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WORKING PAPER SERIES NO. 105

**‘We Need to Talk about Dublin’**  
Responsibility under the Dublin System as a  
blockage to asylum burden-sharing in the  
European Union

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# Working Paper Series

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# Glossary and list of acronyms

<i>acquis communautaire</i>	Accumulated legislation and jurisprudence constituting the body of European Union law
<i>Europe passoire</i>	Filter Europe (used metaphorically)
Europol	European Police Office
Eurostat	European Commission Directorate-General in charge of providing statistical information
ALDE	Alliance of Liberals and Democrats in Europe
AMIF	Asylum, Migration and Integration Fund
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
EASO	European Asylum Support Office
EPP	European People's Party
ERF	European Refugee Fund
EU	European Union
EURODAC	European fingerprint database
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
JRS	Jesuit Refugee Service
LIBE	Civil Liberties, Justice and Home Affairs Committee
NAFTA	North American Free Trade Agreement
OAU	Organisation of African Unity
SPD	German Social Democratic Party
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

# 1 Introduction<sup>1</sup>

In *We Need to Talk about Kevin*, Lionel Shriver tells the story of a mother pondering how innate personal characteristics led her son, Kevin, to destruction. Substitute ‘mother’ for ‘European Union’ and ‘Kevin’ for ‘Dublin’, however, and a story not so dissimilar starts to unfold. The allocation of responsibility for processing asylum claims in the European Union (EU) is part of a broader set of measures forming its Common European Asylum System (CEAS). Regulation (EU) 604/2013 (Dublin III Regulation) lays down the criteria and mechanisms for determining which Member State is responsible for examining an asylum application, with the aim of having every asylum claim in the Union processed by a single Member State. The implementation of the Regulation is facilitated by EURODAC, a fingerprint database established by Regulation (EU) 603/2013 (EURODAC Regulation), whereby Member States register fingerprints of asylum seekers and irregular migrants in order to identify the point of entry or the first application made by a claimant. These two instruments make up the EU machinery for the distribution of asylum processing responsibility, which is commonly referred to as the ‘Dublin system’.

The allocation of responsibility under the Dublin system has generated a multi-faceted debate which starkly illustrates what Turton (2003: 15) describes as the ‘gulf that seems to have opened up between the way in which policy makers conceptualise forced migration and the way in which it is conceptualised by advocates and activists’, as well as courts. On one hand, the perspective of asylum seekers and their human rights on the Dublin system has formed the subject of broad academic contribution. Scholars (Noll 2000; Byrne *et al.* 2002; Guild 2006) and advocacy organisations (ECRE 2008; UNHCR 2009; ECRE 2013; JRS 2013) have concentrated on the impact of the Regulation on applicants and their fundamental rights to liberty, private and family life, and *non-refoulement*. More particularly, judicial intervention in the Dublin mechanism, which has drawn unprecedented attention following the landmark rulings of the European Court of Human Rights (ECtHR) in *MSS v Belgium and Greece* (2011) 53 EHRR 2 and the Court of Justice of the European Union (CJEU) in *NS v Secretary of State for the Home Department* [2012] 2 CMLR 9, has been comprehensively commented on in a large corpus of academic work (Costello 2012; Den Heijer 2012; Moreno-Lax 2012; Papageorgiou 2012). Rights-based critiques of the Dublin Regulation have therefore addressed a substantial part of this debate.

At the other end, however, there seems to be a side of the EU’s approach to allocation of processing responsibility which has not been explored with equal rigour. The viewpoint of Member States in the Dublin debate has so far been largely addressed as a peripheral issue to the broader question of the system’s effect on asylum seekers. The majority of academic commentary therefore stops short of looking deeper into the foundational *raison d’être* of the Dublin system and to the benefits or costs it may bring to those operating it. This scholarly gap runs the risk of neglecting important questions around the rationales underlying allocation of asylum responsibility in the Union when advocating for change in the Dublin regime. Failure to understand the Member States’ interests could account for the limited effect of the recent recast of Regulation (EC) 343/2003 (Dublin II Regulation) by the Dublin III

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<sup>1</sup> I am very grateful to Professor Cathryn Costello for her helpful supervision and advice throughout the development of this paper, as well as to Dr Ioannis Papageorgiou and Dr Barbara Harrell-Bond for their comments on previous drafts.

