better defined than in the Dublin IV, where it was open-ended. Here, cooperation is required “in matters covered by this Regulation”, which is a welcome qualification. Second, the relevant elements and information required are those that are “available to him or her”; this is an essential addition, given that the previous formula would have allowed an applicant to be penalised for non-provision of relevant information which was not available to them at the time, a realistic prospect in many cases.

Nonetheless, the exact nature of the “elements” and “information” considered relevant remains elusive and there is still an underlying assumption that the applicant should provide all the relevant information proactively, without knowing exactly in what the information consists and despite potentially valid reasons for reluctance to provide information, for example in relation to family members. The lack of a definition creates legal uncertainty and a risk of divergent practice.

It is noted however that evidence to “substantiate” the information can be provided at a later deadline set by the Member States and respecting the overall deadlines in the RAMM<sup>31</sup>, where the applicant is “not in a position” at the time of the interview to supply this evidence (likely to relate to justifying claims of family links, presence of family members in other Member States and similar).

Article 9(2) reduces the scope of the derogations from the obligation to apply in the state of first entry, where it covers possession of a valid residence permit or visa, compared to the broader formula of being “legally present”, which may capture additional cases. Third-country nationals can be legally present in a Member State without necessarily being in possession of a residence permit, the legal status of the stay being dependent on national legislation e.g. the written confirmation under Article 14(2) of the Return Directive extending the period for voluntary departure or proving the temporary suspension of the enforcement of a return decision. A broader phrasing of the concept of legal presence could also be based on the CJEU’s interpretation of the notion of legal residence as one that entails compliance with the rules of the host Member State as to entry residence and, where appropriate, employment.<sup>32</sup> The

<sup>29</sup> CJEU, C-380/18, Judgment of 12 December 2019, para. 47.

<sup>30</sup> Recital 53.

<sup>31</sup> These deadlines are further regulated in Article 29 RAMM. As these can be short, the risk persists that the applicant will not be able to put forward relevant information, such as for example medical information.

<sup>32</sup> CJEU, Joined Cases C-317/01 and C-369/01, Judgment of 21 October 2003, para. 84.

adoption of this phrasing would also align Article 9(2) with the wording of Article 15 on unaccompanied children and would ensure the uniform interpretation of the Regulation's components, especially on the issue of presence of an individual in a Member State as a core element of the mechanism and procedures that the Regulation establishes.

Similar to Article 5 Dublin IV, Article 10(1) introduces sanctions for non-compliance, although these are less severe. The applicant loses the right to reception conditions in any Member State other than the one in which they are required to be present from the moment that they receive notification of a transfer decision. This is intended for situations of onward movement, intending to capture cases where an applicant is found to be on the territory of a Member State which is neither the Member State where they are supposed to be present (and usually the Member State which has issued a transfer decision) nor the Member State which has been deemed responsible.

Second, if the elements and information are not provided by the interview, the Member State shall not take them into account (Article 10(2)). The latter is described as "proportionate procedural consequences" in Recital 5.3.

ECRE is concerned about both these elements. The first refuses to take into account the multiple and sometimes valid reasons for onward movement, especially in a context where Member States do not comply with other parts of the CEAS. For instance, onward movement might be caused by the failure of family reunion processes; or it might result from inadequate reception conditions or flaws in decision-making in the country to which the applicant should be transferred or in which they are awaiting transfer. Allowing Member States to refuse to provide reception conditions, creates an increased risk of destitution notwithstanding the "safety clause" in Article 10(1) referring to the need to "ensure a standard of living" in accordance with the relevant EU and international legal provisions in any case.

Given the right to dignity under Article 1 of the Charter, the threshold to be met before withdrawal of reception conditions is permissible is very high;<sup>33</sup> ECRE's longstanding position is that automatically removing reception conditions is not compatible with this right and in contradiction with the CJEU's ruling in *Cimade and Gisti*.<sup>34</sup> The 1951 Refugee Convention also requires states to "accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."<sup>35</sup> Article 20 of the current recast Reception Directive provides the grounds for the reduction or withdrawal of material reception conditions. The list of those who can be excluded from material reception conditions is exhaustive. The 2016 proposal on a new recast Receptions Conditions Directive, however, excludes asylum seekers who are not in the Member State designated as responsible from reception conditions.<sup>36</sup> The Directive further provides that Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants. The CJEU further clarified, in the case of *Haqbin*<sup>37</sup>, the obligation of Member States to ensure a dignified standard of living, which must be met with continuously and without interruption, including by way of supervision of whether the provision of reception conditions actually provides an adequate standard of living.

The second – procedural – consequence of non-compliance forbids Member States from taking into account information and elements that are provided after the given deadline even though there are many valid reasons why information relevant to determination of responsibility may only become available at a later stage. A case in point is medical information, which often appears at a later stage because the asylum seeker might not have had access to sufficient medical care before their stay in the Member

33 ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 32-33.

34 CJEU, Case C-179/11, *CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012.

35 Article 21 Refugee Convention.

36 For more information see: ECRE, *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive COM(2016) 465*, October 2016, available at : <https://bit.ly/3cfqZV0>.

37 CJEU (Grand Chamber), C-233/18 *Haqbin*, 12 November 2019.

State in question. In addition, thorough medical checks take time to be completed. Medical information may be necessary in determination of the dependence on a person living in the Member State or of other circumstances relevant to determination of responsibility for an applicant.

It should be noted that certain procedural consequences foreseen in Dublin IV do not reappear in the RAMM: specifically, the lower quality procedures to be applied to a person following a transfer based on a take-back notification (Dublin IV Articles 20(3)-(5)) are not in the RAMM). ECRE expressed concerns about the likely illegality of these measures so welcomes their removal from the RAMM however it should be noted that these provisions now appear in the proposal for the amended APR, so the implications for the people concerned are the same.

In general, ECRE reiterates its longstanding concerns with any punitive approach to onward movement, and reproduces here its comments on Dublin IV which remain largely relevant:

International refugee law has not regulated the distribution of responsibility between states and does not thereby constrain or expressly permit the choice of an asylum seeker as to the country where he or she may seek asylum. In that respect, the Dublin system would not be prevented from laying down rules requiring refugees to apply for protection in a particular country.

**Articles 5 and 20** (of the Dublin IV proposal), however, enumerate a number of sanctions in the event that this obligation is not complied with. Contrary to the obligation, **sanctions thereon are constrained by international refugee law**. Authoritative commentary explains that Article 31 of the Refugee Convention does not purport to dictate or limit the choice of an asylum seeker as to where to seek protection.<sup>38</sup> It only offers refugees a layer of protection against penalisation for irregular entry, subject to certain conditions.

When interpreted in line with the object and purpose of the Treaty and by reference to additional interpretative guidance from the *travaux préparatoires* of the Convention, the protection of **Article 31 must “be accorded to any refugee, with the exception of those who have been accorded refugee status and lawful residence in a transit State to which they can safely return.”** Given that the Preamble of the Convention promotes international cooperation in sharing responsibility for refugees, it would be **contrary to that purpose to read Article 31 in a way that concentrates “reception burdens” in countries of first entry.**<sup>39</sup>

Failure to incorporate Article 31 of the Convention into the EU asylum *acquis*, as indicated by the CJEU in *Qurbani*,<sup>40</sup> presents a critical gap in the EU’s faithful reliance on the Convention as the “cornerstone” of the CEAS.<sup>41</sup> Member States are bound by this provision both under their international obligations and Article 18 of the Charter. The automatic application of sanctions listed in **Article 5(1) and (3) and Article 20(3)-(5)** is not permissible insofar as an applicant may invoke the safeguards provided by Article 31 of the Refugee Convention.

From [ECRE Comments on Dublin IV](#)

38 For an analysis with reference to the Vienna Convention on the Law of Treaties and relevant jurisprudence, see Gregor Noll, ‘Article 31’ in Andreas Zimmermann (ed), *The 1951 Convention on the Status of Refugees and its 1967 Protocol – A Commentary* (OUP 2011), paras 39-51.

39 For an analysis with reference to the Vienna Convention on the Law of Treaties and relevant jurisprudence, see Gregor Noll, ‘Article 31’ in Andreas Zimmermann (ed), *The 1951 Convention on the Status of Refugees and its 1967 Protocol – A Commentary* (OUP 2011), paras 39-51.

40 CJEU, Case C-481/13 *Qurbani*, Judgment of 17 July 2014.

41 CJEU, Case C-604/12 *H.N. v Minister of Justice, Equality and Law Reform*, Judgment of 8 May 2014, para 27; Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D*, Judgment of 9 November 2010, para 71.

ECRE recommends that the proposal provides a definition of “elements” and “information” that the applicant is expected to submit by the interview.

ECRE proposes the following amendments to Articles 9:

#### *Article 9*

##### *Obligations of the applicant*

1. Where a third-country national or stateless person intends to make an application for international protection, the application shall be made and registered in the Member State of first entry.
2. By derogation from paragraph 1, where a third-country national or stateless person is in possession of a valid residence permit or a valid visa, ***or otherwise legally present***, the application shall be made and registered in the Member State that issued the residence permit or visa, ***or in which they are legally present***.

Where a third-country national or stateless person who intends to make an application for international protection is in possession of a residence permit or visa which has expired, the application shall be made and registered in the Member State where he or she is present.

3. The applicant shall fully cooperate with the competent authorities of the Member States in matters covered by this Regulation, in particular by submitting as soon as possible and at the latest during the interview referred to in Article 12, all the elements and information available to him or her relevant for determining the Member State responsible. Where the applicant is not in a position at the time of the interview to submit evidence to substantiate the elements and information provided, the competent authority may set a time limit within the period referred to in Article 29(1) for submitting such evidence.

ECRE recommends adapting Article 10 as follows:

1. ~~The applicant shall not be entitled to the reception conditions set out in Articles 15 to 17 of Directive XXX/XXX/EU [Reception Conditions Directive] pursuant to Article 17a of that Directive in any Member State other than the one in which he or she is required to be present pursuant to Article 9(4) of this Regulation from the moment he or she has been notified of a decision to transfer him or her to the Member State responsible, provided that the applicant has been informed of that consequence pursuant to Article 8(2), point (b) of Regulation (EU) XXX/XXX [Screening Regulation]. This shall be without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter of Fundamental Rights of the European Union, and international obligations. ***An applicant shall not be sanctioned for entering a Member State other than the Member State in which he or she is obliged to be present where Article 31 of the Geneva Convention applies.***~~
2. Elements and information relevant for determining the Member State responsible submitted after expiry of the time limit referred to in Article 9(3) shall not be taken into account by the competent authorities, ***except where non-compliance can be objectively justified by the applicant.***

## Articles 11 to 13 Procedural Guarantees

Article 11 details the information that a Member State must provide to an applicant. Here, there are also both negative and positive changes compared to the Dublin III and to the Dublin IV proposal.

The provision of information on the complex content of EU asylum law, including on the rights and obligations of applicants, is essential to delivery of fair processes, and also to generating trust in the rules<sup>42</sup> but it remains a significant challenge.<sup>43</sup> Evaluations of Dublin III highlight that many applicants fail to understand the information provided; this was shown to be the case for at least seven countries in the 2016 evaluation of the Dublin III commissioned by the European Commission.<sup>44</sup> A study by UNHCR in 2017<sup>45</sup> also reached similar conclusions, finding that information in some Member States was incomplete, outdated, inaccurate and that it was not consistent across the Member States. A 2020 evaluation published by the EPRS,<sup>46</sup> reached similar conclusions including a key finding that, “Adequate information that applicants can understand is not systematically and consistently provided.”<sup>47</sup>

The EU itself, primarily through EASO, and independent organisations have made efforts to improve information provision, through more sophisticated and tailored approaches to communication, however it remains the case that for many asylum-seekers the information they receive is provided by other asylum-seekers, refugees, contacts and communities, or by legal representatives or informal providers of legal assistance when available.

Partly in order to address this issue, the RAMM includes the provision that the information should be “drawn up in a clear and plain language”, an amendment proposed by ECRE in relation to Dublin IV, and that where necessary, it shall also be provided orally. These provisions build on the transferred existing commitment to provide the information in a language that the applicant understands or could be reasonably expected to understand. Moreover, the RAMM foresees that information should be provided “as soon as possible”, but it goes further than Article 6(1) of the Dublin IV proposal, its equivalent, by specifying that information should be provided “at the latest when an application for international protection is registered”. This is a welcome clarification of the point at which information should be provided to asylum seekers.

Article 11(3) also charges the EUAA with the task of drawing up “common information material” including a leaflet, in close cooperation with national authorities and in a manner to enable them to complement the material with “Member State-specific information”. These are improvements on the Dublin IV provisions, and an appropriate switch in responsibility from Commission to the EUAA.

Despite the paramount importance of provision of clear information, there is a limit to the extent to which this can be legislated for. Improvement in compliance and practice that complies with the spirit as well as the letter of legal provisions is key. The reality remains that beyond family, community, contacts, smugglers, the main providers of information on the rules on determining responsibility, have been and are likely to be those providing legal assistance, be they formal or informal providers of such. Thus, most important to the realisation of this procedural guarantee is access to legal assistance or to legally-informed support organisations (such as representatives of NGOs who may not have a formal role in providing legal assistance but who end up doing so). In some countries (CY,

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42 On the relevance of information to building trust in the Dublin system, see JRS, *Protection Interrupted*, July 2013.

43 Information collected through ECRE's Asylum Information Database (AIDA) demonstrates that in certain countries access to information on the Dublin procedure is either not available or only partially available. This is due *inter alia* to the lack of legal assistance, the language barrier and the absence of interpreters, the complexity of the rules and the poor quality of information provided in some cases as well as the type of information being provided, which may vary within the same country. Limiting access to information for asylum seekers has also related to deliberate policy choices in certain countries.

44 ICF, *Evaluation of the implementation of the Dublin III Regulation*, March 2016, 11.

45 UN High Commissioner for Refugees (UNHCR), *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, available at: <https://bit.ly/3rZHPvL>

46 EPRS, *Dublin Regulation on international protection applications*, February 2020, available at: <https://bit.ly/3bO5f2k>

47 EPRS, *Dublin Regulation on international protection applications*, February 2020, available at: <https://bit.ly/3bO5f2k>, p.13.

DE, EL, HU, MT, PL, SE) access to legal assistance during the Dublin procedure at first instance is generally not available.<sup>48</sup> In others, access to legal aid is met with various practical obstacles, such as short timeframes to lodge an appeal (CH, DE, HU) and insufficient time to study the case and prepare before a hearing (AT).<sup>49</sup>

Article 11(1), similarly to Dublin IV 6(1), its equivalent, incorporates and emphasises the obligations of the applicant as much as the right to information. As such, it operates a subtle change in the purpose of information provision, which becomes less of a procedural guarantee to ensure that the applicant has access to their rights and more about ensuring that the applicant is aware of their obligations. This is also important to the applicant but is a separate function. ECRE would suggest correcting the balance by also requiring the provision of information directly relevant to the applicant's case.

In Article 11(1)(d), the applicant is required to submit but also to "substantiate" information on relatives. ECRE is concerned that substantiating the information would create an unreasonable burden of proof on individuals which runs contrary to the right to good administration (Article 41 CFR).<sup>50</sup> The article states that information should be provided "as soon as possible", which read in conjunction with Article 9(3), implies as soon as possible and at the latest by the interview, and then that a later deadline may be set if it is not possible to provide the information by the interview. As for Article 9(3), the possibility to provide information later represents an improvement, as does the possibility to indicate assistance in family tracing that the Member State could provide.

Article 11(1)(f) provides the possibility to challenge a transfer decision. An effective remedy should also be provided where no transfer decision is taken despite the applicant's claim that another Member State is responsible, including on the basis that he or she has a family member or, for unaccompanied children, a relative in another Member State. In accordance with Article 47 of the Charter an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the responsible Member State.

## Article 11

### Right to information

1. As soon as possible and at the latest when an application for international protection is registered in a Member State, its competent authorities shall inform the applicant of the application of this Regulation and of the obligations set out in Article 9 as well as the consequences of non-compliance set out in Article 10, and in particular: ...

...

(c) of the criteria and the procedures for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration **including the specific criteria applied and Member States requested or notified in the individual case;**

(d) of the aim of the personal interview pursuant to Article 12 and the obligation to submit ~~and substantiate~~ orally or through the provision of documents information as soon as possible in the procedure any relevant information that could help to establish the presence of family members, relatives or any other family relations in the Member States, including the means by which the applicant can submit such information, as well as any assistance that the Member State can offer with regard to the tracing of family members or relatives;

...

48 ECRE/ELENA, [Legal note on access to legal aid in Europe](#), 2017, p. 6; AIDA Country reports.

49 Ibid.

50 For a discussion, see ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, 109 et seq.

(f) of the possibility to challenge a transfer decision within the time limit set out in Article 33(2) **and of the fact that the scope of that challenge is limited as laid down in Article 33(1) and, where no transfer decision is issued, of the right to an effective remedy before a court or tribunal in accordance with Article 33.**

### **Personal interview (Article 12)**

Article 12 provides that the determining Member State shall conduct a personal interview with the applicant, in order to facilitate the process of determining the Member State responsible. The proposal still does not include an obligation on the national authorities to proactively question the applicant about the presence of relatives or family members or about any other elements that could trigger primary responsibility criteria.

Article 12(2)(a) provides that an interview may be omitted where the applicant has absconded, and (c) when the applicant has already provided the information relevant to determine the Member State responsible by other means. Barring asylum seekers from the possibility of a personal interview where the administration deems the information available sufficient to take a decision is incompatible with the right to be heard, enshrined in Article 41 of the Charter and as a general principle of EU law.<sup>51</sup> Similarly, Article 12(3) implicitly denies applicants subject to a “take back notification” the right to a personal interview, which is potentially incompatible with the right to be heard, enshrined in Article 41 of the Charter and a general principle of EU law.<sup>52</sup> This is particularly worrying taking into consideration that the current practice under Dublin III demonstrates a prevalence of take back requests. According to Eurostat, in 2019, there were more than three times as many incoming take back requests (100,260) as there were take charge requests (32,680), and there were 2.5 times as many outgoing take back requests (101,239) as there were take charge requests (41,255) in the EU-27 (excluding Czechia and Cyprus).<sup>53</sup>

In addition, the guarantee is improved through the introduction of the provisions underlined in the text below (recommended by ECRE) in Article 12(4) building on Article 5(4) of Dublin III.

**The personal interview shall be conducted in a language that the applicant understands or is reasonably supposed to understand and in which he or she is able to communicate. Interviews of unaccompanied children shall be conducted in a child-friendly manner, by staff who are appropriately trained and qualified under national law, in the presence of the representative and, where applicable, the minor’s legal advisor. Where necessary, Member States shall have recourse to an interpreter, and where appropriate a cultural mediator, who is able to ensure appropriate communication between the applicant and the person conducting the personal interview. The applicant may request to be interviewed and assisted by staff of the same sex.**

Similarly, an addition at Article 12(5) improves the guarantee compared to Dublin III, underlined below:

**The personal interview shall take place under conditions which ensure appropriate confidentiality. It shall be conducted by a qualified person under national law. Applicants who are identified as being in need of special procedural guarantees pursuant to Regulation (EU) XXX/XXX [Asylum Procedure Regulation], shall be provided with adequate support in order to create the conditions necessary for effectively presenting all elements allowing for the determination of the Member State responsible.**

51 CJEU, Case C-277/11 *M.M. v Minister for Justice, Equality and Law Reform*, Judgment of 22 November 2012, paras 85-89.