Regulation.<sup>2</sup> Despite a lengthy process of negotiations from 2008 to 2013, EU institutions have shied away from critical questions in the Dublin debate, thereby perhaps reducing the reform to ‘lipstick on a pig’ (Peers 2013: 16).

The Member States’ perspectives on the allocation of responsibility for processing asylum claims in the EU are essential to any comprehensive debate, all the more so given that governments understand Dublin as a mechanism primarily unconcerned with the asylum seeker herself. ‘[T]he Dublin system erects a conceptual wall between the asylum process and the refugee. It allocates responsibility for a process, rather than for a person’ (Durieux 2013: 235). This distance between processing responsibility and the asylum seeker was heavily marked in the mechanism’s first form under the Schengen Agreement 1985 and the Dublin Convention 1990, both of which handled applicants solely as ‘objects of state acts’ rather than rights holders (Guild 2006: 636). It has been equally reaffirmed by the CJEU’s recent finding in *Abdullahi v Bundesasylamt* [2013] ECR I-0000 that an asylum seeker cannot challenge a transfer decision on the ground that the Dublin criteria discussed below were wrongly applied by the sending Member State.

From the vantage point of Member States, the debate mainly revolves around the different ways in which responsibility for processing asylum claims may be distributed in the Union. In the absence of an EU-wide asylum status or mutual recognition of Member States’ positive asylum decisions, a country’s responsibility for the examination of an application also translates into responsibility to afford protection if the claim is accepted (Costello 2012: 314). Member States thus attach significant weight to establishing an appropriate model of distribution of responsibility.

One option, currently applied through the Dublin system, is to allocate individual national responsibility on the basis of commonly agreed standards. Hence Chapter III of the Dublin III Regulation sets out the following hierarchy of criteria to determine the Member State responsible for processing an asylum application: family unity under Articles 8-11, issuance of residence permits or visas under Article 12, irregular entry or stay under Article 13 and visa-waived entry under Article 14. In the absence of these grounds, the Member State in which an asylum application was first made becomes responsible under Article 3(2). At the same time, however, Dublin permits a Member State to derogate from these rules in order to assume responsibility for an asylum claim under the ‘discretionary clauses’ contained in Article 17. Finally, Article 3(3) of the Dublin III Regulation and Articles 38 and 39 of Directive 2013/32/EU (Asylum Procedures Directive) codify the ‘safe third country’ concept, under which Member States may refuse to examine asylum claims made by applicants who have irregularly entered their territory from a non-EU country considered safe under certain criteria and return such applicants to that country (Kjaerum 1992: 526; Guild 2006: 637).

A second approach, commonly referred to as burden-sharing, would favour the design of a mechanism of collective responsibility, with a view to ensuring that responsibility for processing asylum claims is fairly and equitably distributed between all Member States in the Union on the basis of their respective reception capacities. Burden-sharing becomes highly pertinent against a backdrop of inequalities in the reception of asylum seekers in the EU. On one hand, the majority of asylum claims are shouldered by a limited number of Member

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<sup>2</sup> The recast technique in EU law-making consists in amending parts of an existing legislative act. It is defined as ‘the adoption of a new legal act which incorporates in a single text both the substantive amendments which it makes to an earlier act and the unchanged provisions of an act’ (European Parliament *et al.* 2002: 2).

States; over 50% of the total 434,000 asylum applications made in the Union's 28 countries in 2013, for instance, were registered in Germany, Sweden and France alone (Eurostat 2014: 4). At the same time, several Member States such as Greece, Bulgaria, Italy or Malta face significant pressures on their asylum systems' reception capacities, calling for an EU-wide response.

The concept of burden-sharing is no new creature in the field of refugee protection. One could look to Article II(4) of the 1969 Organisation of African Unity (OAU) Refugee Convention, the Draft Council Resolution on Burden-Sharing tabled by the German Presidency in 1994 or even to academic suggestions on global burden-sharing mechanisms (Hathaway and Neve 1997) to find early appearances thereof in policy debates. Burden-sharing, however, is a multi-faceted idea encapsulating widely different forms of distribution of obligations. Noll (2000: 270) has arguably provided the most comprehensive account of burden-sharing to date by dividing it into three forms: sharing norms, sharing money and sharing people. For the purposes of this paper, the concept of burden-sharing will focus on the physical distribution of protection seekers.

The CEAS provides an illuminative case study of the delicate relationship between individual and collective models of allocating processing responsibility. Following the Lisbon Treaty reform, Article 80 of the Treaty on the Functioning of the European Union (TFEU) provides that the EU's common policy of asylum is governed by 'the principle of solidarity and fair sharing of responsibility' between Member States. This newly established binding principle is one among several factors triggering policy debates around how the Union may opt for a model of allocation of processing responsibility in line with burden-sharing (European Commission 2011; Council of the European Union 2012; European Parliament 2012). In that light, the mechanism for early warning, preparedness and crisis management brought to life by Article 33 of the Dublin III Regulation illustrates an explicit effort on the part of the Union to combine Dublin responsibility with burden-sharing measures.

Yet the individual and collective models of asylum processing responsibility seem to be underpinned by an uneasy relationship. The majority of Member States have firmly and consistently rejected binding measures of equitable distribution of processing responsibility such as a mechanism for the relocation of asylum seekers and beneficiaries of international protection (European Commission 2013) or joint processing of asylum applications through a centralised decision-maker on refugee status determination (Urth *et al.* 2013: 114). In that light, the implementation of the Article 80 TFEU principle of solidarity in the CEAS seems to be at 'something of an impasse at present' (Vanheule *et al.* 2011: 104) Conversely, the recent adoption of the Dublin III Regulation reflects continuing support on the part of most Member States for the Dublin system as the preferred model of allocation of processing responsibility.

The idea of equitable distribution of obligations across the EU therefore seems to come up against an unavoidable blockage, as Member States continue to adhere to Dublin (Hailbronner 1993: 33; Byrne and Shacknove 1996: 214). To understand the reasons for that continued adherence, one need critically engage with the reasons why Member States have been reluctant to question Dublin as a policy option throughout the evolution of the CEAS.

### **Aim and methodology of this paper**

This paper explores this question by evaluating the Dublin system as a carrier of embedded interests which make it less likely for Member States to allocate processing responsibility on the basis of burden-sharing. A number of points require preliminary clarification before one embarks on this enquiry, however.

Firstly, the term ‘Member States’ needs to be qualified at three levels. The number of Member States operating the Dublin system has increased dramatically throughout different stages of Dublin’s life, as the EU has evolved from a Union of 12 in 1990 to a present Union of 28, while 4 non-EU countries also participate in the system: Norway, Liechtenstein, Iceland and Switzerland. The stark increase of Member States following the 2004 EU enlargement equally translates into a rising diversity of national interests in the area of asylum, even though some common traits may exist between all 28 countries. This is not to suggest that Member States in the Council never speak with one voice. It is rather to clarify that the Council represents a dynamic ensemble of interests *vis-à-vis* the allocation of asylum processing responsibility which may often push in different directions. Recent consultations on the future development of home affairs policies in the EU can only illustrate the divergence of national views:

*In the field of asylum, a number of contributions request an effective and assessed implementation of the current legislation before considering any burden-sharing mechanism, insisting notably on national prerogatives as far as protection-granting is concerned and on the voluntary aspects of relocation. Others, especially in the context of an asymmetric geographical pressure and intermittent international crises, call for a more integrated and criteria-based (ex. GDP per capita burden) approach* (Council of the European Union 2014: 4).