52 CJEU, Case C-277/11 *M.M. v Minister for Justice, Equality and Law Reform*, Judgment of 22 November 2012, paras 85-89.

53 Eurostat, Dublin statistics on countries responsible for asylum application, September 2020, available at: <https://bit.ly/3idUZ4C>.

ECRE recommends adapting Article 12 as follows:

1. In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 11. **The determining Member State shall proactively ask questions on all aspects of the claim that would allow for the determination of the Member State responsible. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 6.**
2. The personal interview may be omitted where:
  - (a) the applicant has absconded;
  - (b) the applicant has not attended the personal interview and has not provided justified reasons for his or her absence;
  - ~~(c) after having received the information referred to in Article 11, the applicant has already provided the information relevant to determine the Member State responsible by other means. The Member State omitting the interview shall give the applicant the opportunity to present all further information which is relevant to correctly determine the Member State responsible within the period referred to in Article 29(1).~~
3. The personal interview shall take place in a timely manner and, in any event, before any take charge request pursuant to Article 29 **or take back request**<sup>54</sup> **pursuant to Article 31** is made.

### **Guarantees for children (Article 13)**

The provisions on the guarantees for unaccompanied children have also been bolstered compared to Dublin III, and incorporate both case law and the evolution of practice in asylum for children.

This includes the obligation to appoint a representative (who may be a person or an organisation and can be the same person appointed under the APR Article 22) and the obligation to carry out a best interests assessment before the transfer of a child (Article 13(5)). The best interest assessment will be based on factors listed in Article 13(4), which includes hearing the views of the child, and involves the representative of the child. Nevertheless, the lack of clarity regarding BIA remains. There is no standard template or procedure across Europe for completing the BIA. It has been reported that: "the views of the family members may not be considered next to the views of the child, as the interviews have taken place in two or more separate countries. There is no guidance on how to weigh the view of the child along with considerations of their age and maturity, next to the view of the guardian or representative. There is also no guidance for those completing the reports on how to reason and evidence best interest, or for the immigration authorities to decide how to weigh different views and arguments to determine what is in the best interest of the child. Each case is individual, unique and subjective."<sup>55</sup> The importance of the views of the child in the context of a Dublin transfer has been emphasised by the UN Committee on the Rights of the Child: the child's situation has to be assessed separately from that of their parents and the unique consequences that flight trauma might have on children must form part of a diligent assessment of their best interests.<sup>56</sup>

<sup>54</sup> ECRE recommends that a take back notification is amended into a take back request (see further: Article 31).

<sup>55</sup> SafeProject, Ensuring the best interest of the child and family unity in the Dublin process Based on the experiences of kinship and Dublin families in Greece, the UK and Denmark, Policy Recommendation Paper, 29 October 2019, available at : <https://bit.ly/3a5WKgz>

<sup>56</sup> Committee on the Rights of the Child, V.A. v. Switzerland, Communication No. 56/2018, 28 September 2020, paras. 7.3 and 7.4.

As recommended by the SafeProject: “a Best Interests Assessment procedure and format for all Dublin transfers that is used across the EU, based on recommendations from the Committee on the Rights of the Child and UNHCR, should be developed. The current BIA from UNHCR is not easily applicable to Dublin cases. A modified version that all European countries use could allow better coordination and clearer expectations”.<sup>57</sup>

While the guidance is useful for ensuring that children are transferred only when the country of destination can guarantee appropriate representation and care, the obligations of both the sending and receiving Member State could be strengthened to reflect the reasoning of the ECtHR on the obligation to obtain individualised guarantees in the *Tarakhel v Switzerland* judgment.<sup>58</sup> In this vein, the focus of Dublin procedures should be on the well being and safety of the children involved, in line with their – properly assessed – best interests, and not on the execution of the transfer. In the context of expulsion procedures for children, the ECtHR has condemned arbitrary measures taken in order to facilitate removal rather than to safeguard the best interests of children.<sup>59</sup> Moreover, in accordance with the *MA* ruling, Member States should not prolong the procedure for determining the Member State responsible beyond what is strictly necessary and should always ensure that the child has prompt access to asylum procedures.<sup>60</sup>

ECRE proposes the following amendments to Article 13

(...)

(2) ~~Each Member State where an unaccompanied minor is present~~ **Member States** shall ensure that he or she is **unaccompanied children are** represented and assisted by a representative with respect to the relevant procedures provided for in this Regulation. The representative shall have the **resources**, qualifications, training and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant’s file including the specific information material for unaccompanied **children minors; and shall inform the child accordingly about the procedure.**

(...)

(5): Before transferring an unaccompanied minor to the Member State responsible or, where applicable, to the Member State of relocation, the transferring Member State shall **obtain individualised guarantees** make sure that the Member State responsible or the Member State of relocation takes the measures referred to in Articles 14 and 23 of Directive XXX/XXX/EU [*Reception Conditions Directive*] and Article 22 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] without delay. Any decision to transfer an unaccompanied minor shall be preceded by an assessment of his/her best interests. The assessment shall be based on the factors listed in paragraph 4 and the conclusions of the assessment on these factors shall be clearly stated in the transfer decision. The assessment shall be done swiftly by staff with the qualifications and expertise to ensure that the best interests of the minor are taken into consideration.

57 SafeProject, Ensuring the best interest of the child and family unity in the Dublin process Based on the experiences of kinship and Dublin families in Greece, the UK and Denmark, Policy Recommendation Paper, 29 October 2019, available at : <https://bit.ly/3a5WKgz>

58 ECtHR, *Tarakhel v Switzerland*, para 115.

59 ECtHR, *Moustahi v. France*, Application no. 9347/14, Judgment of 25 June 2020, para. 64.

60 CJEU – Case C-648/11 *The Queen on the application of MA, BT, DA v Secretary of State for the Home Department*, Judgment of 6 June 2013.

## **Chapter II Criteria for determining the Member State responsible**

### **Articles 14 to 23 – Hierarchy of criteria**

The criteria for determining responsibility are set out in Chapter III which consists of Articles 14 to 23 inclusive. They should be applied in the order set out. While the hierarchy is similar to that of Articles 7 to 15, Dublin III, including in terms of the order, there are some important changes.

In Article 14, the Dublin III provision is changed slightly such that the situation to take into account is that when the application is first registered rather than when it is lodged. The Dublin IV proposal that the assessment should take place “only once”, which raised significant concerns, has not reappeared.<sup>61</sup>

### **Article 15 – Unaccompanied Children**

Article 15, the first criterion in the hierarchy, covers “Unaccompanied Minors” and most notably fails to incorporate the jurisprudence on the issue. According to Article 15(5), when there are no family members or relatives in the picture, then the Member State responsible “shall be that where the application for international protection was first registered, unless it is demonstrated that this is not in the best interests of the minor.” The Introduction at Recital states that the purpose of the rule is to “discourage unauthorised movements of unaccompanied minors, which are not in their best interests...”

ECRE maintains its position that the Member State responsible should be the one where the unaccompanied child is present unless this is found not to be in the best interests of the child. This would reflect the presumption found in the *M.A.* judgment of the CJEU that transfers to another country are not in a children’s best interests.<sup>62</sup> The proposal, like Dublin IV before it, ignores the presumption and places the burden of proof on the (child) applicant to demonstrate that a transfer is not in his/her best interests.

ECRE would thus propose a revision of Article 15(5).

#### Article 15(5)

5. In the absence of a family member or a relative as referred to in paragraphs 2 and 3, the Member State responsible shall be that where the unaccompanied ***child minor is present*** ~~’s application for international protection was first registered~~, unless it is demonstrated that this is not in the best interests of the ***child minor***.

### **Articles 16 and 17 – Family members**

Articles 16 and 17 cover family members and there are two notable changes. First, the definition of family member has been widened. Article 16 and 17 provide that where the applicant has a family member in a Member State who is a beneficiary of or applicant for international protection, that Member State shall be responsible. The introduction at Recital (47) and Article 2(g)(v), explains that the definition of family member includes sibling or siblings (a point retained from the 2016 proposals).

Second, the evidential requirements to demonstrate family connection have been lowered. Recital (49) of the introduction states that circumstantial evidence should be sufficient where it is “coherent, verifiable and sufficiently detailed to establish responsibility for examining an application for international protection.”

ECRE supports these amendments. Widening the definition of family member will mean more people can be reunited with family members, which has multiple beneficial effects for them and also for their prospects for integration.

61 ECRE, ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 2016, available at: <https://bit.ly/3a6RgC8>

62 CJEU, Case C648/11 *M.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013; ECRE, ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 2016, available at: <https://bit.ly/3a6RgC8>

While ECRE welcomes the wider scope, it would be preferable to further enlarge the family definition in Article 2(g) to cover members of households that existed in the country of origin. Under the proposed definition, adult children living with their parents and conversely older parents living with their adult children will still be separated. These family structures are very common and the family tie between a parent and their child is no lesser than the tie between siblings. The separation of family members should never be accepted when it can be avoided. Widening to cover members of households, also allows the inclusion of same sex partners, which is important in general but also because they may have fled their countries of origin because it was not possible to live together as a same sex couple. In many countries, same sex partners who live together forming a household are not able to officially register as such. They should nonetheless be able to rely on the family provisions.

The limited implementation of the family reunification clauses has been a subject of ongoing research, advocacy and litigation, and one of the reasons for this lack of application of law is the unrealistic evidential standards applied to demonstrate family links, thus, adapting the requirements should allow for more requests to be accepted. Nonetheless, despite these positive changes, the research on this area shows that there is widespread lack of respect for the hierarchy among the Member States, with an over-reliance on the default criterion, the first country of arrival, which should only be the basis of allocation after the other criteria have been examined and found not to apply.<sup>63</sup> Practice so far has largely demonstrated that family provisions under Dublin III are rarely used in most countries.<sup>64</sup> Despite being foreseen as the first in the hierarchy of responsibility criteria, family reasons accounted for only 9.5% of all incoming Dublin requests, and 11% of all outgoing Dublin requests in 2019 according to Eurostat.<sup>65</sup>

It is often policy decisions and practice that undermine the hierarchy and even with these positive changes, there is little to indicate that Member States will change their approach.

### **Article 20 – Educational qualifications**

At Article 20, a wholly new criterion is added by “Diplomas or other qualifications”. If an applicant has a diploma or qualification issued by an educational establishment in a Member State, that Member State becomes responsible (so long as certain other conditions apply). This is only applicable if the application for international protection is registered after having left the Member State following the completion of his or her studies.

### **Article 21 – Entry**

As mentioned above, Article 21 serves to reinforce the “first entry criterion”. The country of entry will be responsible if none of the other criteria apply (or are applied) for three years according to Article 21 (extended from one year under the current rules). It states that responsibility ceases “if the application is registered more than 3 years after the date on which that border crossing took place.” (Article 21(1)). The three-year duration of responsibility applies if the person has been disembarked following Search and Rescue but not if the person was relocated under the RAMM (Article 57) to another Member State after entry.

The Article should be read in conjunction with the revised Article on cessation of responsibilities (Article 27 RAMM). The provision of Dublin III which allows for cessation of responsibility when a person has been absent for three months, current Article 19(2), has been removed. The Explanatory Memorandum and introduction explain that these measures are introduced in order to discourage unauthorised move-ment. In combination, these measures exacerbate the unfairness of the system and the disproportionate responsibility of the countries at the EU’s external borders.

63 EPRS, Dublin Regulation on international protection applications, February 2020, available at: <https://bit.ly/3bO5f2k>, pp. 42-50; AIDA, The Dublin system in 2019 and during COVID-19, August 2020, available at: <https://bit.ly/3ipYq8v>, pp.11-17.

64 ECRE/AIDA, The Dublin system in 2019 and during COVID-19, August 2020, p.13-16, available at: <https://bit.ly/39sJ7rm>.

65 Eurostat, Dublin statistics on countries responsible for asylum application, September 2020, available at: <https://bit.ly/3idUZ4C>.

ECRE has previously explained its support for a fundamental overhaul of the rules on responsibility, along with many other commentators and policy-makers. In the absence of such a deeper reform ECRE recommends the reinstatement of the cessation of responsibility clauses in Article 21 (and below on Article 27).

ECRE recommends amending Article 21 as follows:

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists referred to in Article 30(4) of this Regulation, including the data referred to in Regulation (EU) XXX/XXX [*Eurodac Regulation*], that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the first Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease if the application is registered more than ~~3-years~~ **1 year** after date on which that border crossing took place.
2. The rule set out in paragraph 1 shall also apply where the applicant was disembarked on the territory following a search and rescue operation.

### **Article 22 – Visa waived entry**

If a third-country national or a stateless person enters into the territory of the Member States through a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection. That responsibility shall cease if the application is registered more than three years after the date on which the person entered the territory. This differs from the current rules on visa-waived entry. The current Article 14(1) of the Dublin III Regulation does not foresee a three year responsibility and the current Article 14(2), provides that this paragraph 1 shall not apply if the person lodges his or her application for international protection in another Member State in which the need for him or her to have a visa for entry into the territory is also waived. In that case, that other Member State shall be responsible for examining the application for international protection.

In line with the previous recommendation, ECRE recommends amending Article 22 as follows:

#### Article 22 - Visa waived entry

If a third-country national or a stateless person enters into the territory of the Member States through a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection. That responsibility shall cease if the application is registered more than ~~one three-years~~ **one** after the date on which the person entered the territory.

## **Chapter III Dependent Persons and Discretionary Clauses**

### **Article 24 – Dependent Persons**

Article 24 on dependent persons transfers into the RAMM the current Article 16, with three changes, two positive and one negative. The purpose of the article is to ensure that Member States “keep or bring together” dependent people and their family members with carer responsibilities. The article is amended to include families that are formed en route not just those that existed in the country of origin; the requirement that relationships existed in the country of origin, as per Dublin III, has been removed. It is further amended to include “severe trauma” as a ground for dependency (as previously recommended by ECRE). Pulling in the other direction, the family relationships that are covered have been amended to remove sibling relationships, so confined to parent-child relationships (with the dependency running either way).

The reason for the reduced scope of the dependency clauses is not explained in the introduction to the draft proposal. It can only be assumed that it is to limit the number of people benefiting or that it is seen as a quid pro quo for the increased scope of the family reunification clauses (expanded to include the sibling relationship). Given the number of families displaced and the number of siblings forced to flee together, and dependent on each other, the change is an unnecessarily cruel proposal. In addition, the family reunification clauses do not function effectively, as is well documented, so allowing sibling reunion via those clauses is unlikely to “compensate” for its denial in the case of siblings where one is dependent on the other.

There is ultimately no logic in linking the two in any case. The right to family reunification has its origins in the right to family life as an established principle of international human rights law and within international refugee law, whereas the dependency clauses have a broader range of origins, covering the rights of the child, the right to dignity and security of the person, and the rights of persons with a disability.

ECRE thus proposes amending these clauses to reintroduce the sibling relationship.

### CHAPTER III

#### **DEPENDENT PERSONS AND DISCRETIONARY CLAUSES**

##### *Article 24*

##### *Dependent persons*

1. Where, on account of pregnancy, having a new-born child, serious illness, severe disability, severe trauma or old age, an applicant is dependent on the assistance of his or her child, **sibling** or parent legally resident in one of the Member States, or his or her child, **sibling** or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, **sibling** or parent, provided that family ties existed before the applicant arrived on the territory of the Member States, that the child, **sibling** or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.

Where there are indications that a child, **sibling** or parent is legally resident on the territory of the Member State where the dependent person is present, that Member State shall verify whether the child, **sibling** or parent can take care of the dependent person, before making a take charge request pursuant to Article 29.

2. Where the child, **sibling** or parent referred to in paragraph 1 is legally resident in a Member State other than the one where the applicant is present, the Member State responsible shall be the one where the child, **sibling** or parent is legally resident unless the applicant's health prevents him or her from travelling to that Member State for a significant period of time. In such a case, the Member State responsible shall be the one where the applicant is present. Such Member State shall not be subject to the obligation to bring the child, **sibling** or parent of the applicant to its territory.

## **Article 25 – Discretionary clauses**

The provisions that currently appear in Article 17 of the Dublin III Regulation, known as the discretionary clauses, are incorporated into the RAMM, albeit with significant amendments. The first clause, now Article 25(1), allows a Member State to decide to examine an application at any time (the “sovereignty” clause). However, this has been changed to an application “registered” in that Member State rather than “lodged” there.

Article 25(2) allows for a take charge request to be issued by the examining or responsible Member State on the basis of family relations or humanitarian grounds, based “in particular” (but not exclusively) on family or cultural considerations, with the wider Dublin III wording preserved rather than the restrictive Dublin IV proposal which – inexplicably – removed the reference to humanitarian and cultural considerations. The Dublin IV proposed time restrictions, whereby they should only apply before determination of responsibility, also do not re-appear.

In both cases, however, the clauses whereby responsibility is transferred either to the Member State deciding to examine the application or to the Member State accepting the take charge request have been removed. However, Article 27(1) states that: “When a Member State... decides to apply Article 25... that Member State shall become the Member State responsible...”

As a general consideration, ECRE has strongly supported the use of the discretionary clauses for humanitarian reasons and in order to support fairer sharing of responsibility. Unfortunately, it remains the case that the clauses are rarely used. According to figures gathered by ECRE, Article 17(1) requests were issued 11,958 times in 2018 and the use of the humanitarian clause of Article 17(2) is much more limited with 1,060 requests issued in 2018. This limited use of Article 17 continued in 2019: Eurostat statistics indicate a total of 7,564 cases of the sovereignty clause being applied and only 1,980 cases of the humanitarian clause being used during that year in the EU-27.

Nonetheless, there remains great potential for the use of these clauses to ensure a speedier processing of cases. Some national courts have also underlined the importance of the discretionary clauses.<sup>66</sup> Recently, that has been in the context of disembarkation and relocation, where ECRE Policy Paper “Relaying on Relocation” proposes the use of the discretionary clauses to provide a legal basis for relocating Member States to assume responsibility for disembarked persons. Even with improvements including the potential solidarity mechanism for disembarkation after Search and Rescue (SAR), there are other occasions when the use of the clauses would help improve protection outcomes. In the standard operating procedures it developed in 2019 (known as the “Messina model”), EASO also highlighted the applicability of the Dublin system in the context of ad hoc relocation: “The Messina model requires and foresees that the legal basis of the intervention should be article 17 of the Dublin Regulation.”<sup>67</sup>

Notwithstanding the decision to propose the (continued) use of a regulation as the legal form for these commitments, granting Member States the discretion to go beyond the obligations in the Regulation is important. Thus, overall the provisions are valuable, even though questions remain as to the interplay between the two provisions and their use in practice, including the tendency of the Member States to conflate the clauses or to not lay down specific criteria for their application in practice.<sup>68</sup>

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66 (Germany) Administrative Court of Berlin, Decision 23 L 706.18 A, 15 March 2019; (United Kingdom) Upper Tribunal, *HA v Secretary of State for the Home Department* [2018] UKUT 297 (IAC), 19 April 2018.

67 EASO, Note on the ‘Messina Model’ applied in the context of ad hoc relocation arrangements following disembarkation, 2019, available at: <https://bit.ly/2AFr4kA>, p.1.