Moreover, ‘Member States’ would best be seen as heterogeneous entities with disaggregated interests. National asylum authorities’ views on the Dublin system may differ from the policies formulated by the country’s justice and interior ministry. Countries’ positions ‘at home’ may equally diverge from the views of their political envoys in Brussels. Concretely understanding which entities of the state support Dublin therefore proves a particularly delicate task. Given research and space constraints, this paper will consider the stance taken by Member States on the basis of their governments’ stated positions at EU level.

Further, while the terms ‘Member States’ and ‘EU’ or ‘Union’ may often appear to be used interchangeably throughout this paper, one need take into consideration the diversity of institutional voices in the Dublin debate. The EU comprises other relevant actors in this area, including the European Commission and, more recently, the European Parliament and the CJEU, whose positions may or may not converge with those of some or all Member States.

Secondly, understanding how and by whom the development of the Dublin system is driven seems to test different theoretical accounts of European integration. On one hand, according to a liberal intergovernmentalist account (Moravcsik 1998), the Dublin system could be conceptualised as the product of bargaining between different national preferences among EU governments. Similar to any other bargain, agreement on Dublin would therefore stem from a weighing process between the costs and benefits it brings both to individual Member States and to the Union as a whole. In that light, scholars such as Thielemann and Armstrong (2013) have developed a public goods framework to explain how sceptical Member States bought into the mechanism in exchange for a number of collective benefits in the broader policy area of home affairs.

The interstate dimension of the Dublin debate remains present to a large extent. Yet an intergovernmentalist reading of Dublin as a pure product of states’ rational choices is tested to a large extent by the evolution of the European project itself. Institutional revisions such as the Amsterdam Treaty (Byrne 2002: 373) and the Lisbon Treaty (Kostakopoulou 2010: 154) have gradually nuanced the power of states in asylum and immigration policies by introducing an order of increasing multi-level governance. The role played by new decision-making actors such as the European Commission and the European Parliament, and mechanisms of judicial



control by the CJEU and the ECtHR, in the development of the Dublin system should not be overlooked. Very often, as the rulings in *MSS* and *NS* illustrate, these actors have placed constraints on the application of the mechanism against the wishes of Member States, thereby challenging the pertinence of intergovernmentalism as a lens for understanding Dublin.

Thirdly, the quest for ‘embedded interests’ in the Dublin system may invite different theoretical perspectives on the very nature of a state’s interests in this field. A neorealist understanding of ‘interests’ would assume each Member State as a rational actor seeking to maximise power. This account could equally be relied upon to explain why Member States have established a common mechanism for the allocation of processing responsibility. As neoliberal theorists such as Keohane (1984) have argued, institutions facilitate cooperation between states by reducing uncertainty and decreasing transaction costs. Under that reading, one would therefore seek to explain the decision to establish and maintain the Dublin system with reference to pursuing rational ends.

Yet the question of what constitutes a rational choice for a state in the area of migration control requires some degree of unpacking. While a *non-entrée* policy would primarily be understood as a functional means intended to deter the entry of asylum seekers in the territory of a state, it may at the same time carry inherent ‘symbolic and perceptual appeal... regardless of its actual deterrent effect’ (Andreas 2000: 4). With reference to similar questions raised in the policing of the US-Mexico border, Andreas (2000: 9) explains that policies which may be ‘suboptimal from the perspective of a means-ends calculus of deterrence can be optimal from the political perspective of constructing an image of state authority and communicating a moral resolve’. Looking at the distribution of processing responsibility from a strictly instrumental lens may therefore lose sight of potential non-functional interests driving Member States’ support for the Dublin system. As this paper will argue, such a rational-choice account seems to ignore the ways in which Dublin becomes less about rational ends and more about symbolic ones for the Union.

Finally, the term ‘*embedded* interests’ has been chosen in order to depict the Dublin system as a mechanism with a potential life of its own. A historical institutionalist account may provide useful insight into the ways in which this instrument has acquired value as *acquis communautaire* throughout its lifespan. Interestingly, the very notion of *acquis communautaire* connotes a historically established corpus of rules inherited by and binding on future policy-makers (Pierson 1996: 147). This theoretical framework could serve to explain Dublin’s endurance throughout the development of the CEAS. As this paper will illustrate, despite significant changes in the Union’s asylum landscape, the various objectives pursued by the Dublin system are often taken for granted and unquestioned in EU-level policy debates and judgments. Path dependence therefore seems to have rendered the Dublin logic of responsibility for processing asylum claims more ‘sticky’ (Pierson 1996: 143) and self-reinforcing (Krasner 1989) for Member States with every new adoption, thereby giving it the status of ‘cornerstone’ of the CEAS (European Council 2010: 6.2).

To embark on these questions, this paper will draw upon textual analysis of official EU policy documents reflecting the positions of Member States, the European Commission and the European Parliament on Dublin, whilst relying on relevant jurisprudence of the CJEU and ECtHR to reflect the perspective of courts on the mechanism. It will also draw upon selected secondary sources in order to engage with and build upon the main arguments developed by existing literature in the Dublin debate.

This paper will explore the Dublin system's objectives, and its appropriateness in delivering them, by way of three tenets: deflection, efficiency and control. It will submit that the mechanism's peculiar interpretation of responsibility for processing applications accounts for its failure to deflect asylum claims by creating incentives for Member States to defect from the allocation criteria and by prompting courts to halt transfers to external border Member States intended to receive the bulk of applications. The efficiency objectives of rapid processing of asylum claims and prevention of multiple applications and 'asylum shopping' are also not appropriately met, as the Dublin system causes significant delays in the processing of applications and provides asylum seekers with incentives to engage in irregular secondary movement. This built-in failure seems to reveal the symbolic objective of asserting control over entrants in their territory as the primary interest behind Member States' support for Dublin.

## 2 The deflection objective

### **The aim: externalisation of migration control**

Deflection should be understood as a twofold objective, as it aims to shift protection claims outside the Union as a whole, on one hand, and within the Union on the other. However, the allocation of responsibility for processing asylum claims in the Dublin context is particularly linked with political concern around the deflection of migration flows between Member States in the Union. The express political linkage drawn, for instance, between the adoption of the Dublin II Regulation and the fight against irregular migration during the catalytic 2002 Seville European Council seems to contextualise the Dublin system within a broader arsenal of migration control devices (Aus 2006: 23; Thielemann and Armstrong 2013: 148-149). The contemporary trend of the globalisation of migration control, no less present in the EU context, has formed the subject of academic and policy debate. Gammeltoft-Hansen (2011: 7-8) has accurately summarised it as a tactic grounded in states' belief 'that by delegating authority beyond their territory they are able to release themselves – *de facto* or *de jure* – from some of the constraints otherwise imposed by international law'. States have thus formulated a broad range of elaborate *non-entrée* policies on that basis to delegate responsibilities attached to their territorial sovereignty to other states. This process, often described as offshoring or externalisation of migration control, has been insightfully captured as 'commercialisation of sovereignty' (Gammeltoft-Hansen 2011: 31-32), a term which encompasses the conception of a state's responsibility towards asylum seekers as a tradable commodity.

Looking back to 1990, the original Dublin Convention appears to have been negotiated against a blank slate. In the absence of a common mechanism of allocation of responsibility, the 'natural order' of refugee protection would apply: each country would process any asylum claim made on its territory, in accordance with its duties under the 1951 Refugee Convention. In practice, however, territorial asylum responsibility had already been qualified by European States by the 1990s. Through the 'safe third country' concept, developed in Denmark in 1986 and quickly taken up by others, Western European countries were already able to deflect the examination of asylum claims coming from the East (Costello 2006: 4). Following its 1993 constitutional reform, for instance, Germany could expel asylum seekers from its territory under a readmission agreement with Poland, which could in turn return applicants to Lithuania (Byrne 2003: 349).

Why was Dublin then established? An institutionalist perspective could illuminate some of the benefits brought about by a common mechanism for the deflection of asylum claims. The

Dublin Convention served to institutionalise and sophisticate what were existing unilateral 'safe third country' practices into a formal mechanism (Kjaerum 1992: 526; Guild 2006: 637). A common system would promote clarity and efficiency in two ways: setting out clear, commonly agreed rules determining the Member State responsible for examining an application; and monitoring their enforcement by imposing a duty upon that state to receive the asylum seekers for whom it has been deemed responsible.