68 For an overview, see AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, 82-84.

## Part IV Obligations of the Member State Responsible, Chapter V Procedures

The articles on obligations and procedures have been amended in line with the objectives stated in the introduction to determine “efficiently and effectively” the Member State responsible. In particular, the Explanatory Memorandum states that the regulation:

**“...would limit the cessation of responsibility clauses as well as the possibilities for shift of responsibility between Member States due to the actions of the applicant, and significantly shorten the time limits for sending requests and receiving replies, so as to ensure that applicants will have a quicker determination of the Member State responsible and hence a quicker access to the procedures for granting international protection;”**

Although the measures are not as extensive as those of Dublin IV, the effect will be to introduce something close to the permanent responsibility envisaged by that legislative proposal.

### **Article 26 – Obligations of the Member State responsible**

These articles set out the obligations of the Member States, the cessation of responsibility, and the start of the procedure, respectively, and need to be read in conjunction with the sections that follow on take charge and take back procedures.

Article 26 expands the scope of the take back procedure to include beneficiaries of international protection and those who have arrived via resettlement under the proposed Union Resettlement Framework. ECRE is strongly opposed to this proposal to restrict the movement of beneficiaries of international protection through an expansion of the scope of the (post)Dublin system. It is another example, similar to the family provisions, where the Pact offers something with one hand and takes it away with the other: while the Pact includes a proposal to amend the Long Term Residences Directive so that BIPs are entitled to long-term residency after three years rather than the current five, the restriction proposed here is likely to affect more people.

It should also be noted that for as long as the differences between Member States regarding recognition rates and the provision of economic and social rights, including opportunities to participate in the labour market, vary so much including BIPs in the Dublin system will only increase onward movement as there is no legal option for a BIP to move to a Member State where there are labour market needs.

ECRE recommends deletion of Article 26(c):

**~~(c) take back, under the conditions laid down in Articles 31 and 35 of this Regulation, a beneficiary of international protection in relation to whom that Member State has been indicated as the Member State responsible under Article 11(1) of Regulation (EU) XXX/XXX [Eurodac Regulation];~~**

### **Article 27 and 18 Cessation of responsibilities and start of the procedure**

As mentioned above, Article 27 on cessation of responsibility does not incorporate the provisions currently in Dublin III Article 19(2) whereby responsibility ceases after a person has been absent from the territory for three months. It should be read in conjunction with Article 28(2), which comprises an additional clause on continuation of responsibility, stating that the Member State where the application is first registered should continue the process of determining responsibility even if the applicant leaves the territory “without authorisation or is otherwise not available to the competent authorities of that Member State”.

The overall aim is to delete the rules allowing for cessation or shift of responsibility based on the behaviour of the applicant – absconding or leaving the territory of the Member States – which is perceived by the European Commission as an incentive for unauthorised movement.

Cessation of responsibility thus only occurs if another Member State issues a residence permit or if the time limits on procedures are not respected (Article 27(1)) or if the person has left the territory in compliance with a return or removal decision in which case a new procedure starts if they re-enter (Article 27(2)).

Article 28(5) brings applicants who are due to be relocated under the scope of the take back procedure, stating that if a Member State has “confirmed” that they will relocate a person and that person then makes an application in a different Member State before the (relocation) transfer has happened, they will then be taken “back” to the Member State of relocation.

ECRE reiterates its concerns on rendering responsibility (near)permanent as it exacerbates unfairness on both Member States situated at the external borders and applicants and will therefore create incentives for irregularity and less compliance. Contrary to the Commission’s intention to tackle absconding, Article 27 is likely to lead to less compliance in practice. It creates perverse incentives for Member States of first entry to neglect their identification and registration obligations and to avoid investing in reception systems so as to evade responsibility rules, as well as for asylum seekers to resort to irregularity so as to avoid being identified and confined to these countries.

ECRE thus proposes the reinstatement of cessation of responsibility and the removal of articles on continuation of responsibility.

ECRE proposes reintroduction of the following sub-paragraph at Article 27:

*Cessation of responsibilities*

...

**2. The obligations specified in Article XX shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant or another person as referred to in Article XX, that the person concerned has left the territory of the Member States for at least three months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible.**

**An application registered after the period of absence referred to in the first subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.**

## **Section II Procedures for Take Charge Requests**

### **Article 29 and 30 – Submitting a take charge request and Replying to a take charge request**

The Explanatory Memorandum states that shorter time limits are introduced “in order to speed up the determination procedure to grant swifter access of an applicant to the asylum procedure” given that the time limits in Dublin III mean that the applicant may wait 10 or 11 months (in the case of take back or take charge requests respectively) before the procedure starts.

The procedure for issuing a take charge request remains as per Dublin III, except that the deadline for issuing the request is now two months from the registration of the application, or one month from a Eurodac hit (Article 29(1)). This is compared to the deadlines in Dublin III of three months from the lodging and two months from the database hit. Moreover, Article 29(1) is now aligned with the

Mengesteab ruling where the Court considered that the calculation of the time limit starts running from the moment the asylum seeker's intention to seek international protection is registered, rather than at the later stage of the formalisation of the application as per Dublin III.<sup>69</sup>

Article 30 gives the requested Member State one month from receipt of a take charge request to check and reply, or two weeks in the case of a Eurodac or VIS hit. In the case that the application was registered following a decision to refuse entry or the issuance of return decision, the requesting Member State "may" request an urgent reply and is allowed to specify the time period for the reply, so long as it is at least one week. The requested Member State is obliged to reply within the period requested or "failing that", within two weeks.

There is another important change compared to Dublin IV which is the preservation of the article transferring responsibility if the deadlines are not met, which now appears in Article 30(8), according to which if the requested Member State does not object to the request within the deadlines set "...this shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival." Whereas the deadlines for making requests are not met then the responsibility will lie with the Member State of registration (Article 29(1)).

While the deadlines constitute an improvement compared to the Dublin IV proposal, ECRE remains concerned that they are unrealistic. Although attempts to speed up the process are welcome given 1) the difficulties in gathering evidence on which to base a take charge request; 2) the relatively high number of arrivals in the countries likely to make take charge requests; and 3) the political reluctance of Member States to accept take charge requests, the reduced deadlines are likely to hinder the chances of a fair outcome for the applicants.

The likely outcome is that applicants who have a right under Articles 14 to 25 to be transferred to another Member State will not be able to access that right due to deadlines passing. The situation also contributes to continued disproportionate responsibilities sitting with the Member States at the external border, given that they will become responsible when they are not able to issue a take charge request within the shorter deadline.

In the interests of increasing rather than reducing the number of successful take charge requests – given that they are both the basis for realisation of the right to family reunification and a tool for responding to humanitarian emergencies – ECRE proposes that the original deadlines are maintained. Indeed, the current situation suggests that an extension rather than a reduction of the deadlines would be in order, given the paltry number of cases that reach a successful conclusion. The Explanatory Memorandum acknowledges the "complexity of cases concerning family tracing and family reunification" so it appears contradictory to reduce the deadlines here. In that regard the European Parliament has recommended in the past to ensure swift family reunification and access to the asylum procedures for applicants where there are, *prima facie*, sufficient indicators showing that they are likely to have the right to family reunification.<sup>70</sup>

In order to further support family unity, the provisions that allow for an extension of the deadline in cases for unaccompanied children could be expanded to cover all family cases.

ECRE proposes the following amendments to Article 29:

1. If a Member State where an application for international protection has been registered considers

<sup>69</sup> CJEU, Case C-670/16 *Mengesteab*, Judgment of 26 July 2017.

<sup>70</sup> Proposed Article 24(a), European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), November 2017, available at : <https://bit.ly/3cbZdc0>

that another Member State is responsible for examining the application, it shall, without delay and in any event within ~~two~~ **three** months of the date on which the application was registered, request that other Member State to take charge of the applicant.

Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Articles 13 and 14a of Regulation (EU) XXX/XXX [*Eurodac Regulation*] or of a VIS hit with data recorded pursuant to Article 21 of Regulation (EC) No 767/2008, the request to take charge shall be sent within ~~one month~~ **two months** of receiving that hit.

Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State where the application was registered.

Where the applicant is an unaccompanied minor ***or the request is based on Article 16 or 17*** the determining Member State may, ~~where it considers that it is in the best interest of the minor,~~ continue the procedure for determining the Member State responsible and request another Member State to take charge of the applicant despite the expiry of the time limits laid down in the first and second subparagraphs.

### **Article 30 – Evidence**

The loosening of the evidential requirements presaged in the introduction is codified in Article 30(3) to (6), including at 30(6) the codification of the provision that circumstantial evidence is sufficient when it is “coherent, verifiable and sufficiently detailed”.

ECRE welcomes the changes set out in Article 30, including that circumstantial evidence will be sufficient and that responsibility will be transferred in the case that no response is received to a take charge request.

### **Section III Procedures for Take Back Notifications**

#### **Article 31 – Take back notifications**

The provisions on take back procedures envisage short deadlines in order to speed up access to the procedure, however in the Explanatory Memorandum and the introduction, emphasis is also placed on the need to address “unauthorised movements”. For this reason, two additional elements are included.

First, as in the 2016 proposal, the take back request becomes a “take back notification” because “the responsible Member State will be evident from the Eurodac hit”. Second, a new element is an explicit obligation on the Member State responsible to take back the person, which is seen as a “necessary legal tool to enforce transfers back”.

When a Member State considers that another Member State is responsible based on Article 26(1)(b) (an applicant, third country national or stateless person Eurodac hit), (c)(beneficiary of international protection with a Eurodac hit) or (d)(resettled in another Member State) they are obliged to make a take back notification “without delay and in any event within two weeks” of receiving the Eurodac hit.

The notified Member State then has just one week to “confirm” receipt (unless they claim cessation of responsibility under Article 27). Crucially, similarly to take charge requests, as per Article 31(4): “Failure to act within the one-week period set out in paragraph 3 shall be tantamount to confirming the receipt of the notification.”

A first concern is that “notification” implies an almost unilateral relationship rather than the mutual contractual process of request and acceptance. It is no longer an agreement but a decision derived from the determining process in the Member State where the applicant is. The Member State receiving the notification is allowed only to “confirm” it, unless the notified Member State can demonstrate within one

week that its responsibility has ceased pursuant to Article 27. If the Member State does not act within one week, they are considered to have confirmed receipt of the notification.

Part V of the Regulation explains the conciliation procedure that is to be used when a Member State disputes responsibility (see below), here, a number of legal objections are considered. First, what is the status of a confirmation of receipt? The article implies that it is an agreement but a confirmation of receipt is not a legally equivalent action to an agreement. A Member State could logically confirm receipt of the notification while objecting to the determination of responsibility on any number of grounds and thus confirm receipt but not agree to take back the applicant.

Only a limited option to challenge the decision on responsibility, within an extremely short deadline (one week) is provided for in the article. Given, first, the weaknesses in many Member States' asylum systems, including chronic under-resourcing and failures in decision-making (demonstrated by the number of decisions on all aspects of asylum processes over-turned by the courts), and, second, the efforts by most Member States to deflect responsibility to other countries, there are reasons to doubt the robustness of the processes for determining responsibility.

Finally, the deadline of one week to respond is neither realistic nor proportionate when compared to the amount of evidence that may need to be gathered, as well as the internal decision-making processes that would be required to investigate and potentially decide to challenge the decision behind the notification.

Political and humanitarian concerns also arise. One of the objectives of the Regulation is to create "mutual trust" between the Member States whereas this provision has great potential to generate conflict instead. The form of a notification rather than a request suggests that Member States where the persons is will be able to impose their decisions. There is then a notable asymmetry when it comes to take charge and take back requests. The former remain mutual and with longer timelines, while the latter are unilateral and subject to short timelines. The tension between Member States at the external borders and those without external borders, and between the northern Member States and southern Member States will be exacerbated. The limited option (when cessation of responsibilities took place) to challenge the notification – in the context of flawed asylum systems and politicised decision-making – means that conflicts are likely to escalate. Under Article 44, conciliation mechanisms are envisaged but remain very general.

The imbalance could be perceived as legislating in the interests of certain Member States at the expense of others, the central critique of the Dublin Regulation. As with the 2016 CEAS reform package, the Commission is open (in the accompanying documents) about the need to address "secondary move-ment" (onward movement within the EU), which remains a major political concern in some Member States but not in others.

Evidence indicates that prioritising of transfers based on take back requests creates uncertainty for applicants. Procedural safeguards related to transfers are discussed below, however the likely consequences include applicants left in limbo due to conflicts between Member States on responsibility. In particular, the notified state may simply refuse to accept back the person – explicitly or through passive resistance (e.g. delays in putting in place necessary arrangements or in replying to correspondence from the notifying Member State). In this situation, responsibility transfers, including obligations towards the applicant, however the applicant will not have been transferred, creating the risk that people are left in limbo.

Another likely consequence is that conditions for applicants in certain countries will remain low when it comes to procedures and particularly to reception. The current framework Dublin III already creates a perverse incentive for countries of first entry located at the external land and sea borders of the EU to deliberately avoid compliance with other elements of the CEAS because if the situation is so poor, courts will block transfers. At very least, they have no incentive to improve conditions as they may have

little interest in faithfully following responsibility rules they do not perceive to be fair. There is nothing else in the package to suggest that this will not continue to happen. It requires stricter compliance but that is not the focus of the package; the ongoing violations are barely mentioned.

European and national jurisprudence underlines the duty of sending countries to obtain guarantees to ensure the legality of Dublin transfers in certain cases. This requires assessing the situation in the destination country, *inter alia* regarding access to the asylum procedure and reception, as well as the risk of chain refoulement. However practice in recent years indicates that these judgments are often not respected and that domestic courts have diverging interpretations of the need to seek individual guarantees in Dublin cases to certain countries.<sup>71</sup>

The jurisprudence is acknowledged and the Article states that if a transfer cannot take place for these reasons, then the requesting state becomes responsible, however poor conditions can exist before they reach the threshold required for court to prevent a transfer and access to a remedy in the courts is not always (or even often) possible, given the situation of applicants in many countries (and provisions on safeguards). As per Article 34, subject to rules and safeguards, the person can be held in detention for up to four weeks to awaiting transfer.

ECRE recommends amending Article 31 as follows:

#### Article 31

##### Submitting a take back **notification request**

1. In a situation referred to in Article 26(1), point (b), (c) or (d) the Member State where the person is present shall make a take back **notification request** without delay and in any event within two weeks after receiving the Eurodac hit.
2. A take back **notification request** shall be made using a standard form and shall include proof or circumstantial evidence as described in the two lists referred to in Article 30(4) and/or relevant elements from the statements of the person concerned.
3. The ~~notified requested~~ Member State shall **accept the request** ~~confirm receipt of the notification~~ of the Member State which made **the request within four weeks** ~~notification within one week~~, unless the ~~requested notified~~ Member State can demonstrate within that time limit that **it is not responsible** ~~its responsibility has ceased pursuant to Article 27~~.
4. Failure to act within the **four** ~~one~~-week period set out in paragraph 3 shall be tantamount to confirming the receipt of the **request notification**.
5. The Commission shall, by means of implementing acts, adopt uniform conditions for the preparation and submission of take back **requests** ~~notifications~~. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 67(2).

## Section IV Procedural Safeguards

### Article 32 Notification of a transfer decision

For both take back and take charge procedures the transfer decision should be taken “at the latest within one week” of the acceptance or notification of the Member State deemed responsible. The applicant – or their legal representative or counsel – is to be notified “without delay” of the transfer decision and the decision must contain information on the remedies, including the right to apply for suspensive effect (which was not foreseen under the Dublin IV proposal), time limits and practicalities.

71 EPRS, Dublin Regulation on international protection applications, February 2020, available at: <https://bit.ly/3bO5f2k>, pp. 63-63; AIDA, The implementation of the Dublin III Regulation in 2019 and during COVID-19, August 2020, available at: <https://bit.ly/2XUMmTq>, pp.23-28.

ECRE is concerned that “without delay” is too vague a provision and thus recommends that a specific deadline for notification of the transfer decision should be included.

2. Where the requested Member State accepts to take charge of an applicant or to take back a person referred to in Article 26(1), point (b), (c) or (d), the requesting ~~or the notifying~~ Member State shall notify the person concerned in writing ~~without delay~~ **within one week** of the decision to transfer him or her to the Member State responsible and, where applicable, of the fact that it will not examine his or her application for international protection.

### **Article 33 – Remedies**

As per the Explanatory Memorandum:

**The rules on remedies have been adapted in order to considerably speed up and harmonise the appeal process. In addition to clarifying the applicant’s right to request suspensive effect of a transfer decision during an appeal or review, the proposal establishes a specific, short time limit for the courts or tribunals to take such decisions.**

Article 33 then sets out the remedies available to applicants wishing to challenge a transfer decision. As with the Dublin IV proposal, issues arise concerning the scope of appeals, time limits for appeals, and the (lack of) suspensive effect of appeals.

#### ***The scope of the appeal***

Article 33(1) provides the applicants referred to by Article 26(1) point (b), (c) and (d) (take back following a Eurodac hit or of a person resettled to another Member State) with the right to an effective remedy against a transfer in the form of an appeal or a review, but it also limits the scope of the remedy (Article 33(1)(a)). For these applicants the remedy will only assess, “...whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights”. ECRE reproduces here its arguments against limiting the scope of remedies.

A restrictive reading of remedies against the Dublin system was advanced by the CJEU in *Abdullahi v Bundesasylamt* in the context of the Dublin II Regulation, which at the time made no reference to the right to an effective remedy. The *Abdullahi* doctrine has been heavily criticised for unduly restricting the scope of the right to an effective remedy, contrary to the scope of Article 47 of the Charter.<sup>72</sup>

The CJEU ruled again on the scope of Dublin appeals in the cases of *Ghezelbash* and *Karim*. In *Ghezelbash*, agreeing with the Opinion of Advocate-General Sharpston, the Court clearly dismissed the *Abdullahi* line of reasoning by holding that the **Dublin III Regulation allows an applicant to challenge a transfer decision on the basis of misapplication of the responsibility criteria**.<sup>73</sup> This basis for an appeal stems from the respect of rights of defence and the right to be heard under Article 41 of the Charter in “all proceedings likely to culminate in a measure adversely affecting a person.”<sup>74</sup> Similar interpretations of the right to an effective remedy were followed by domestic courts

72 See e.g. Maria Hennessy, ‘The Dublin system and the right to an effective remedy – The case of C-394/12 *Abdullahi*’, 13 December 2013, available at: <http://goo.gl/J8ze6O>; Daphne Bouteillet-Paquet, ‘The Dublin system and the right to an effective remedy – Observations on *Karim* and *Ghezelbash*’, 1 September 2015, available at: <http://goo.gl/8nc8CC>.

73 CJEU, Case C-63/15 *Ghezelbash*, 7 June 2016, paras 46 and 61.

74 CJEU, *Ghezelbash*, AG Sharpston, para 82, citing *mutatis mutandis* CJEU, Case C-277/11, *M.M.*, para 85.

in **Germany**,<sup>75</sup> the **Netherlands**,<sup>76</sup> **Belgium**<sup>77</sup> and **Switzerland**.<sup>78</sup>

In light of the CJEU judgments in *Karim* and *Ghezelbash*, ECRE recalls that the right to be heard enshrined in Article 41 of the Charter must be ensured with respect to any measure liable to adversely affect an applicant. Therefore the Dublin Regulation may not pose limitations to the scope of the right to appeal a transfer decision.

*Reproduced from ECRE Comments on Dublin IV*

In 2019, the CJEU restricted the scope of permissible appeals that are allowed based on incorrect application of the responsibility criteria in the context of take back cases: in *H. and C.*, it found that take charge procedures differ from take back procedures, which are governed by separate provisions. The Court therefore concluded that, where a decision has been taken following the acceptance of a take back request, the applicant cannot plead that the country deemed responsible has not properly examined the responsibility criteria of the Regulation, unless the applicant falls under Article 20(5) of the Regulation, i.e. they left the first Member State before the process of determining the responsibility was completed, and has provided sufficient evidence establishing correct responsibility.<sup>79</sup> This restrictive approach to appeals and the exception that the Court foresees only for cases where the determination process has been interrupted underline the importance of strong procedural safeguards and rights-compliant state conduct from the very start of the Dublin procedure.

The scope of a Dublin appeal is still open before the CJEU: Advocate General Athanasios Rantos issued an opinion in February 2021 recognising that Article 27 of the Dublin III Regulation and Article 47 EU Charter confer a right to asylum applicants to invoke circumstances that emerged after a transfer decision has been taken, provided that these circumstances can affect the determination of the responsible Member State.<sup>80</sup>

Remedies against transfers decisions that follow take charge requests are treated separately with the scope of appeal limited to infringement of Articles 15 to 18 and Article 24 of the RAMM. While this represents a welcome clarification of appeal rights in case of take charge requests, in line with jurisprudence from Member States,<sup>81</sup> two concerns arise:

- First, again, the scope of the right to an effective remedy should not be limited but, in line with the rulings in *Ghezelbash* and *Karim* should include any misapplication of the criteria.
- Second, the key issue is elided: the continued absence of a remedy against a rejection of take charge request. A large body of work shows that a factor in the failure of family reunification and the inadequate care for unaccompanied children is the rejection of take charge requests, i.e. cases when no transfer decision is taken. There is an opportunity to introduce a right to appeal against these rejections. It requires the clear introduction of the right; the notification in writing provided to the applicant of the negative decision on the take charge request; and relevant time limits and practicalities.

There is also the issue of wrongful information in take back forms. In some cases, information is left out of the notification form, or it may be written incorrectly, and thus the Member State bases its “accept” response on wrongful information. They will for example not be in a position to assess Article

75 Hannover Administrative Court, Judgment 1 B 5946/15, 7 March 2016.

76 Hague District Court, Judgment No 16/6983, 26 April 2016, available at: <http://goo.gl/uLBk9I>.

77 Council of Alien Law Litigation, Judgment No 165 134, 31 March 2016, available at: <http://goo.gl/GsiO4m>.

78 Federal Administrative Court, Judgment D-2399/2016, 6 July 2016.

79 CJEU, Joined Cases C-582/17 and C-583/17 H. and R., Judgment of 2 April 2019, paras 57-58 and 74-75. (EDAL summary at: <https://bit.ly/3ivjc6O>).

80 CJEU, C-194/19 H. A. v État belge, Opinion of Advocate General Athanasios Rantos, 3 February 2021

81 Federal Administrative Court; Judgment 1 C 24.15, 27 April 2016; Potsdam Administrative Court, Judgment 6 L 87/16.A, 4 February 2016.

27 or deadlines for submitting the take back notification if they do not have all the information. And the applicant has no chance to appeal if there has been a mistake.

The CJEU clarified in *Ghezelbash* that “the EU legislature did not confine itself, in Regulation No 604/2013, to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but decided to involve asylum seekers in that process”, by introducing obligations of information and “by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process”.<sup>82</sup> By analogy, the right to an effective remedy should be secured in the context of a rejection of take charge requests in order to avoid a gap of law and situations that directly contravene the EU principle of effective judicial protection enshrined in Article 47 of the EU Charter. National courts in Germany and the United Kingdom have also ruled that the refusal of a take charge request can be justiciable before courts, in order to safeguard the right to an effective remedy and family unity.<sup>83</sup> The introduction of a remedy against a rejection of a take charge request in this mechanism established under this Regulation would ensure that the EU legislature remains in line with the evolutive interpretation that the CJEU has followed on the Dublin III system so far, namely that of a system that aims to improve “[...] the protection afforded applicants under that system, to be achieved, inter alia, by the effective and complete judicial protection enjoyed by asylum seekers.”<sup>84</sup>

The need for such a remedy has been highlighted specifically in the Greek context due to concerns about the apparently increasing use of spurious reasons for rejection of requests issued by the Dublin Unit in Greece.<sup>85</sup>

ECRE recommends amendments to Article 33 to:

1. The applicant or another person as referred to in Article 26(1), point **(a)**, (b), (c) and (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision ***or a decision to reject a take charge request***, before a court or tribunal.

~~The scope of the remedy shall be limited to an assessment of:~~

~~(a) whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights;~~

~~(b) whether Articles 15 to 18 and Article 24 have been infringed, in the case of the persons taken charge of pursuant to Article 26(1), point (a).~~

### ***Time limits for lodging an appeal***

The deadline for lodging an appeal is two weeks, as per Article 33(2). ECRE believes that this is so short that it would be unreasonable within the meaning of Article 47 of the Charter. In addition, in practice, many Member States have longer deadlines so reducing the time limit would also constitute

<sup>82</sup> CJEU, C-63/15, Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie, Judgment of 7 June 2016, para. 51.

<sup>83</sup> Germany: Wiesbaden Administrative Court 6 L 4438 / 17.WI, 15 September 2017, Hannover Administrative Court, 2 B 3013/19, 9 August 2019, Administrative Court of Münster, 2 L 989/18.A, Decision of 20 December 2018; United Kingdom: Upper Tribunal Immigration and Asylum, The Queen (on the application of MS), (a child by his litigation friend MAS) v. SSHD, [2019] UKUT 00009 (IAC), 19 July 2018, Court of Appeal, The Queen on the application of Help Refugee Limited v. SSHD, [2018] EWCA Civ 2098, 3 October 2018, Court of Appeal, The Queen on the application of Help Refugee Limited v. SSHD, [2018] EWCA Civ 2098, 3 October 2018.

<sup>84</sup> CJEU, C-670/16 Mengesteab, Judgment of 26 July 2017, para. 46

<sup>85</sup> RSA, RSA Comments on the Commission proposal for an Asylum and Migration Management Regulation COM(2020) 610, October 2020, available at: <https://bit.ly/2YhVBgr> Evidence drawn from EPRS ibid.

a significant lower of standards. The concept of reasonableness in relation to time limits was one of the issues examined by the CJEU in *Diouf*,<sup>86</sup> albeit in the context of accelerated procedures. The Court considered the discretion left to Member States under the Asylum Procedures Directive to apply an accelerated procedure if specific grounds justified this.<sup>87</sup> It found that a 15-day time-limit for appealing a decision in an accelerated procedure “appears reasonable and proportionate in relation to the rights and interests involved”.<sup>88</sup>

In ECRE’s view, the “rights and interests involved” in relation to a transfer decision following a process of determining responsibility are both different and hold greater weight than those in an accelerated procedure under the APD. The rationale for the accelerated procedure is that the claim is likely to be unfounded or there are security concerns<sup>89</sup>. These factors serve to justify the short deadline for appeals. A large range of rights are potentially engaged by a transfer decision (see section below on grounds for appeal). For these reasons, ECRE argues that the transfer decision should be treated in the same way as the regular asylum procedure rather than the accelerated procedure; there is no reason for a less favourable approach to appeal rights. Thus, adequate time should be provided to prepare and then lodge the appeal.

In terms of Member State practice, the Asylum Information database (AIDA), managed by ECRE, includes information on what European countries consider reasonable time limits in Dublin appeals. Certain countries have introduced time limits as short as 3 or 5 days. However, time limits exceeding 7 days remain in place in at least 15 countries.

Time-limit	Country
3 days	Hungary
5 days	Portugal,Switzerland, Romania
7 days	Germany, Bulgaria, Netherlands
8 days	Croatia, Slovenia
14 days	Austria, Poland, UK, Malta
15 days	France, Greece
10 working days	Ireland
21 days	Sweden
30 days	Belgium, Italy, Latvia, Finland, Spain
75 days	Cyprus

The above demonstrates that the notion of “reasonable” time limit in the context of Dublin appeals has been interpreted widely differently from one asylum system to another.

There are also examples where efforts to reduce time limits failed because the remedy was no longer “effective with such short time limits. Notably in France<sup>90</sup>, a fifteen-day time limit was introduced because seven days was found, “insufficient to allow the person to benefit from an ‘effective’ remedy while the

86 CJEU, Case C-69/10 *Samba Diouf*, Judgment of 28 July 2011.

87 CJEU, *Diouf*, para 31.

88 CJEU, *Diouf*, para 67.

89 Recital 20 recast Asylum Procedures Directive.

90 Projet de loi relative à la réforme du droit d’asile, 23 July 2014, INTX1412525L, Article L742-4-I.

country of destination is generally not known until the moment of the notification of transfer.”<sup>91</sup>

ECRE proposes the follow changes to Article 33(2):

(2) Member States shall provide for a period of ~~two~~ **at least four weeks** after the notification of a transfer decision or **a decision to reject a take charge request** within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.

### ***Suspensive effect***

In all cases, the appeal does not have automatic suspensive effect – the person has the right to request the suspension of the transfer decision pending the outcome of the appeal or review (Article 33(3)). The Member States should however stop the transfer (suspend the implementation of the transfer decision) while the request for a suspension is before the court, with the decision to suspend to be taken within one month. If the decisions on the request to suspend the transfer are negative, reasons must be provided. If suspensive effect is granted, i.e. if the transfer is stayed, then the court shall “endeavour” to decide on the appeal in one month.

The Article is silent concerning the delivery of an appeal decision in the case that the transfer decision is not suspended and the person should – but may not – have been transferred, however Article 35 on transfers incorporates the Dublin III provisions that a person should be “promptly” transferred back should the transfer prove to be erroneous or the decision be overturned on appeal. ECRE recommends automatic suspensive effect of appeals which would bring the provision in line with the right to an effective remedy under Article 47 of the Charter. It would further avoid that remedies vary across Europe. Practice on the implementation of remedies under the Dublin III Regulation has demonstrated the disparity amongst Member states, with some countries (e.g. Greece, Poland, Croatia, Malta, Ireland, France, Portugal) automatically granting suspensive effect to appeals, while others (e.g. Germany, Netherlands, Austria, Switzerland, Slovenia, Bulgaria, Hungary, Romania) require a request to be filed before the court to that end.

ECRE recommends the following changes to Article 33(3):

2. Member States shall provide for a period of two weeks after the notification of a transfer decision within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1. **No transfer shall take place before the decision on the appeal or review is taken.**

~~3. The person concerned shall have the right to request, within a reasonable period of time from the notification of the transfer decision, a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within one month of the date when that request reached the competent court or tribunal.~~

~~Where the person concerned has not exercised his or her right to request suspensive effect, the appeal against, or review of, the transfer decision shall not suspend the implementation of a transfer decision.~~

~~A decision not to suspend the implementation of the transfer decision shall state the rea-~~

91 French National Assembly, *Rapport au nom de la Commission des lois constitutionnelles sur le projet de loi (n° 2182) relatif à la réforme de l’asile*, 26 November 2014, available at : <http://goo.gl/YwgWQA>, D.1.

**sons on which it is based.**

**~~If suspensive effect is granted, the court or tribunal shall endeavour to decide on the substance of the appeal or review within one month of the decision to grant suspensive effect.~~**

Article 33(4) and (5) contains complicated and potentially contradictory provision on legal assistance. The Member States shall ensure that legal assistance is available and that it is free of charge where the person cannot afford the costs. These are at first sight welcome articles but they are then limited.

First, regarding fees and costs, the treatment must not be more favourable than that accorded to nationals “in matters pertaining to legal assistance.” ECRE finds that the wording is vague and wide, and could be interpreted in a way that restricts access to legal assistance. More problematically, the next section of Article 33(5), allows Member States to deny free legal assistance and representation “when the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success.” ECRE is firmly opposed to the application of the so-called “merits test” as it may result in hindering asylum applicants from accessing an essential procedural guarantee. As a rule, free legal assistance should always be provided objectively and regardless of the chances of success of the asylum application concerned.

The CJEU has ruled that access to legal aid is an important component of the general principle of effective judicial protection in EU law.<sup>92</sup> The CJEU has further provided some guidance on the nexus between access to legal aid and the right to an effective remedy as enshrined in Article 47 of the Charter of Fundamental Rights.<sup>93</sup> Accordingly, when assessing whether the grant of legal aid is necessary or not, national courts must ensure compliance with the principle of effective judicial protection and take several criteria into account. Thus, effective access to legal aid is deemed necessary to comply with the rights under the Charter, including Articles 18, 19 and 47.<sup>94</sup> In the case of *M.S.S. v. Belgium and Greece*, for instance, the ECtHR has also highlighted that the lack of legal assistance and representation can undermine the effectiveness of the remedy under Article 13 ECHR to the point that it becomes inaccessible.<sup>95</sup>

Another immediate concern is that a “competent authority” is not an impartial body – the appeal will be against the decision of this authority so it has a strong interest in the outcome which is in turn highly likely to be influenced by the availability or otherwise of legal assistance or representation. Although the article twice opines that Member States should not arbitrarily restrict access to legal assistance, to give the competent authority a role in judging the prospects of the appeal and then denying legal assistance on that basis, opens up the prospect of arbitrary denial of legal assistance, not to mention blanket or biased denial.

92 Explanations Relating to the Charter of Fundamental Rights, Title VI — Justice, Explanation on Article 47, Official Journal of the European Union C 303/17 - 14.12.2007, available at: <http://bit.ly/2tTOdGI>; and, by analogy, CJEU, Case C-63/01, Evans and the Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau, judgment of 4 December 2003, para 77; Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, judgment of 22 December 2010, para 42.

93 ECRE and the Dutch Council for Refugees, The Application of the EU Charter of Fundamental Rights to asylum procedural law, Chapter V, 63-64, available at: <https://bit.ly/2uQ3dK7>.

94 ECRE/ELENA, Legal note on access to legal aid in Europe, November 2017, 4, available at: <https://bit.ly/2ziZeAU>; see also : Elspeth Guild, The Asylum Seeker's Right to Free Legal Assistance and/or Representation in EU Law, 20-23, available at: <http://bit.ly/2upPjNO>.

95 The Court found a violation of Article 13 in conjunction with Article 3 ECHR inter alia because the applicant has no practical means of paying a lawyer and received no information on organisations offering legal assistance, which was considered essential in securing access to the asylum procedure in Greece; See, ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgment of 21 January 2011, para 319.

In fact, the next paragraph recognises these risks by providing a right to an effective remedy before a court or tribunal to challenge the decision if it was taken by an authority other than a court or tribunal. In ECRE's opinion, it would be simpler, fairer and more consistent with the respective roles of courts versus state administrative bodies to simply remove the role of competent authorities and thus the need for a remedy against the decision that they take.

The penultimate paragraph sets out the content of the legal assistance as "at least the preparation of the required documents and representation before a court or tribunal", which is adequate. Unfortunately, the paragraph goes on to state that the assistance "may be restricted to legal advisors or counsellors specifically designated by national law" to provide assistance. Although this is a "may" clause, opening up the option for Member States to do this, rather than an obligation, in a context where some Member States have been removing access to independent legal assistance,<sup>96</sup> ECRE believes that this clause should be removed. Legal assistance should be independent because it is designed to support the applicant to access their rights vis-à-vis the state. If national law designates who provides assistance, there is again the risk that the state designs national law to provide advice that is lower quality or not truly independent. In the most extreme cases, states already restrict advice provision to a pool of advisors employed by the state's authorities.

ECRE recommends the following amendments to Article 33(5)

5. Member States shall ensure that legal assistance is granted on request free of charge ***and at the earliest stage possible*** where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of persons subject to this Regulation shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

~~Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation is not to be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success:~~

~~Where a decision not to grant free legal assistance and representation pursuant to the second subparagraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision. Where the decision is challenged, that remedy shall be an integral part of the remedy referred to in paragraph 4:~~

~~In complying with the requirements set out in this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that effective access to justice for the person concerned is not hindered:~~

Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal ~~and may be restricted to independent legal advisors or counsellors specifically designated by national law to provide assistance and representation.~~

Procedures for access to legal assistance shall be laid down in national law.

96 See for example, ECRE, Reforming legal assistance in Austria: an end to independent provision? July 2019, available at: <https://bit.ly/2XYLFbG>.

## **Article 34 – detention**

The provisions on detention state clearly that a person cannot be detained solely for the purposes of the Regulation, i.e. it is not possible to detain in order to effect a transfer under the RAMM; there have to be additional grounds for detention (Article 34(1)). Existing law under the Reception Conditions Directive and in the extensive jurisprudence on grounds for detention thus apply, as do the safeguards, as Article 34(5) states explicitly.

Article 34(3) introduces time periods and deadlines for Member State action on take charge requests and take back notifications that are different from those specified in Article 31. Where an applicant is detained as part of a take back procedure, the Member State notifying (and detaining) has two weeks to issue notifications if the person is detained at registration or one week if they are detained at a later stage. For take charge procedures, the urgent process must be used, giving the requested state one week to reply. In both cases, if the person is detained and responsibility is confirmed to have shifted, the transfer must occur within four weeks. After that deadline, the person will be released from detention. ECRE's assessment of provisions on time limits is largely positive, in that efforts are made to minimise detention and the ambiguities of the current law are removed.

On the other hand, the very ground for detention raises concerns. Article 34(2) of the proposal lowers the threshold of the risk of absconding which justifies detention. While under the current rules, detention could be applied if there is a significant risk of absconding, Article 34(2) removes the word "significant." Given that detention is subject to a last resort principle, the scope of grounds allowing this measure should not be extended. Hence, the word "significant" should be re-inserted.

The CJEU ruling in *Jawo* recalled that the term "absconding" is not defined in EU law,<sup>97</sup> though it noted that in the Dublin context it entails deliberate evasion of the reach of the national authorities in order to prevent the transfer.<sup>98</sup> This may be assumed where the applicant has left the accommodation place without informing the authorities.<sup>99</sup> Article 2(p) of the proposal defines "absconding" as the action by which an applicant does not remain available to the competent administrative or judicial authorities, such as by leaving the territory of the Member State without authorisation from the competent authorities for reasons which are not beyond the applicant's control. While it is welcome that this concept is defined in the proposal, the definition is broad when compared to *Jawo* ruling. In particular, it does not concern "deliberate evasion" to prevent transfer but is extended to the failure to remain available to the competent authorities. This broad language may capture a considerable proportion of people subject to transfer and hence lead to systematic detention. ECRE recommends aligning the definition in Article 2(p) with the *Jawo* ruling.

As regards the criteria for establishing the risk of absconding, in *Al Chodor*, the Court held that Dublin detention is unlawful if the objective criteria for determining a "significant risk of absconding" pursuant to Article 2(n) of the Dublin Regulation have not been laid down in a national legal provision of general application.<sup>100</sup> Domestic courts have agreed that, in the absence of such criteria laid down in law, detention is unlawful. However, the codification of criteria for the determination of a "significant risk of absconding" has led to overly broad and often irrelevant indicators being included in legislation in order to justify detention in Dublin procedures.<sup>101</sup> The length of the lists varies from one country to another and can range from three criteria (Hungary, Poland) to 12 (Netherlands, France) or even 13 (Cyprus). The content of those criteria also varies considerably across countries.<sup>102</sup> These practices are likely to continue unless there is more precise wording in the Regulation.