Secondly, a common mechanism aided Member States in legitimising the 'safe third country' concept by framing the issue of asylum applicants coming from third countries where they have genuine opportunities of protection as a collective action problem. The Preamble of the London Resolution on Host Third Countries, adopted by the Council in 1992 to detail a harmonised EU approach on safe third countries, only echoed Member States' conviction 'that a concerted approach should be made to it' (Council of the European Union 1992: 1). The normative strength of a European mechanism on Member States' domestic asylum policies is particularly acute in the constitutional reforms passed by Germany and France, which linked restrictions on the constitutional right to asylum with the implementation of the Dublin Convention in order to obtain the consent of the German Social Democratic Party (SPD) opposition and socialist President François Mitterrand respectively (Lavenex 2001: 862). Accordingly, Dublin seems to have been primarily intended as a system both facilitating and legitimating the deflection of asylum applications.

The objective in question is by no means uncontroversial. The compatibility of the 'safe third country' concept with the obligations imposed on states by international law, no less with regard to *non-refoulement*, has been heavily criticised (Kjaerum 1992; Hailbronner 1993; Kjaergaard 1994; Byrne and Shacknove 1996; Costello 2005). More specifically in the EU context, however, Guild (2006: 637) correctly points out that the underlying rationale of the Dublin system is difficult to reconcile with the border-free area on which the Union prides itself, as it proves that internal border controls are maintained at least for one category of persons in the internal market: asylum seekers. It therefore seems fallacious to interpret a mechanism for intra-EU allocation of responsibility as a flanking measure to the abolition of internal border controls aimed at preserving the fundamental principle of free movement in the Schengen area, as suggested by Thielemann *et al.* (2010: 31). Quite to the contrary, Dublin seems to be a blatant contravention thereof. For the purposes of the present discussion, however, the deflection objective will be assumed as a legitimate political aim for Member States to pursue.

### **The means: the criteria for responsibility**

The means employed by Dublin to achieve such deflection deserve closer attention. A second look at the allocation criteria of the Dublin Regulation raises sensitive questions around the peculiar meaning attached to responsibility for processing asylum claims in the Union. As discussed earlier, the Dublin system assigns responsibility based on a hierarchy of grounds, ranging from family unity provisions to the 'first country of asylum' principle. More particularly, however, the allocation of responsibility between Member States is based *inter alia* on criteria entirely unrelated to asylum which result in making Dublin a 'back door' policy-maker on immigration, border management and visa policy. An examination of the criteria relating to the issuance of residence documents or visas, irregular entry or stay and visa-waived entry set out in Articles 12, 13 and 14 of the Dublin III Regulation illustrates a conception of responsibility as a corollary of authorisation: the more a country opens its doors to a third-country national, the more responsibility it undertakes for that third-country national's potential engagement in the EU asylum process (Hurwitz 1999: 648; Noll 2000: 189). Under these criteria, Dublin responsibility therefore signals a degree of fault on the part

of the responsible Member State, for it comes as ‘a burden and a punishment for the Member State which permitted the individual to arrive in the Union’ (Guild 2006: 637).

The terminology used by the Dublin III Regulation to describe different procedures for undertaking responsibility for asylum seekers equally evokes a blame-based reading of responsibility. Under Article 18(1)(a), the responsible Member State ‘takes charge’ of an applicant who has applied in a different Member State without engaging in irregular movement; for instance, when the Member State responsible is determined based on the family unity provisions. Conversely, pursuant to Articles 18(1)(b)-(d), the responsible Member State ‘takes back’ a person whose application is under examination, withdrawn or rejected and who is irregularly residing on the territory of another Member State. The conceptual distinction between ‘taking *charge of*’ and ‘taking *back*’ an individual is subtle but normatively charged. The Dublin system implies a degree of blame on the country which allowed an individual to enter the Union and engage in irregular movement by enjoining it to ‘take [her] back’.