97 CJEU – Case C-163/17 *Jawo*, Judgment of 19 March 2019, para 54.

98 *Ibid*, para 56

99 *Ibid*, para 57.

100 CJEU – Case C-528/15 *Al Chodor*, Judgment of 15 March 2017.

101 In France for example, the lack of reception conditions or a place of residence is listed as a criterion, despite the fact that the reception system falls far short of meeting actual reception needs to date, with only 50% of asylum seekers registered in 2019 granted accommodation.

102 ECRE, [The implementation of the Dublin III Regulation in 2018](#), 2019, p. 14.

ECRE argues that asylum seekers should not be detained purely for reasons of immigration policy under Article 6 of the Charter<sup>103</sup> and that detention during the determination of responsibility or when awaiting a transfer is not permissible under the Charter (in the absence of other factors). It is only for the purpose of “securing the fulfilment of an obligation prescribed in law”<sup>104</sup> and the obligation must be sufficiently clear and precise.<sup>105</sup>

Further, Article 34 rightly states that it must be proportionate, other less coercive methods cannot be applied, and it must be based on an individual assessment which considers inter alia the vulnerability of the applicant. In *FMS*, relying on a similar wording of detention provisions of the Return Directive, the CJEU required examination of the necessity and proportionality prior to imposition of detention.<sup>106</sup>

It is currently the case that Member States widely use detention in circumstances that are unlawful, including during the determination of responsibility and while awaiting transfer after acceptance of the decision, which likely continue without adequate clarity in the legal framework.

ECRE further recalls that children and unaccompanied children should never be detained. Practices of detention of children, whether in Dublin, return or transit zone/border proceedings, have been reported in several Member States despite general provisions in most countries calling for the use of detention of children only as a measure of last resort.<sup>107</sup> The ECtHR has clarified that a detention measure that is imposed without any consideration as to the best interests of the child, with no proportionality assessment and no use of alternatives to detention is unlawful.<sup>108</sup>

Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both the Committee on the Rights of the Child as the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.<sup>109</sup>

ECRE recommends amending Article 34 as follows

3. Where there is a **significant** risk of absconding, Member States may detain the person concerned in order to secure **a transfer procedures decision after a final transfer decision has been taken and notified** in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively, based on an individual assessment of the person’s circumstances.

103 Article 6 of the Charter mirrors Article 5(1)(b) ECHR in that respect.

104 For an analysis, see ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015, available at: <http://goo.gl/gSCynS>. See also ECtHR, *OM v Hungary*, Application No 9912/15, Judgment of 5 July 2016.

105 See e.g. ECtHR, *Vasileva v Denmark*, Application No 52792/99, Judgment of 25 September 2003; *Ostendorf v Germany*, Application No 15598/08, Judgment of 7 March 2013; *OM v Hungary*, Application No 9912/15, Judgment of 5 July 2016.

106 CJEU, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C924/19 PPU, C925/19 PPU, (May 14, 2020), para. 302(7).

107 EASO, Annual report on the situation of asylum in the EU 2018, 2019, pp. 155-157

108 ECtHR - *Rahimi v. Greece*, Application No. 8687/08, Judgment of 5 July 2011.

109 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <https://bit.ly/3pzz9uv>

## **Chapter V, Section VI Transfers**

### **Article 35 – Detailed rules and time limits**

In Article 35, the time limit for effecting the transfer is set at six months (with minor exemptions), the same as under Dublin III. If the time limit elapses then responsibility shifts to the requesting/notifying Member State.

However, Article 35(2) introduces an exception to the six months deadline when person concerned has absconded. In such a case scenario, ‘the transferring Member State shall retain the right to carry out the transfer within the remaining time at a later stage’. ECRE warns against the practical consequences of this provision in practice, as Member States may unfaithfully use it to extend the time limits for the purpose of transfers.

ECRE recommends following amendment:

2. Where the transfer does not take place within the time limits set out in paragraph 1, first subparagraph, the Member State responsible shall be relieved of its obligations to take charge of or to take back the person concerned and responsibility shall be transferred to the requesting or notifying Member State.

~~Notwithstanding the first subparagraph, where the person concerned absconds and the requesting or notifying Member State informs the Member State responsible before the expiry of the time limits set out in paragraph 1, first subparagraph, that the person concerned has absconded, the transferring Member State shall retain the right to carry out the transfer within the remaining time at a later stage, should the person become available to the authorities again, unless another Member State has carried out the procedures in accordance with this Regulation and transferred the person to the responsible Member State after the person absconded.~~

### **Article 44 – Conciliation**

The conciliation mechanism has been adapted for reasons explained in the Introduction:

**The conciliation procedure as a dispute resolution mechanism, which has not been formally used since it was foreseen in the 1990 Dublin Convention (albeit in a slightly different form), is amended in order to make it more operational and facilitate its use.**

Given the potential for conflicts to arise, an attempt to operationalise the conciliation procedure is welcome and the mechanism may prove useful in individual cases or for particular caseloads, especially with the provisions in Article 44(2) that allow the Member State to request the Commission’s involvement. ECRE supports an enhanced role for the Commission so long as it operates in an impartial way, focusing on compliance with legal standards. As part of the conciliation mechanism, it will be required to act as an honest broker among the Member States in order that conflicts can be managed.

## Part IV Solidarity

The provisions in Chapter III on responsibility sharing set the standard rules, and Chapter IV covers corrective solidarity mechanisms for two situations:

- disembarkation following search and rescue (SAR) (Articles 47-49)
- and migratory pressure (Articles 50-55), and other options for solidarity are presented (Article 56).

Combined with the Regulation on crisis and force majeure, these have been presented as four different situations or “modes” of operation. ECRE considers the RAMM proposal as a general set of rules with two solidarity mechanisms that serve to correct the outcomes of the rules, given that: 1) the basic rules remain largely unchanged, as described above; 2) the mechanism (or “specific process”) for SAR is for “recurring” situations (as per Recital 19) and situations of migratory pressure are common, and 3) the two solidarity mechanisms may operate at the same time.

There are then three main legal regimes:

- **Standard regime** – Basic rules on determination of responsibility (Part III RAMM) apply, with two corrective solidarity mechanisms (for situations of SAR and migratory pressure), which are cumulatively likely to be supporting up to 10 Member States at any one time.
- **Crisis regime** – Adapted basic rules on determination of responsibility, allowing derogations, and adapted solidarity mechanisms. Likely to be operating in at least one Member State at any time with obligations on other Member States.
- **Force Majeure regime** - Adapted rules allowing derogations in a Member State invoking force majeure with limited obligations and implications for other Member States.

The crisis regime is analysed in ECRE’s comments on the Crisis Regulation, and the solidarity mechanisms that are used in the standard regime are analysed here. The rules and mechanisms for solidarity are complex so ECRE focuses here on untangling the rules and then presenting its analysis, rather than rehashing the many familiar and longstanding debates on solidarity in the context of EU asylum policy, which are simply summarised below and then referred to as relevant.

### **Solidarity disputes**

The starting point of the debate on solidarity is the interpretation of Article 80 of the Treaty on the Functioning of the European Union (TFEU), which introduces solidarity and fair sharing of responsibility as a governing principle for the policies in Chapter 2 of the TFEU on border checks, asylum and immigration.

***The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.***

While the Article provides a legal basis for “appropriate measures” to realise the principle (or at least a joint legal basis as many argue that Article 80 alone is not sufficient<sup>110</sup>), the nature of the obligations arising is the subject of ongoing unresolved disputes. Some argue that the current rules do not give effect to this principle and need therefore to be reformed; for others the rules are fair as they stand. These different views then lead into the disputes on whether solidarity should be mandatory (if the rules

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110 See for example: European Parliamentary Research Service (EPRS), Briefing: Solidarity in EU asylum policy, March 2020, available at: <https://bit.ly/3arC8Rv>; The Principle of Solidarity and Fair Sharing of Responsibility in Article 80 TFEU: A Conceptual Analysis; Maiani Francesco, 2018. *Revue Suisse pour la pratique et le droit d’asile (ASYL)*, SO/18 pp. 20-23.

already respect the principle of solidarity and fair sharing of responsibility, why should this be the case? Alternatively, if the rules are by their nature unfair, then solidarity that is not mandatory cannot give effect to the principle in Article 80). The Explanatory Memorandum circumvents some of the discussion by referring to the “overarching principle” of solidarity and fair sharing of responsibility<sup>111</sup> without citing Article 80 as a legal basis for the proposal.<sup>112</sup>

As is already clear, the overall approach of the RAMM is to largely maintain the rules on responsibility sharing that are contained in the Dublin system but to add “corrective” mechanisms that are intended to correct the outcomes of the standard rules and render them fairer. In this, the proposal takes the same approach as Dublin IV and declines to introduce the changes to the rules such as those that the European Parliament proposed in its report on the Dublin IV proposal<sup>113</sup>, or the alternatives presented by independent commentators.<sup>114</sup> The taboo on adjusting the basic rules, leads to what academic commentators describe as “path dependency” in the Dublin system.<sup>115</sup>

For the Commission, the proposal to maintain the rules but to add corrective solidarity mechanisms implies a recognition that – at least in certain circumstances – the outcomes produced by the rules are not fair and should then be adjusted (corrected) *inter alia* to give effect to the principle of solidarity and fair sharing of responsibility. The Explanatory Memorandum claims that the approach will lead to a “stronger, more sustainable and tangible expression” of the solidarity principle.

It should be noted though that in political terms the solidarity mechanism has two functions: It is a corrective to the rules on responsibility sharing but it is also intended to sweeten the deal on the increased use of processes and procedures at the borders. The Screening Regulation and changes to the APR will increase the responsibilities of the countries at the external borders so solidarity mechanisms serve as compensation. Similarly, getting Member States not at the external borders to agree on solidarity measures is seen as conditional on the introduction of additional measures to contain people at the borders. While the Explanatory Memorandum refers to evidence and legal questions, it is widely understood that political constraints and information from political consultations with the Member States lie behind the measures proposed.

ECRE maintains its position that a deeper overhaul of the criteria on sharing of responsibility is necessary in order to address the dysfunctionalities of the system. It is inherently paradoxical to maintain a system which generates unfairness that has then to be corrected through solidarity mechanisms. Without a deeper reform, the far from perfect status quo is the preferable option.

### **ECRE’s overall position**

Given that reforms are going ahead, ECRE nonetheless presents its comments on the solidarity mechanisms, considering whether they serve to correct the unfairness of the rules for Member States

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111 Explanatory memorandum to the proposal, p.1.

112 Explanatory memorandum to the proposal, p.7.

113 European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), November 2017, available at : <https://bit.ly/3cbZdc0>

114 See for example: Philippe De Bruycker, Marie De Somer, Jean-Louis De Brouwer (eds.), From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration, December 2019, available at: <https://bit.ly/3azly0J>; Francesco Maiani, The reform of the Dublin system and the dystopia of ‘sharing people’, Maastricht Journal of European and Comparative Law, Vol 24, Issue 5, 2017, 2017; Marcello Di Filippo, “Dublin ‘reloaded’ or time for ambitious pragmatism?”, 2016, available at: <https://bit.ly/3pwKqvK>; Guild E., Costello C., Garlick M., Moreno Lax V., Carrera S. Enhancing the Common European Asylum System and Alternatives to Dublin, EP Policy Department C, PE 519.234 (2015); Guild E., Costello C., Garlick M., Moreno Lax V., Mouzourakis M., Carrera S. New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection, EP Policy Department C, PE 509.989 (2014); Thielemann E., Williams R., Boswell C., What System of Burden-Sharing between Member States for the Reception of Asylum Seekers?, EP Policy Department C, PE 419.620 (2010).

115 See for example: F. Maiani, A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact, October 2020, available at: <https://bit.ly/3aoSZUK>;

and whether they are workable in practice. Two other considerations have to be taken into account.

First, although Article 80 is EU-specific, the EU Member States are part of the global protection system and International Refugee Law also includes provisions on fair sharing of responsibility. These provisions suffer from similar difficulties in that extrapolating obligations and a system for dividing and enforcing responsibility sharing is not possible. Commentators have proposed changes in IRL<sup>116</sup> or more recently the use of the Global Compact on Refugees<sup>117</sup> to address these lacunae. In the absence of change, states voluntarily commit to responsibility sharing, and while EU Member States have been increasing resettlement pledges, the responsibility for refugees lies vastly and disproportionately with other regions of the world.<sup>118</sup> While the RAMM is silent on global responsibility sharing and focused on creating complicated systems for Europe, the overall thrust of the Pact is to minimise the number of refugees that arrive in Europe or who are granted protection there. Thus, it continues a strategy that is not strictly in line with the spirit of international law.

A second additional dimension is solidarity and fairness for the applicant. While some have tried to extrapolate an obligation of solidarity towards the applicant from Article 80, this is difficult given the explicit reference to the principle applying “between the Member States”. Instead, respect for the fundamental rights of the applicant, as set out in EU and international law in multiple binding commitments, would lead to rules that demonstrate solidarity towards and fairness for the persons subject to the EU’s responsibility sharing rules and the compensatory solidarity mechanisms.

It is clear that fairness for the Member States may overlap with, reinforce or be in tension with fairness for the applicant, and notably the expansion of types of solidarity to include return sponsorship and cooperation with third countries increases the risk of a clash between fairness towards applicants and fairness for Member States. ECRE will refer to these different dimensions of fairness in its analysis below as relevant.

### **Article 45 – Solidarity contributions (types of solidarity)**

The types of solidarity contributions for Member States “under migratory pressure or subject to disembarkations following search and rescue operations” are listed as (Article 45(1) points (a) to (d)):

- relocation for applicants not subject to border procedure
- return sponsorship (a new concept)
- relocation of beneficiaries of international protection (new)
- capacity building, operational support and other measures of various forms (some new elements).

One of the main innovations of the RAMM is to widen the concept of solidarity “beyond the issue of which Member State is responsible for examining an application for international protection.”<sup>119</sup> Most notably, return sponsorship, a new concept, is introduced. Then, the relocation of beneficiaries of international protection is included and some new elements are added to the “capacity building” and operational support activities that Member States offer to those facing pressure (in recent years this is usually via EASO).

ECRE is concerned about two of the proposed types of solidarity:

- First, return sponsorship, explored in detail below, where ECRE’s primary concern is the impact on the fundamental rights of applicants, with the workability of the proposal also a concern.
- Second, the provisions on capacity building and support, which are described as follows at Article 45(1)(d):

116 Turk V, Garlick M (2016) From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees. *International Journal of Refugee Law* 28:656–678

117 J. Hathaway, *The Global Cop-Out on Refugees*, *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, Pages 591–604, available at: <https://doi.org/10.1093/ijrl/eeey062>

118 UNHCR, *Annual Global Trends reports*, available at: [www.unhcr.org](http://www.unhcr.org).

119 Explanatory memorandum to the proposal, p. 1.

**(d) capacity-building measures in the field of asylum, reception and return, operational support and measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries.**

Capacity building measures and operational support can be useful so long as they respond to the needs in and identified by the country supposed to benefit. ECRE research on EASO operations shows that support offered by other Member States to those facing challenges is usually but not always useful.<sup>120</sup> On the one hand, from a capacity perspective, the deployment of caseworkers has undeniably aided the first instance authorities in managing backlogs of pending cases in all operations. On the other hand, the impact of the Agency's presence on the quality of asylum procedures and on improving asylum systems appears to be mixed and to vary depending on different factors. One such factor is the (national) background and expertise of individual caseworkers, which has helped improve the structure, COI and reasoning of decisions taken by national authorities in some cases but has also contributed to poor quality decisions in others, with examples from admissibility assessments in Greece and eligibility assessments in Cyprus and Greece. In addition, the strong role of the Commission in the preparation of the Migration Management Report indicates that there is a risk that needs are not wholly defined based on the perspective of the country intended to benefit.

A more concerning element is that the last of the measures is “measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries”. ECRE considers that the wording is too vague and would thus allow for too many “measures” to be classed as solidarity, including those that are of questionable benefit to the Member State in question. Equally, including ill-defined cooperation with third countries as a form of solidarity exacerbates the tendency to outsource responsibilities to other regions and this undermines solidarity and fair responsibility sharing in the global protection system as a whole. It is also likely that the provision will be interpreted as entailing restrictive measures that prevent the onward movement of people from third countries towards Europe. The Explanatory Memorandum seems to confirm this interpretation as it indicates that such measures could include “financing directed at managing the asylum and migration situation in a specific third-country that is generating particular migratory flows to a Member State”.<sup>121</sup> ECRE argues that measures aimed at preventing onward movement from third countries involve significant risks of human rights violations, often occurring outside Europe where accountability is more challenging and may further undermine the principle of *non-refoulement*.

Of note is the inclusion of beneficiaries of international protection in relocation at Article 45(1)(c), provided that international protection was granted within the last three years and subject to their written consent at Article 57(3). This applies in the second solidarity mechanism. In addition, the provision at Article 58(4) opens the door to mutual recognition of protection decisions, stating:**4. Where the Member State of relocation has relocated a beneficiary for international protection, the Member State of relocation shall automatically grant international protection status respecting the respective status granted by the benefitting Member State.**

ECRE welcomes the addition of relocation for beneficiaries of international protection as it creates another opportunity for regular onward movement for beneficiaries of international protection, who face a precarious situation and challenges in accessing their rights in some Member States, even with status. Generalised mutual recognition of protection decisions would be a more effective way to achieve similar outcomes, however.<sup>122</sup>

120 ECRE, The Role of EASO Operations in National Asylum Systems, November 2019, available at: <https://bit.ly/2YiOzbh>

121 Explanatory memorandum to the proposal, p.20.

122 This has also been proposed by the European Parliament; see: European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), November 2017, available at : <https://bit.ly/3cbZdc0>

Questions arise as to the basis for approaching and identifying beneficiaries of international protection by Member States based on Article 57(3), and why the Commission has chosen the 3 years timeframe.

Two other types of solidarity contribution are available as voluntary contributions outside of the frameworks and rules for situations of SAR and migratory pressure. These are (Article 45(2) points (a) and (b)):

- relocation for applications who are subject to the border procedure
- relocation of illegally staying third country nationals (i.e. “relocation for return”)

ECRE objects to the concept of “relocation for return”, which involves relocating a person in an irregular situation. By virtue of Article 58(5), following such a relocation, the person would be subject to a return procedure. The proposal does not clarify whether the person would already have received a return decision in the benefitting state. If so, this mechanism would resemble the return sponsorship mechanism after the lapse of the eight-month period. Hence, ECRE’s concerns about this procedure expressed below<sup>123</sup> apply also to this form of solidarity.

ECRE acknowledges that return is part of migration policy but believes that it should only take place when three conditions are in place, one of these is that the process should be carried out in full respect for fundamental rights including human dignity.<sup>124</sup> Prolongation of the process with transfer to another Member State before return undermines the dignity of the person. Relocation for return is also likely to increase the period during which a person is held in detention, given that they are likely to be detained prior to, during and after the relocation. As discussed below in relation to return sponsorship, there is a risk of cumulative periods of detention that exceed the maximum legal periods of detention in each of the involved Member States.

If the persons to be part of the system of return are those who receive a return decision after a return border procedure or an asylum border procedure, then the fiction of non-entry is stretched to its limits: it would be maintained that the person has not entered EU territory after undergoing a screening process, a border procedure, a relocation transfer and post-relocation detention before return. Respect for procedural guarantees is also significantly jeopardised should a person be transferred to another Member State prior to return.

ECRE thus proposes the following amendments to Article 45:

*Article 45*

*Solidarity contributions*

1. Solidarity contributions for the benefit of a Member State under migratory pressure or subject to disembarkations following search and rescue operations shall consist of the following types:
  - relocation of applicants who are not subject to the border procedure for the examination of an application for international protection established by Article 41 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*];

123 See Section on Article 55 below.

124 See: ECRE Policy Note 19 Return Policy: Desperately Seeking Evidence and Balance, July 2019; ECRE , COMMENTS ON THE COMMISSION PROPOSAL FOR A RECAST RETURN DIRECTIVE COM(2018) 634, November 2018, available at [www.ecre.org](http://www.ecre.org) .

- ~~return sponsorship of illegally staying third-country nationals;~~
  - relocation of beneficiaries of international protection who have been granted international protection less than three years prior to adoption of an implementing act pursuant to Article 53(1);
  - capacity-building measures in the field of asylum, reception and return, **and** operational support **when this is clearly in the interest of the benefitting member state** ~~and measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries.~~
2. Such contributions may, pursuant to Article 56, also consist of:
- a. relocation of applicants for international protection subject to the border procedure in accordance with Article 41 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*];
  - b. ~~relocation of illegally staying third-country nationals.~~

### **Articles 47 and 48 – solidarity mechanisms for situations of disembarkation after SAR**

These two articles are central to deciding on the contributions required of Member States in disembarkation/SAR situations which generate “recurring” arrivals (Article 47(1)). The idea is that solidarity should be “available on a constant basis”.<sup>125</sup> There are four routes to settling on the contributions, starting with voluntary contributions and moving to compulsory contributions if Member States are not willing to provide what has been deemed necessary.

The solidarity needs are based on the annual Migration Management Report (MMR) that the Commission will prepare, as per Article 6(4). It sets out the overall needs of countries with recurring arrivals, including the number of applicants who should be relocated and the capacity building measures necessary to “assist” the affected country. Within two weeks of the MMR, the Commission requests contributions consisting only of relocation and capacity building measures, and indicates the relocation numbers expected from the Member States based on the distribution key (Article 54, see below). Contributions go into a Solidarity Response Plan.

There are **four possible scenarios** and concomitant rules:

**Scenario 1:** If the contributions are – collectively – adequate to meet the needs for the Member State facing SAR solidarity needs, then implementation follows, with the creation of a “solidarity pool” for each Member State benefitting, and implementing acts following (Article 48(1)). The solidarity pools are to be replenished as needed (which applies for all scenarios and is done at the request of the EU Agencies via the Solidarity Forum).

**Scenario 2:** If the contributions are not adequate, but rather “fall significantly short” the Commission convenes a Solidarity Forum (described in Article 46) and “invites” Member States to increase contributions (Article 47(5)). If that is successful, then implementation follows.

**Scenario 3:** Solidarity becomes mandatory. If the contributions “still fall significantly short”, such that there is no “foreseeable basis of ongoing support”, Article 48(2) explains what happens in the third scenario. At this point, after two opportunities in scenarios 1 and 2 for voluntary contributions, solidarity becomes mandatory.

First, the Commission adopts an implementing act to establish the solidarity pool for benefitting Member

<sup>125</sup> Explanatory Memorandum, p.12

States, initially covering relocation and capacity building, and also including the contributions to be required from the donating Member States. The needs are still based on the MMR. The relocation contributions for each Member State are determined by the distribution key and the capacity building contributions are based on what Member States have offered at the earlier stage in the process. Contributions in the form of capacity building have to be “in proportion” to the contributions that Member States would have made to relocation according to the distribution key.

It should be noted 1) that Member States thus can avoid relocation by providing a sufficient amount of capacity building measures as solidarity; and 2) that there is an implicit adjustment of the capacity building solidarity contributions to ensure they are proportionate to what the relocation contribution “would have been”.

It is not clear however how this determination is to be made, i.e. on what basis will it be judged that the capacity building offer is proportionate to (or equivalent to) the relocation quota of the Member State? In practical terms, if the distribution key shows that a Member State should relocate 100 people, based on GDP and population size, what capacity building measures would be proportionate to (or equivalent of) relocation of 100 people? How much capacity building of what type should take place? If the needs are met, implementation goes ahead on this basis, however, a fourth scenario is also considered in Article 48(2) subparagraph 2.

**Scenario 4:** If, after scenario 3 has played out, there still is a 30% shortfall in relocation contributions due to Member States having offered solidarity instead in the form of capacity building, then the Member States only offering capacity building will have their contributions adjusted. They will have to provide 50% of their contribution (as per the distribution key) as either relocation or return sponsorship or both – they choose.

In the case that a Member State does not specify its contributions at any point, both the amount and the type will be determined by the Commission.

### ***Vulnerable persons***

There are extra provisions for vulnerable applicants. Articles 47(1) and 49(4) read in conjunction explain that vulnerable applicants fall within the scope of the solidarity mechanism regardless of how they arrived in the country. They are included as possible candidates for relocation as part of the solidarity pool if the Member States has capacity needs due to the presence of vulnerable persons. Thus, if the Migration Management Report notes that a country facing recurring SAR arrivals is also facing capacity challenges due to the presence of vulnerable people, then they may be included as applicants to be relocated.

### ***ECRE's analysis***

First, it is welcome that specific provisions cover solidarity in the situation of disembarkation after SAR. It is unfortunate that this is needed, but it is the case and will remain the case. Given that the deeper reform of the rules for allocation of responsibility has been deemed politically impossible and is not part of the proposal, and that the proper implementation of the criteria is not guaranteed, *then* provisions on solidarity in the case of SAR become necessary.

ECRE has previously argued for a contingency plan covering responsibility for disembarkation and relocation, and for more formal arrangements for SAR. This is due to the humanitarian emergencies taking place and exacerbated by refusals to disembark. Ad hoc responses may be better than nothing but they remain time-consuming, informal and unpredictable. The solidarity pool for SAR operations seeks to answer some of these needs.

Second, a positive aspect of the proposal is that it envisages preparing plans in advance, shortly after the delivery of the Migration Management Report. This should allow avoidance of some of the suffering and violations caused when prolonged stand-offs occur after SAR operations.

Third, according to EU Treaty Law all Member States should contribute to solidarity. Thus, the development of a mechanism that obliges all to provide contributions is necessary, and a significant improvement on informal “coalition of the willing” arrangements for SAR disembarkation/relocation.

Fourth, providing a firmer legal basis for solidarity in the SAR context is also important because it allows for greater accountability, including legal challenges from individuals, and the possibility to engage the rights embedded in the EU Charter for Fundamental Rights.

Fifth, although the provisions on vulnerable persons are somewhat incongruous – in that they extend the scope of a mechanism primarily focused on SAR – they are nonetheless welcome. Increasing the options for relocation of vulnerable people, regardless of their manner of arrival, should alleviate suffering for the people concerned and also bolster the support provided to the Member States at the borders. In addition, there is a political benefit in expanding the pool of candidates for relocation: for some Member States it will be politically more feasible to relocate vulnerable people.

While broadly welcoming the proposal, ECRE has serious concerns about certain elements:

- The first concerns the types of contributions available to Member States;
- the second the amount of solidarity;
- and the remaining concerns cover procedural questions.

### **Types of solidarity**

Ideally, all Member States should offer solidarity in the form of relocation. Given that one of the objectives of solidarity is to mitigate the unfairness of the rules on allocation of responsibility for examination of applications, then solidarity should logically involve assumption of responsibility for people (in the absence of the preferred reform of the rules on allocation).

Nonetheless, there are legal and ethical considerations that make mandatory relocation difficult to recommend (regardless of political opposition to it). When certain Member States’ treatment of applicants and beneficiaries of international protection consistently demonstrates systemic deficiencies, such that violations of EU and international law are regular occurrences, it is not possible to support relocation to these same countries. If Dublin transfers to countries are unlawful for reasons of deficiencies in the asylum system then, by the same logic, relocation should not be taking place. As mentioned above, the proposal rests on the assumption in Recital 33 that all Member States are safe for all applicants. Practice shows that official positions against Dublin transfers have been adopted by some countries. In recent years, that relates in particular to Greece and Hungary. Domestic courts continue to provide important guidance on transfers to the latter, as well as to other countries including Italy, Bulgaria and more recently Croatia.

The question arises as to whether there are useful solidarity contributions that can be provided by countries when relocation is not a suitable option. It seems unlikely that a country which cannot – or should not – receive people due to inadequacies in its asylum or reception system would be in a position to build capacity or offer operational support to another Member State.

In the section below, ECRE sets out its concerns with return sponsorship as a form of solidarity contribution. Thus, it does not support the inclusion of return sponsorship as an option in this solidarity mechanism. As discussed, supporting return as a solidarity contribution has been included for political reasons: it may be acceptable to countries opposed to all other types of solidarity. From a human rights perspective a dilemma arises if return sponsorship is a solidarity option in the SAR context because it leads to the need to weigh up the risk of violations occurring without disembarkation of SAR operations compared to the risk of violations occurring in the context of return operations. It is impossible to make this utilitarian calculation.

## Amount of solidarity

Despite its complexity, the mechanism does not guarantee that it will meet all the relocation needs of the benefitting country. Under scenario 3 (Article 48(2)), the solidarity pool goes ahead with 71% of the relocation needs met. Under scenario 4 (Article 48(2) subparagraph 2) a potentially higher percentage of relocation needs may not be met. The scenario is triggered when 70% has not been reached. The Member States which are not offering relocation are then allowed to choose between relocation and return sponsorship. A number of outcomes arise that are unfair to the benefitting Member State and to applicants due to the limited number of relocation places likely to be filled.

## Procedural questions

Similarly to Dublin IV, the RAMM includes no provisions to suspend take back procedures when solidarity mechanisms are in place to support a Member State, indeed, the measures in Chapter III of the RAMM are all geared towards an increase in the completion of take back procedures. This creates another paradoxical situation whereby countries have candidates being relocated and returned to them simultaneously.

Overall, it should also be noted that the mechanism is highly complex and bureaucratic, as ECRE has commented elsewhere.<sup>126</sup> Given that certain Member States (at least six at any one time) remain fervently opposed to relocation of applicants for international protection, it is questionable as to whether including so many steps is likely to increase the prospects of meeting the relocation needs.

For these reasons, and while acknowledging the political challenges present in the disputes over solidarity, ECRE recommends adjusting the mechanism in order to simplify it and to ensure that solidarity does not undermine the functioning of asylum systems or the fundamental rights of applicants. This entails removing the second and fourth scenarios, so that there is just one rather than two opportunities for Member States to provide voluntary contributions, and removing the option of return sponsorship.

ECRE recommends amending Articles 47 and 48 as follows:

### *Article 47*

*Solidarity for disembarkations following search and rescue operations*

...

**5 Where the Commission considers that the solidarity contributions indicated by all the Member States pursuant to paragraph 4 fall significantly short of the total solidarity contributions set out in the Migration Management Report, the Commission shall convene the Solidarity Forum. The Commission shall invite Member States to adjust the number and, where relevant, the type of contributions. Member States that adjust their contributions shall submit revised SAR Solidarity Response Plans in the course of the Solidarity Forum.**

### *Article 48*

*Commission implementing acts for search and rescue operations*

1. Within two weeks from the submission of the SAR Solidarity Response Plans referred to in Article 47(4) ~~or two weeks from the end of the Solidarity Forum referred to in Article 47(5), and~~ where the total solidarity contributions indicated by all the Member States in their Plans corresponds to, or is considered by the Commission to be sufficiently close to the total solidarity contributions set

<sup>126</sup> ECRE, Editorial: RAMMING it Home: A New Low or the Climax of EU Law? October 2020, available at: <https://bit.ly/36kxaTT>.

out in the Migration Management Report, the Commission shall adopt an implementing act setting out the solidarity measures indicated by Member States pursuant to Article 47(4) or Article 47(5). Such measures shall constitute a solidarity pool for each Member State expected to be faced with disembarkations in the short term.

...

2. Where the total number or type of solidarity contributions indicated by Member States pursuant to Article 47(5) ~~still~~ falls significantly short of the total solidarity contributions set out in the Migration Management Report leading to a situation where the solidarity pool is not able to provide a foreseeable basis of ongoing support to the Member States referred to in Article 47(2), the Commission shall, ~~within two weeks after the end of the Solidarity Forum~~, adopt an implementing act establishing a solidarity pool for each Member State expected to be faced with disembarkations in the short term.

...

Where Member States have indicated measures set out in Article 45(1), point (d), those measures shall be in proportion to the contributions that the Member States would have made by means of the relocations referred to in Article 45(1), point (a) as a result of the application of the distribution key set out in Article 54. They shall be set out in the implementing act except where the indications by Member States would lead to a shortfall of greater than 30% of the total number of relocations identified in the Migration Management Report. In those cases, the contributions set out in the implementing act shall be adjusted so that those Member States indicating such measures are required to cover 50% of their share calculated in accordance with the distribution key set out in Article 54 through relocation ~~or return sponsorship as referred to in Article 45(1) point (b) or a combination of both. The Member States concerned shall immediately indicate to the Commission how they intend to cover their share in this regard.~~ The Commission shall adjust the contributions set out in the implementing act regarding relocation, ~~return sponsorship~~ and the measures referred to in Article 45(1), point (d) for those Member States accordingly.

...

Where the Asylum Agency notifies the Commission and the Member States that 80% of the solidarity pool in the first subparagraph has been used for one or more of the benefitting Member States, the Commission shall convene the Solidarity Forum to inform the Member States of the situation and the additional needs of the Member States. Following the Solidary Forum the Commission shall adopt an amendment to the implementing act establishing a solidarity pool referred to in the first subparagraph in relation to the benefitting Member State concerned to increase the total number of third-country nationals covered by the solidarity measures referred to in point (a) of the first subparagraph by a maximum of 50%. The share of each Member State referred to in point (b) of the first subparagraph ~~shall be amended accordingly. Where the provisions of the second sub-paragraph are applied and Member States have indicated that they shall contribute through return sponsorship, the share of these measures shall be increased by 50%.~~ The measures referred to in Article 45(1), point (d) shall also be increased by a share that is in proportion to a 50% increase of that Member States share calculated according to the distribution key set out in Article 54.

### **Article 48 – Top-up contributions**

In sub-paragraphs (1)<sup>2</sup> and (2)<sup>4</sup> of Article 48, provisions for additional contributions are made when 80% of the solidarity pool has been used for one or more of the benefitting Member States. In all cases,

the Commission convenes the Solidarity Forum to discuss additional contributions in order to replenish the solidarity pool. In scenarios 1 and 2, Member States are “requested” to increase the contributions and in scenarios 3 and 4, the Commission amends the implementing act and adds to Member States’ contributions based on the distribution key.

ECRE views the provisions in Article 48 as a sensible way to replenish the solidarity pools, notwithstanding concerns detailed above on the types of contributions.

### **Article 49 – Role of Commission and Agencies**

Similarly to Article 48, the provisions on the role of the Commission and agencies are practical and suited to the implementation of the rules (concerns relate to the rules themselves). There are also provisions on solidarity pools established for situations of SAR being used to support situation of migratory pressure and use of one Member State’s solidarity pool for a different Member State in need so long as the former is not jeopardised. These are also useful practical proposals.

In order to ensure consistency with its opposition to return sponsorship, ECRE nonetheless proposes amendments to Article 49 to remove references to the concept and to the role of Frontex, which is no longer necessary if return sponsorship is not part of the mechanism.

#### *Article 49*

##### *Solidarity pool for search and rescue operations*

1. Within two weeks of the adoption of the implementing act referred to in Article 48(1) or Article 48(2), the Member State referred to in Article 47(2) shall notify the Commission of its request for solidarity support. Following that request, the Commission shall draw on the solidarity pool and coordinate the implementation of the solidarity measures for each disembarkation or group of disembarkations taking place in a period of two weeks.
2. Under the coordination of the Commission, the Asylum Agency ~~and the European Border and Coast Guard Agency~~ shall draw up the list of eligible persons to be ~~relocated and to be subject to return sponsorship~~. The list shall indicate the distribution of those persons among the contributing Member States taking into account the total number of persons to be relocated ~~or to be subject to return sponsorship~~ by each contributing Member State, the nationality of those persons and the existence of meaningful links between them and the Member State of relocation ~~or of return sponsorship~~. Priority shall be given to the relocation of vulnerable persons. The Asylum Agency ~~and the European Border and Coast Guard Agency~~ shall assist the Commission in monitoring the use of the solidarity pool.
3. Where the Commission has adopted a report concluding that a Member State referred to in Article 47(2) is under migratory pressure as set out in Article 51(3), the remaining solidarity contributions from the solidarity pool established under Article 48(1) or Article 48(2) may be used for the purpose of immediately alleviating the migratory pressure on that Member State. In such cases, the provisions of paragraph 2 shall apply.

This paragraph shall not apply where an implementing act provided for in Article 53 is adopted. As from the adoption of that implementing act drawing on the list of eligible persons to be relocated ~~and to be subject to return sponsorship~~ as provided for in paragraph 2 shall cease.

Where the solidarity pool referred to in the first subparagraph is insufficient for the purpose of

immediately alleviating the challenges faced by the Member State referred to in Article 47(2), solidarity contributions from the solidarity pool of the other Member States established under Article 48(1) or Article 48(2) may be used insofar as this does not jeopardize the functioning of the pool for those Member States.

4. Where the Migration Management Report identifies that a Member State referred to in Article 47(2) is faced with capacity challenges due to the presence of applicants who are vulnerable regardless of how they crossed the external borders, the solidarity pool established under Article 48(1) or Article 48(2) may also be used for the purpose of relocation of vulnerable persons. In such cases, the provisions of paragraph 2 shall apply.
5. The Commission shall support and facilitate the procedures leading to the relocation of applicants ~~and the implementation of return sponsorship~~, paying particular attention to unaccompanied children minors. It shall coordinate the operational aspects of relocation-~~and return sponsorship~~, including with the assistance of experts or teams of experts to be deployed by the Asylum Agency ~~or the European Border and Coast Guard Agency~~.

### ***Solidarity mechanism for the situation of migratory pressure***

#### ***Articles 50 and 51– Assessment of and report on migratory pressure***

The solidarity mechanism covers measures for the situation of migratory pressure and the rules pertaining are explained in Articles 50 to 53. It should be noted that under the mechanism, solidarity contributions are compulsory and each Member State's share of the total amount is set by a distribution key. However, Member States can decide between relocation (of applicants and/or beneficiaries of international protection) and return sponsorship to make up their share of the total. As per the Explanatory Memorandum:

***Solidarity contributions that Member States will be under the obligation to provide consist of either relocation or return sponsorship and there is also the possibility to contribute to measures aimed at strengthening the capacity of Member States in the field of asylum, reception and return and in the external dimension.***

It is then specified that the capacity building measures will not always be available (see below).

The procedure and criteria for determining a situation of migratory pressure are set out in Article 50. There are various differences compared to the first (SAR) solidarity mechanism. The assessment is carried out by the European Commission following a Member State informing the Commission that it "considers" it is under migratory pressure or the Commission believing that that "may be" the case. Thus, the mechanism can be triggered at any time during the year.