Rather unsurprisingly, this blame-based interpretation of responsibility could mandate a dangerous ‘race to the bottom’ in *non-entrée* policies between Member States (Thielemann *et al.* 2010: 33). Article 12 of the Dublin III Regulation has an understandable spill-over effect on Member States’ policies on legal migration. If the issuance of a residence permit or visa to a third-country national leads almost automatically to exclusive responsibility for any future asylum claim made by that third-country national, the issuing Member State would be incentivised to approach the application for admission with much greater caution. Similarly, Article 14 dictates visa policy ‘through the back door’ by attaching remote consequences to a Member State’s decision to waive visa requirements in respect of nationals of a third country. This criterion precipitates the risk of a ‘race to the bottom’ in restrictive visa policies, as it encourages a Member State to maintain visa requirements in order to avoid assuming responsibility for any future asylum claim made in the EU by a third-country national admitted in its territory through visa-waived entry.

Finally, Article 13 applies the ‘safe third country’ concept to EU Member States. The use of the ‘safe third country’ concept by Member States *inter se* makes an uneasy interpretation of asylum processing responsibility by deeming the mere fact of an applicant’s transit through a Member State apt to provide her asylum sufficient to hold that Member State responsible for examining her application. The tenuous bond between irregular entry and asylum responsibility turns the Dublin system into a *de facto* border guard by urging Member States to efficiently protect their borders to avoid the burden of any prospective claim made by an irregular migrant in the Union.

Against that backdrop, Member States situated at the Union’s external borders should inevitably become somewhat uncomfortable with the Dublin system. Understanding why these countries would consent to such a mechanism brings different factors into play. In 1990, the Dublin Convention may have been agreed with hopes on the part of periphery states that the deflection of asylum claims from the centre to the external frontiers of the EU would not work in practice. Asylum responsibility proved in fact to be distributed very differently in practice from what was envisioned by the drafters of the Dublin Convention (Noll 2003: 251). The second Dublin negotiations faced different national interests and concerns, however. The inadequacy of the Dublin Convention as a deflection mechanism was undeniable by 2003, notably in the case of Germany, which received minimal transfers despite its geographical position at the Eastern frontier of the Union (Byrne 2003: 351). In that respect, Member States actively sought to remedy the consequences – anticipated or not – stemming from the flawed

enforceability of the Convention. The establishment of EURODAC by Regulation (EC) 2725/2000, for instance, was a clear indication of Member States' intention to make Dublin work to shift responsibility to the external borders of the Union, with one eye cast on the new 'buffer zone' offered by the 2004 accession countries.

Similarly to the intergovernmental Dublin Convention, the adoption of the Dublin II Regulation required unanimous support from Member States in the Council. The decision to buy into the mechanism therefore revolved around finding a common denominator between national interests in favour of and concerns about shifting responsibility for processing asylum claims. The earlier idea of deflection through 'commercialisation of sovereignty' (Gammeltoft-Hansen 2011: 31-32) finds its way back into this debate, as it correctly connotes that Dublin II responsibility for processing asylum claims was to be traded against a number of benefits for the Member States receiving the bulk of applications. The logic of trading burden for benefits has been captured by theoretical accounts of a public goods framework in the Dublin context.

The broader policy setting of home affairs and internal security provided multiple 'public goods' in exchange for the Dublin II Regulation, ranging from common approaches to irregular migration (Aus 2006: 23) to common visa policies, financial support under the European Refugee Fund (ERF) and the advent of EU agencies such as the European Asylum Support Office (EASO) and FRONTEX (Thielemann and Armstrong 2013: 154-155). Such financial and infrastructural incentives therefore designed the Council's deal as a 'Dublin plus assistance' package which shares common features with other responsibility-shifting agreements beyond the Union such as Australia's 'Pacific Solution' (Howard 2003: 38). Thielemann and Armstrong (2013: 160) stretch the public goods framework further by submitting that external border Member States agreed to Dublin in exchange for a secure Schengen area which would enable their citizens to move freely to Western European countries. The Dublin trade-off would thus be comparable to the reciprocity underlying visa facilitation and readmission agreements negotiated between the EU and neighbouring third countries in the context of Mobility Partnerships (Menz 2014: 9).