The Agencies assist, whereas the Parliament, Council and (other) Member States are informed of the assessment taking place. The assessment covers the situation during the preceding six months, and the situation in the Member State in question is to be compared with the overall situation in the EU. It is thus backward looking, rather than based on prediction of arrivals.

The assessment is based on eleven factors, with a further ten factors to be taken into account. Article 51 provides for a report to be prepared and submitted to the European Parliament and Council, covering:

- the decision on whether there is in fact a situation of migratory pressure or not;
- the capacity and needs of the Member State;
- and the actions to be taken by the Member State and by other Member States.

The needs are set out in a "Report on Migratory Pressure" which is specific to the situation in one Member State and appears to complement or update the Migration Management Report (MMR), which is comprehensive and produced for the EU as a whole on an annual basis.

The report on migratory pressure also assesses the capacity of the Member State under pressure and then the measures that it should take and the measures that other Member States should take (Article 51(3)).

### **ECRE's analysis:**

A number of observations can be made on the solidarity mechanism for migratory pressure.

First, the Commission again has a strong role, here determining whether there is a situation of migratory pressure, which is defined as a “broad qualitative assessment” in Recital 25. Although it is not clear from Article 50(1) whether the two conditions for launching an assessment are alternatives or cumulative (because there is neither an “and” nor an “or” between them), a full reading of Article 50, suggests that each alone is sufficient, i.e. either the Member State considers that it is facing migratory pressure or the Commission believes it may be the case. This is a very different approach compared to the Dublin IV proposal where solidarity was triggered automatically by an objective factor – asylum applications reaching a certain number.

This would mean that the Commission can decide to assess whether a Member State is facing migratory pressure without the Member State declaring this to be the case, and potentially against its will (although in practice it would be difficult although not impossible for the assessment to be carried out without the cooperation of the Member State). If the assessment concludes that it is a situation of migratory pressure, solidarity could be offered without it being sought (although, again, it seems impractical to “impose” solidarity).

Second, responses to migratory pressure are not solely about solidarity; they also concern “measures that the Member State under migratory pressure should take in the field of migration management, *and in particular in the field of asylum and return*” (as per Article 51(3)(b)(i), ECRE emphasis).

There is a strong similarity to the provisions in the draft Frontex regulation which allowed for similar European action. This potentially opens the door for Member States to be assessed and instructed to act even if they do not agree. ECRE proposes some amendments to address these issues.

Third, so many factors are included as either part of the “basis” of the decision or to be “taken into account” that it leaves room for a less than objective assessment as to whether a country is under migratory pressure. The question arises as to whether the Commission is an impartial arbiter and neutral assessor of the situation in Member States.

Fourth, Member States can also ask to be defined as facing migratory pressure, presumably when they wish to benefit from solidarity measures, which would happen should the assessment confirm a situation of migratory pressure. To do so, though, also carries the risk that they will be requested to implement measures under Article 51(3)(a)(i), as described above, as well as benefiting from solidarity measures provided by other Member States under 51(3)(a)(ii) and (iii) (the measures discussed above at Article 45.)

Fifth, these articles allow for assessment and measures to be proposed in the case of potential as well as actual pressure, depending on the weighting that is placed on the factors to be “taken into account” compared to the factors on which the “assessment is to be based”. As a number of the factors concern future trends, the Report will go beyond the “real time assessment” of the situation that is suggested in the Explanatory Memorandum. Dealing with potential future pressure is a separate issue which requires building up asylum capacity. ECRE strongly supports preparedness in terms of ensuring asylum and reception capacity is available to manage future arrivals however there is a risk that actions proposed will focus on prevention of predicted arrivals rather than preparedness. As formulated in the Explanatory Memorandum and the EC's staff working document, the aim of the contingency plan is mainly “to *prevent* the build-up of migratory pressure” (emphasis added).<sup>127</sup>

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<sup>127</sup> Explanatory Memorandum, p.15 ; COMMISSION STAFF WORKING DOCUMENT Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], SWD/2020/207 final, September 2020, available at: <https://bit.ly/2YmJnmO> , p.77.

ECRE suggests adjusting the assessment to separate out return and also to focus on current rather than potential pressure the Member State is facing.

## Article 50

### Assessment of migratory pressure

1. The Commission shall assess the migratory situation in a Member State where:
  - (a) that Member State has informed the Commission that it considers itself to be under migratory pressure; ***and***
  - (b) on the basis of available information, it considers that a Member State may be under migratory pressure.
2. The Asylum Agency and the European Border and Coast Guard Agency shall assist the Commission in drawing up the assessment of migratory pressure, ***in cooperation with the Member State in question***. The Commission shall inform the European Parliament, the Council and the Member States, without delay, that it is undertaking an assessment.
3. The assessment of migratory pressure shall cover the situation in the Member State concerned during the preceding six months, compared to the overall situation in the Union, and shall be based in particular on the following information:
  - (a) the ***total*** number of applications for international protection by third-country nationals and the nationality of the applicants;
  - (b) ~~the number of third-country nationals who have been detected by Member State authorities while not fulfilling, or no longer fulfilling, the conditions for entry, stay or residence in the Member State including overstayers within the meaning of Article 3(1)(19) of Regulation (EU) 2017/2226 of the European Parliament and of the Council<sup>58</sup>,~~
  - (c) ~~the number of return decisions that respect Directive 2008/115/EC;~~
  - (d) ~~the number of third-country nationals who left the territory of the Member States following a return decision that respects Directive 2008/115/EC;~~
  - (e) the number of third-country nationals admitted by the Member States through Union and national resettlement [or humanitarian admission] schemes;
  - (f) the number of incoming and outgoing take charge requests and take back notifications in accordance with Articles 34 and 36;
  - (g) the number of transfers carried out in accordance with Article 31;
  - (h) the number of persons ***apprehended identified*** in connection with an irregular crossing of the external land, sea or air border;
  - (i) the number of persons refused entry in accordance with Article 14 of Regulation EU (No) 2016/399;
  - (j) the number and nationality of third-country nationals disembarked following search and rescue operations, including the number of applications for international protection;
  - (k) the number of ***vulnerable applicants, in particular*** unaccompanied ***children minors***.

4. The assessment of migratory pressure shall also take into account the following:
  - (a) the information presented by the Member State, where the assessment is carried out pursuant to paragraph 1, point (a);
  - (b) ~~the level of cooperation on migration with third countries of origin and transit, first countries of asylum, and safe third countries as defined in Regulation (EU) XXX/XXX [Asylum Procedure Regulation];~~
  - (c) ~~the geopolitical situation in relevant third countries that may affect migratory movements;~~
  - (d) the relevant Recommendations provided for in Article 15 of Council Regulation (EU) No 1053/2013<sup>59</sup>, Article 13, 14 and 22 of Regulation (EU) XXX/XXX [European Union Asylum Agency] and Article 32(7) of Regulation (EU) 2019/1896;
  - (e) ~~information gathered pursuant to Commission Recommendation of XXX on an EU mechanism for Preparedness and Management of Crisis related to Migration (Migration Preparedness and Crisis Blueprint)~~
  - (f) the Migration Management Report referred to in Article 6(4);
  - (g) the Integrated Situational Awareness and Analysis (ISAA) reports under Council Implementing Decision (EU) 2018/1993 on the EU Integrated Political Crisis Response Arrangements, provided that the Integrated Political Crisis Response is activated or the Migration Situational Awareness and Analysis (MISAA) report issued under the first stage of the Migration Preparedness and Crisis Blueprint, when the Integrated Political Crisis Response is not activated;
  - (h) ~~information from the visa liberalisation reporting process and dialogues with third countries;~~
  - (i) quarterly bulletins on migration, and other reports, of the European Union Agency for Fundamental Rights.
  - (j) the support provided by Union Agencies to the benefitting Member State.

### **Article 52 and 53 – Solidarity Response Plans in situations of migratory pressure**

Similar to the solidarity pools created in the SAR solidarity mechanism, Articles 52 and 53 explain the calculation of solidarity contributions to be provided by other Member States (those not benefitting from the migratory pressure solidarity mechanism themselves) in Solidarity Response Plans and the linked implementing acts.

The mechanism seems to function quite differently to the first solidarity mechanism in that Member States' contributions are determined by the distribution key from the beginning but they may indicate the share of their quota which they meet through relocation and that which they meet through return sponsorship. If capacity building is available as an option, then they may cover part of the quota with such measures. Annex II to the proposal sets out the form that is to be completed to establish the Solidarity Response Plan.

The form shows that the three measures – relocation of applicants, return sponsorship and relocation of beneficiaries of international protection set out in Article 45(a),(b) and (c) and referred to under 51(3)(b) (ii) – each appear on a separate line with Member States requested to indicate the share (percentage) of their quota that will be met by the measure adding up to 100%. Thus, a Member State could divide it equally as 33% for each of the three measures or it could divide 50% return sponsorship and 50% relocation. A second part of the form asks the Member State to list capacity building measures and the other measures under 45(d) if these are available.

## **Scenario 1**

After the Report, the Member States have two weeks to indicate the contributions that they will provide. They can choose relocation of applicants, return sponsorship or relocation of beneficiaries of international protection. It is implied that these types of solidarity contribution will always be identified. According to Article 52(2), if the Report on Migratory Pressure also identifies capacity-building measures, then the Member States can provide their contributions in this form but only so long as the contributions for relocation and return sponsorship do not fall below 30% of the total needs in the Report.

Deductions are offered if Member States have received high numbers of asylum applicants over the preceding five years and/or offered solidarity in other ways (Article 52(5)). As with the first solidarity mechanism, if Member States do not specify their contributions, they are determined by the Commission. If the contributions are adequate, then implementation goes ahead.

## **Scenario 2**

If the Commission considers that the contributions are not adequate it convenes the Solidarity Forum to request additional contributions (Article 52(4)) by requesting that Member States revise the Solidarity Response Plans. If they are now adequate, then implementation goes ahead.

## **Scenario 3**

If the contributions offered for relocation and return sponsorship still fall short by more than 30% then the Commission adjusts the contributions offered as capacity building by the Member States only offering capacity building so that 50% of their contribution is composed of relocation and return sponsorship.

Here, the following observations are noted.

### **Interchangeability of relocation and return sponsorship**

In the second solidarity mechanism, for migratory pressure, relocation and return sponsorship are brought together from the start, with Article 51(3)(b)(ii) listing them together as measures that the supporting Member States should take. Capacity building is separated off into Article 51(3)(b)(iii) and it appears that it will not always be available as an option. Relocation and return sponsorship appear to have equal weight, given that the provisions on capacity building refer to compensation for up to 30% of the combined amount of relocation and return sponsorship.

The Commission determines whether capacity building measures offered (when identified in the Report) are proportionate to the relocation or return sponsorship offered, and the latter are used interchangeably. It is not clear what happens if either the relocation needs or the return sponsorship needs are not met. For example, in the case that capacity building is not available, only relocation and return sponsorship, what happens if all Member States decide to provide 100% of their share as return sponsorship and none offer relocation?

There appears to be no corrective mechanism to ensure that relocation (or return sponsorship) needs are met. ECRE proposes removing return sponsorship as a solidarity option in any case.

The risk that Member States choose only return sponsorship is mitigated by the unappealing elements in the return sponsorship plan, and notably the assumption of responsibility after eight months and the role of the Commission and Frontex in deciding on the people to be subject to return sponsorship. The prospects of the people actually being returned or deported will vary hugely based on many factors. Member States can specify the nationalities of the people they will sponsor according to Annex II but nothing beyond that. In addition, Article 72 seems to indicate that funding is attached to relocation under AMIF but not to return sponsorship.

While these are factors that might incentivise Member States to opt for relocation there will always be strong political pressure on governments to choose return sponsorship while it is an option and particularly one with equal weight to relocation.

As for the SAR solidarity mechanism there may be a considerable shortfall in meeting relocation needs even if the mechanism functions as intended (i.e. even if Member States are willing to play by the rules). As above, it may be that Member States opt only for return sponsorship. In addition, if 71% of relocation and return sponsorship needs are met, then implementation goes ahead. In the case that the shortfall is over 30% on relocation and return sponsorship needs then countries only offering capacity building will have their contributions adjusted and 50% will have to be provided as relocation and return sponsorship. It is not clear whether or not this will make up the shortfall.

## Fundamental rights considerations

From the perspective of rights and protection, there are both opportunities and clear risks in the solidarity mechanism; everything will depend on how these articles are used and on the weight given to the different elements in the assessment, and then on the process for identifying needs, and finally on the solidarity offered by the Member States. For example, an assessment triggered by either the Member State or the Commission could find that a Member State is facing migratory pressure because it is processing a relatively high number of asylum applications. The Commission's report could identify measures that country should implement to improve its asylum system and that other Member States should implement to offer solidarity in the form of relocations. From a human rights perspective, this would be a positive use of the mechanism.

Alternatively, the same articles could produce a report that concludes migratory pressure based on future potential arrivals, and recommends shoring up border infrastructure and increasing return capacity, without addressing asylum and reception capacity at all. From ECRE's perspective, this latter use of the mechanism would generate significant risks.

### Recommendations

#### Article 52

#### *Solidarity Response Plans in situations of migratory pressure*

1. Where the report referred to in Article 51 indicates that a Member State is under migratory pressure, the other Member States which are not themselves benefitting Member States shall contribute by means of the solidarity contributions referred to in Article 45(1), points (a), ~~(b)~~ and (c). Member States shall prioritise the relocation of ***vulnerable applicants, in particular unaccompanied children minors***.
2. Where the report referred to in Article 51 identifies measures referred to in paragraph 3, point (b) (iii) of that Article, other Member States may contribute by means of those measures instead of measures referred to in Article 51(3)(b)(ii). Such measures shall not lead to a short fall of more than 30% of the total contributions identified in the report on migratory pressure under Article 51(3)(b)(ii).
3. Within two weeks from the adoption of the report referred to in Article 51, Member States shall submit to the Commission a Solidarity Response Plan by completing the form in Annex II. The Solidarity Response Plan shall indicate the type of contributions from among those set out in Article 51(3)(b)(ii) or, where relevant, the measures set out in Article 51(3)(b)(iii) that Member States propose to take. Where Member States propose more than one type of contribution set out in Article 51(3)(b)(ii), they shall indicate the share of each.

~~**Where the Solidarity Response Plan includes return sponsorship, Member States shall indicate the nationalities of the illegally staying third-country nationals present on the territory of the Member State concerned that they intend to sponsor.**~~

Where Member States indicate measures set out in Article 51(3)(b)(iii) in the Solidarity Response Plan they shall also indicate the detailed arrangements and the time-frame for their implementation.

4. Where the Commission considers that the solidarity contributions indicated in the Solidarity Response Plans do not correspond to the needs identified in the report on migratory pressure provided for in Article 51, it shall convene the Solidarity Forum. In such cases, the Commission shall invite Member States to adjust the type of contributions in their Solidarity Response Plans in the course of the Solidarity Forum by submitting revised Solidarity Response Plans.
5. A Member State proposing solidarity contributions set out in Article 51(3)(b)(ii), may request a deduction of 10% of its share calculated according to the distribution key set out in Article 54 where it indicates in the Solidarity Response Plans that over the preceding five years it has examined twice the Union average per capita of applications for international protection.

### *Article 53*

#### *Commission implementing acts on solidarity in situations of migratory pressure*

1. Within two weeks from the submission of the Solidarity Response Plans referred to in Article 52(3) or, where the Solidarity Forum is convened pursuant to Article 52(4), within two weeks from the end of the Solidarity Forum, the Commission shall adopt an implementing act laying down the solidarity contributions for the benefit of the Member State under migratory pressure to be taken by the other Member States and the timeframe for their implementation.
2. The types of contributions set out in the implementing act shall be those indicated by Member States in their Solidarity Response Plans. Where one or more Member States have not submitted a Solidarity Response Plan, the Commission shall determine the types of contributions to be made by the Member State taking into account the needs identified in the report on migratory pressure.

Where the type of contribution indicated by Member States in their solidarity response plans is that referred to in Article 45(1), point (d), the Commission shall assess whether the measures proposed are in proportion to the contributions that the Member States would have made by means of the measures referred to in Article 45(1), points (a), ~~(b) or~~ and (c) as a result of the application of the distribution key set out in Article 54.

Where the measures proposed are not in proportion to the contributions that the contributing Member State would have made by means of the measures referred to in Article 45(1), points (a), ~~(b) or~~ and (c), the Commission shall set out in the implementing act the measures proposed while adjusting their level.

Where the measures proposed would lead to a shortfall greater than 30% of the total number of solidarity measures identified in the report on migratory pressure under Article 51(3)(b)(ii), the contributions set out in the implementing act shall be adjusted so that those Member States indicating such measures would be required to cover 50% of their share calculated according to the distribution key set out in Article 54 through measures set out in Article 51(3)(b)(ii). The Commission shall adjust measures referred to in Article 51(3)(b)(iii) indicated by those Member States accordingly.

3. The implementing act shall set out:

- (a) the total number of persons to be relocated from the requesting Member State pursuant to Article 45(1), points (a) or (c), taking into account the capacity and needs of the requesting Member States in the area of asylum identified in the report referred to in Article 51(3)(b)(ii);
- (b) ~~the total number of persons to be subject to return sponsorship from the requesting Member State pursuant to Article 45(1), point (b), taking into account the capacity and needs of the requesting Member States on return identified in the report referred to in Article 51(3)(b)(ii);~~
- (c) the distribution of persons to be relocated ~~and/or those to be subject to return sponsorship~~ among the Member States including the benefitting Member State, on the basis of the distribution key set out in Article 54;
- (d) the measures indicated by Member States pursuant to second, third and fourth subparagraph of paragraph 2.

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### **Article 54 – Distribution Key**

The distribution key determines the solidarity quotas for each Member State. It comes into play in the two solidarity mechanisms in different ways:

- For the SAR solidarity mechanism, the distribution key determines contributions in scenario 3 and 4 when solidarity becomes mandatory because voluntary solidarity contributions are insufficient to meet the SAR solidarity needs identified in the Migration Management Report.
- In the “migratory pressure” solidarity mechanism, the distribution key is used from the beginning. Needs are identified in the Report on the migratory pressure and then each Member State’s contribution is determined by the key. Here, relocation and return sponsorship are used interchangeably, so Member States are given a figure generated by the key and then they decide which share they provide as relocation and as return sponsorship.

The key has just two elements – the size of the population, weighted at 50%, and the country’s GDP, similarly weighted at 50%. This is similar to the reference key proposed in Dublin IV, although that played a somewhat different role.

Attempts to decide on a fair and workable key were a central element of the Dublin IV reform proposal, which included a “corrective allocation mechanism”, intended to correct the disproportionate division of responsibilities that derives from the Dublin system (with Dublin IV, like the RAMM, leaving the basic rules untouched). Many commentators have also prepared their own proposals for a distribution key.<sup>128</sup> This includes efforts such as ECRE’s which focus on sets of rules for division of responsibility that replace the responsibility criteria rather than serve to “correct” the basic rules.<sup>129</sup>

Given sensitivity of the question of responsibility sharing and the varied interests that come into play, many proposed distribution keys are complex, attempting to balance the Member States’ disinclination to accept responsibility, objective (demographic, economic) facts about the country, other factors such as labour market needs and related prospects for absorbing new populations, with factors

128 See for more information : E. Guild, C. Costello, M. Garlick, V. Moreno-Lax, ML. Mouzourakis, *New approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons seeking International Protection*, Study requested by the Committee on Civil Liberties, Justice and Home Affairs, 2014.

129 ECRE, *Principles for Fair and Sustainable Refugee Protection in Europe. ECRE’s Vision of Europe’s Role in The Global Refugee Protection Regime: Policy Paper 2*, 2017, available at: <https://bit.ly/3raOQJE>

that are related to the person, such as family, community and skills, and some element of preference. In terms of the latter, the applicants' preferences appear in traditionally proposals for a fairer system ranging along a spectrum, from free choice of the applicant to no choice. Often, prioritisation and weighting of factors add to the complexity.

The key proposed here has the advantages of simplicity, objectivity and quantifiability, which are considerable merits. Where it falls short are in terms of an assessment of fairness widely writ and in terms of workability.

As mentioned above, fairness has different dimensions, including fairness for the Member States and fairness for the applicant. In terms of the former, assessing the fairness of the proposed distribution is difficult because it is impossible to predict the outcomes of all the distribution rules due to the following uncertainties.

First, as described above, the basic rules remain the same; some countries consider these rules fair, others do not. The extent to which the rules will be applied (i.e. the extent to which the hierarchy will be respected) in the future compared to the past is unpredictable. Thus, the outcomes of the basic rules that solidarity mechanisms are supposed to correct are unclear. Second, if there is a situation of disembarkation after SAR or migratory pressure and a Member State is deemed to be entitled to solidarity support, the needs will be identified by the Commission and based on many factors. The distribution key only determines which Member State provides which contribution; the decisions on what is to be provided derives from the needs assessment and many uncertainties arise about the needs to be identified. A final uncertainty is whether the Member States will actually provide what is stipulated.

The second dimension of fairness is fairness for the applicant, and a range of issues arise. Long before questions of applicants' choices or preferences come into play, it remains the case that equal conditions for applicants do not pertain across the Member States.<sup>130</sup> There are great divergences when it comes to implementation of EU and international law and relatedly in terms of conditions and rights for applicants in asylum systems. At the farthest extreme are Member States which are flagrantly violating EU law and where applicants may be subject to inhuman and degrading treatment, or where applicants may face (chain)*refoulement*. There are Member States to which courts regularly block transfers for individuals based on these factors.<sup>131</sup> Without these factors being addressed, a distribution system will give rise to the risk that applicants are distributed to countries where they are not safe.

Less extreme but also significant are divergences in the provision of reception conditions, in the use of detention, and in the outcomes of decision-making. These issues are directly relevant to the fairness for the applicant because their fundamental rights are affected but also in any ordinary usage of the word "fair". ECRE repeats the provisions in international law referred to above by which there is no interdiction of onward movement when there is a difference in protection standards.

An additional and controversial factor when considering the fairness of the distribution key for the applicant is that at no stage is the applicant's preference taken into account. In this longstanding controversy, for some commentators not considering the preference of the applicant immediately renders the system unfair. For others, it would rather be unfair to allow a preference and applicants should accept protection wherever it is offered (and it may also be believed that they would do so if they really needed protection). The RAMM tends towards the latter assessment.

ECRE refrains from entering the debate here, but reiterates its position that there are often rational and understandable reasons for onward movement, such as language, family, community and historical links.<sup>132</sup> Given the average length of displacement, factors such as the likelihood of finding work are also relevant.

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130 See: AIDA country updates, available on [www.asylumineurope.org](http://www.asylumineurope.org).

131 Official positions against transfers were adopted by some countries in respect of Greece and Hungary. In 2019, transfers to Greece remain suspended as a matter of policy as is the case for the United Kingdom, Spain, and Portugal, which have maintained a suspension policy since the *M.S.S. v. Belgium and Greece* judgment. ECRE (AIDA), The implementation of the Dublin III Regulation in 2019 and during COVID-19, August 2020, available at: <https://bit.ly/3apWYAt>.

132 Poppy James and Dr. Lucy Mayblin, Factors influencing asylum destination choice: A review of the evidence, 2016; Dutch Advisory Committee on Migration Affairs, Advisory report, Secondary movements of asylum seekers in the EU, 2019.

Disregarding the preference of the applicant may or may not be fair, however the question of feasibility also arises. If there is no reference to applicants' preferences then it becomes more likely that applicants move on themselves irregularly, despite the penalties that result. The proposed change to the Long-Term Residents Directive to allow beneficiaries of international protection to qualify for long-term resident status after three years rather than five is useful in providing an incentive to stay and should be maintained.

### **Article 55 – Return sponsorship**

Article 55 sets out the concept of return sponsorship, one of the novelties of the Pact. Return sponsorship is a new form of solidarity whereby one Member State supports another to return or deport a person to another country, usually their country of origin or residence. The list of activities that qualify as “sponsoring” a returnee are listed at Article 55(4). The reason for the introduction of return sponsorship as a form of solidarity is not spelled out. The closest the Explanatory Memorandum gets is in stating that it is to allow benefitting Member States “to be better able to manage the increasing share of mixed migration flows”.<sup>133</sup> The inclusion of return sponsorship is consistent with the strong focus on return and the efforts to bring together asylum and return processes that run through the Pact. The reasoning beyond its introduction is also likely to be political.

For the Commission, the introduction of the concept of return sponsorship is an attempt to square the circle of solidarity, that is, to reconcile the irreconcilable positions of the Member States. The EC staff working document further states<sup>134</sup>: “By setting out the broad assessment of pressure and the responses that would be necessary to deal with the situation, including on returns, the issue raised by a number of Member States that relocation can be a “pull factor” is also addressed. By means of providing for the possibility of return sponsorship it is clear that the Union is able to tackle the challenges of migration in a holistic manner”.

For some Member States, solidarity has to be compulsory, especially for as long as the basic rules remain unfair (in their view) or unapplied. For other Member States, solidarity cannot be compulsory, and indeed their objection to the mandatory nature of relocation undermined the relocation decisions of 2015 and helped to stymie the 2016 CEAS reform package. The Commission proposes compulsory solidarity but offers a new type of solidarity in return sponsorship, hoping that the Member States will be able to accept that solidarity becomes compulsory if they are able to choose the form of solidarity to provide.

Previous efforts to resolve the conflict involved different versions of “flexible” solidarity and options to “buy out” of solidarity by providing or foregoing funding.<sup>135</sup> Given that the Member States which oppose compulsory solidarity tend to support return, it may be hoped by the Commission that return will be appealing enough to them that they set aside their objections. It is also a way for the Commission to call the bluff of these Member States by offering them something they support which it is harder for them to say no to, especially in the context of criticism of other Member States for not returning sufficient numbers of people.

While acknowledging the political background and the thinking behind the proposal for return sponsorship, ECRE raises a number of concerns.

Return sponsorship distorts the idea of solidarity, which should be mutual support among Member States to meet the objectives of the EU *acquis* on asylum, the creation of a common system for international protection in Europe. ECRE does not subscribe to the notion that increasing return rates is central to making asylum systems function in Europe or in increasing protection space.<sup>136</sup>

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133 Explanatory memorandum, p.12.

134 COMMISSION STAFF WORKING DOCUMENT Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], SWD/2020/207 final, September 2020, available at: <https://bit.ly/2YmJnmO>, p.76.

135 See: Maarten den Heijer, Corrective allocation or effective solidarity? The Slovak Presidency non-paper on the revision of the Dublin system, March 2017, available at: <https://bit.ly/3pnzvUR>

136 ECRE, Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded, October 2020, available at: <https://bit.ly/2Mb2Q7v>.

The proposal is likely to be unsatisfactory to both groups of Member States it is supposed to appease. For those who insist that solidarity be compulsory, their primary concern is to have additional support from Member States in the examination of applications and adequate resources to secure reception capacity. Solidarity is seen as compensation for the unfairness of the basic rules when it comes to responsibility for applications/applicants. In addition, the sponsoring Member State may discharge its duties quite easily,<sup>137</sup> as under Article 55(4) the activities include providing counselling on return and reintegration to the persons concerned; providing logistical, financial and other material or in-kind assistance, including reintegration, to persons willing to depart voluntarily; leading or supporting the policy dialogue and exchanges with the authorities of third countries for the purpose of facilitating readmission; contacting the competent authorities of third countries for the purpose of verifying the identity of third-country nationals and obtaining a valid travel document; and organising on behalf of the benefitting Member State the practical arrangements for the enforcement of return, such as charter or scheduled flights or other means of transport to the third country of return.

For the Member States opposed to solidarity, they will object to assuming responsibility should the return sponsorship fail. It is hard to imagine that many of the Member States opting for return sponsorship will actually accept the “sponsored” people. It looks likely that the system will break down at that point.

Practical challenges concern how a sponsoring Member State will actually provide the support and whether it helps or hinders. It will presumably involve deployment of people to carry out tasks such as return counselling. It is perhaps easier to see how a sponsoring Member State can assist with liaison with third countries (Article 55(4)(c)) particular Member States have contacts and others do not. Given the paltry numbers of returns, though, would they be prepared to use their leverage to increase the return of people from another Member States rather than for securing readmission of people from their own territory? Ultimately, one of the major sticking points is that return sponsorship may not increase returns, the main obstacle to which is the lack of cooperation of third countries.

Given all of these factors return sponsorship starts to look unappealing to Member States, as well as unworkable, but that does not mean that they will be encouraged to select other forms of solidarity because the very inclusion of return sponsorship is likely to render it politically difficult to choose another option, as mentioned above.

Fundamental rights concerns arise due to the provision that if the person has not been returned after eight months they will become the responsibility of the sponsoring Member State (Article 55(2)). The same concerns described above about the lack of protection arise, especially as some of the Member States likely to choose return sponsorship are characterised by a lack of respect for EU asylum law. The key question is whether the sponsoring state will adopt a new return decision after the transfer. If it does, the procedure is extended. If it relies on the initial decision, it will be bound to enforce a decision which it did not issue. Although this option is favoured by the Commission, the conditions of legal stay are not completely harmonised across the EU. Since return sponsorship based on a single return decision would need to rely on the Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals,<sup>138</sup> the Commission should carry out an implementation assessment of that directive to shed light on implementation challenges.<sup>139</sup>

Other fundamental rights concerns relate to the prolongation of the return process, the prolongation of related detention measures, the prolonged state of limbo for the applicant and challenges attached to accessing an effective remedy that all arise when a person with a return decision is to be transferred

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137 ECRE, Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded, October 2020, available at: <https://bit.ly/2Mb2Q7v>.

138 Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, available at: <https://bit.ly/3rZV1AY>.

139 Although recital 27 provides that states *may* recognise the decision issued by the benefitting state in application of the Directive 2001/40/EC, in practice it would be necessary, unless the sponsoring state would adopt a new decision.

to another Member State. As regards detention, it can be expected that the person would be detained after the transfer. In addition, there is a risk of cumulative lengths of detention and the person would be detained for a period exceeding legal limits in each of the involved Member States.

It is unclear why it can be presumed that the sponsoring Member State will succeed in returning the person after the transfer if such return was not possible during eight months despite joint efforts of two Member States. Extending the return procedure hampers both the effectiveness and human rights compliance of the EU return system. Hence, for the return sponsorship mechanism to fulfil the Commission's goal it should provide that after the period of sponsoring the person should receive a permit in the benefiting state.

ECRE thus recommends the removal of return sponsorship as a solidarity option.

## **Chapter II Procedural requirements : Articles 57 and 58 – Procedures before and after relocation**

These articles attempt to codify and expand on some of the practice on relocation that has developed in recent years. ECRE makes four observations on the procedures for relocation outlined:

- First, Article 57(3) expressly sets out that “meaningful links” between the person and countries of relocation should be taken into account. This is a positive element.
- Second, the Articles include ample provisions on security checks, perhaps intended to reassure relocating Member States. Both the benefiting and the relocating Member States check that the person is not a danger to “national security or public order”. One of the obstacles to relocation during the implementation of the Relocation Programmes of 2015/2016 identified by ECRE was the spurious use of national security grounds for rejection of relocation candidates.<sup>140</sup> The proposal requires a Member State deciding to reject a person to provide information on “the nature of and underlying elements for an alert from any relevant database”, which constitutes a welcome attempt to make sure that rejections are justified. Without any means of redress, however, it is still possible that Member States misuse these grounds for rejection.
- Third, the timelines for decisions on relocation requests are short (one week with the possible extension to two weeks in exceptional circumstances). This is important given the need to relocate rapidly to ensure access to the procedure.
- Fourth and finally, a major concern arises due to the apparent reintroduction of the “backloading” of responsibility determination which was also envisaged in the Dublin IV corrective allocation mechanism.

On the final issue, at Article 58(2), it is mentioned:

***2. Where the Member State of relocation has relocated an applicant for whom the Member State responsible has not yet been determined, that Member State shall apply the procedures set out in Part III, with the exception of Article 8(2), Article 9(1) and (2), Article 15(5), and Article 21(1) and (2).***

Thus, for some people, a partial form of responsibility determination will take place after relocation, where the criteria will be considered except for all the provisions on country of first entry or registration (Article 8(2), Article 9(1), Article 15(5), Article 21(1) and (2); and possession of a visa or residence permit from another Member State (Article 9(2)).

As stated in the comments on Chapter III, the scope of the rules on determination of responsibility remains unclear. As well as the lack of clarity, ECRE is also concerned about potential backloading and reproduces here its arguments made in relation to analogous provisions in Dublin IV.

<sup>140</sup> ECRE, Relying on Relocation: ECRE Proposal for a Predictable and Fair Relocation following Disembarkation, January 2019, available at: <https://bit.ly/3orLmkq>.

Firstly, the proposal adds an unnecessary procedural layer to the process by turning what was a bilateral procedure under the Relocation Decisions to a tripartite arrangement, involving a benefitting Member State, a Member State of allocation and a Member State responsible. Under the proposal, an asylum seeker would apply in one country, undergo a transfer to a second country where he or she would have a personal interview, and possibly undergo a subsequent transfer to a third country where his or her application would be examined.

...ECRE recalls that the **allocation process and the Dublin procedure are not an end in itself, but a means towards enabling asylum seekers to rapidly access the asylum procedure**, as is made evident in the reasoning of the CJEU's ruling in *M.A.*<sup>141</sup> The ostensible efficiency of this automatic allocation process in reality creates more procedural complexity than it aims to resolve, and may result in unnecessary transfers of asylum seekers. The administrative and human costs for Member States and asylum seekers stemming from such complexity clearly advocate against such a mechanism.

Secondly, **Article 39(d)-(e) Dublin IV** unduly restricts the scope of applicable responsibility criteria in the assessment of the Member State responsible by excluding the residence documents / visas and entry criteria set out in **Articles 14 and 15 Dublin IV**. Fragmenting the hierarchy of Dublin criteria does not seem appropriate from the viewpoint of legal certainty or principle – especially as far as residence permits are concerned – and is liable to complicate the implementation of the corrective allocation mechanism by introducing further complexity.

ECRE recommends that responsibility determination take place before departure. If the deadlines are kept and there are extenuating circumstances, and it takes place in the Member State of relocation then all criteria should be considered. The Member State of relocation should also be encouraged to assume responsibility unless family criteria apply.

## Article 58

Procedure after relocation

1. The Member State of relocation shall inform the benefitting Member State of the safe arrival of the person concerned or of the fact that he or she did not appear within the set time limit.
2. ~~Where the Member State of relocation has relocated an applicant for whom the Member State responsible has not yet been determined, that Member State shall apply the procedures set out in Part III, with the exception of Article 8(2), Article 9(1) and (2), Article 15(5), and Article 21(1) and (2).~~

~~Where no Member State responsible can be designated under the first subparagraph, the Member State of relocation shall be responsible for examining the application for international protection.~~

The Member State of relocation shall indicate its responsibility in Eurodac pursuant to Article 11(1) of Regulation (EU) XXX/XXX [Eurodac Regulation].

~~3. Where the Member State of relocation has relocated an applicant for whom the benefitting Member State had previously been determined as responsible on other grounds than the criteria referred to in Article 57(3) third subparagraph, the responsibility for examining the application for international protection shall be transferred to the Member State of relocation.~~

**3. Responsibility determination after relocation can solely take place under extenuating cir-**

141 CJEU, *M.A. v Secretary of State for the Home Department*, para 55.

**cumstances, and provided that all time lines are being respected. The Member State of relocation should consider all criteria.**

**~~The Member State of relocation shall indicate its responsibility in Eurodac pursuant to Article 41(3) of Regulation (EU) XXX/XXX [Eurodac Regulation].~~**

4. Where the Member State of relocation has relocated a beneficiary for international protection, the Member State of relocation shall automatically grant international protection status respecting the respective status granted by the benefitting Member State.
5. **~~Where the Member State of relocation has relocated a third-country national who is illegally staying on its territory, of Directive 2008/115/EC shall apply.~~**

ECRE further recommends amending Article 57(3), which sets criteria for ineligibility. Article 57(3), final paragraph states that applicants for whom the benefitting MS is responsible under the responsibility criteria in Article 15 to 20, and 24 shall not be eligible for relocation. While this entails an important restriction on relocation, the exclusion, however, does not apply to applicants under Article 21 on the first country of entry criteria, as well as unaccompanied children without family members for whom the first member state where they registered would be responsible.

#### Article 57

##### Procedure before relocation

...

3. Where relocation is to be applied, the benefitting Member State shall identify the persons who could be relocated. Where the person concerned is an applicant for or a beneficiary of international protection, that Member State shall take into account, where applicable, the existence of meaningful links between the person concerned and the Member State of relocation. Where the identified person to be relocated is a beneficiary for international protection, the person concerned shall be relocated only after that person consented to relocation in writing.

Where relocation is to be applied pursuant to Article 49, the benefitting Member State shall use the list drawn up by the Asylum Agency and the European Border and Coast Guard Agency referred to in Article 49(2).

**~~The first subparagraph shall not apply to applicants for whom the benefitting Member State can be determined as the Member State responsible pursuant to the criteria set out in Articles 15 to 20 and 24, with the exception of Article 15(5). Those applicants shall not be eligible for relocation.~~**

## Part VI Amendments to other Union Acts

### **Article 71 – Amendments to the Long Term Residence Directive**

The amendment reduces the period of “legal and continuous” residence before acquisition of long-term right to remain from five to three years for beneficiaries of international protection. In doing so, the amendment would assist allow for the better integration, including enhancing job prospects, as well as security and the prospect of a durable solution for beneficiaries of international protection in Europe. Given the prolonged periods of displacement experienced by most refugees (on average 16 years), this is a highly welcome change.

Nonetheless, it may not prove to be a sufficient disincentive to onward movement. For a functioning European asylum system, and to reduce onward movement, it is important to enable mobility between the Member States for beneficiaries of international protection. A positive incentive for asylum seekers to remain in the Member State responsible for their asylum application would be preferable and could involve the introduction of mobility within the EU for beneficiaries of international protection when they have a job offer available or similar kinds of mobility under certain conditions.

An additional dilemma is built into the proposal: a beneficiary of international protection in a Member State with limited labor market access would have severe difficulties in obtaining the prerequisite for benefiting from the amendment of stable and regular resources (as per Article 5(1)(a) of the Long Term Residence Directive).

### **Recommendation**

ECRE strongly supports the proposed amendment of the Long Term Residence Directive to allow acquisition of the right to remain after three years of residence, but also recommends exploration and introduction of options which increase intra-EU mobility for beneficiaries of international protection.



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