Nevertheless, Dublin's blame-based definition of responsibility seems to have seeped into the mechanism's performance to hamper the deflection objective in at least two ways. Dublin has provided incentives for Member States to defect from the allocation criteria in order to avoid responsibility for asylum applications, on one hand, and on the other hand, has been curtailed by 'system collapse' in the very countries intended to receive the majority of claims.

### **Perverse effects**

Albeit framed as a collective action problem, the deflection objective of the Dublin system does not seem to be collectively pursued in practice, as each Member State strives to 'throw the ball' of processing responsibility into the other Member States' court. A number of lessons may be drawn from examples of rule-bending in the implementation of the mechanism. Firstly, a number of Member States have attempted to shy away from responsibility for processing asylum claims by setting unduly high evidential thresholds to fulfil the Dublin criteria. Such attitudes made their first appearance in the early years of the Dublin Convention, whereby Member States systematically refused to follow the Dublin Executive Committee guidelines on standard of proof for the assessment of responsibility criteria (Boccardi 2002: 176-179). Even under the Dublin II Regulation, however, Ireland operated a particularly onerous test by requiring a DNA test as evidence to substantiate a 'take charge' request on family unity grounds (Maiani and Vevstad 2009: 4). Secondly, according to the European Council on Refugees and Exiles (ECRE), Member States often refuse to take into



account information on family members present in the EU submitted at a later stage during a Dublin procedure in an attempt to evade the application of family unity provisions (ECRE 2013: 34).

These cases could account for the scarcity of ‘take charge’ requests based on family unity grounds which, despite their position at the top of the hierarchy of criteria, only make up a worrying 1% of requests, while ‘humanitarian clause’ requests by Member States voluntarily assuming responsibility on humanitarian grounds do not exceed 0.5% (ECRE 2013: 49, Annex V).<sup>3</sup> On the other hand, the Article 13 criterion of irregular entry or stay forms the most commonly used ground for Dublin ‘take back’ requests (ECRE 2013: 6, 41), thereby confirming fears that the Union’s collective disincentive to properly implement the hierarchical order of criteria for responsibility leads to specific Member States becoming responsible by default pursuant to the irregular entry criterion or the first country of asylum principle (Maiani and Vevstad 2009: 3; Costello 2012: 314; Mitsilegas 2012: 335).

However, recent asylum crises in those Member States situated at the Union’s geographic contours have left the operation of the Dublin system in a precarious position. The active role of courts in response to such crises comes as a vivid illustration of multi-level governance in the area of processing responsibility, as it has placed constraints on the mechanism against Member States’ deflection interests. Despite the Council’s successful rejection of the Commission proposal for an emergency clause on the suspension of transfers in the Dublin III Regulation (Commission 2008a: 52), Dublin’s deflection capacities have been significantly curtailed by judicial inroads, ranging from national courts’ rulings against transfers of asylum seekers in individual cases to the more powerful prohibition of Dublin returns to Greece pronounced by the ECtHR and CJEU. More particularly, the Luxembourg Court’s finding in *NS* that an asylum seeker may not be transferred to a Member State where ‘systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers would amount to substantial grounds for believing that’ she would be exposed to a risk of inhuman or degrading treatment seems to have triggered a number of political and financial implications for the mechanism, in addition to exposing its fundamental rights limitations.<sup>4</sup>

In essence, *NS* has clarified that the effective operation of the Dublin system requires the swift reparation of ‘systemic deficiencies’ in national asylum systems. Though but one contributing factor to pressured Member States’ asylum crises, Dublin therefore becomes inevitably intertwined with questions of solidarity, burden-sharing, financial support under the ERF, practical cooperation measures and the involvement of EASO, aimed at remedying the causes of its suspension. Examples may be drawn from Member States’ financial contributions to Greece as part of the Greek National Action Plan on Asylum Reform and Migration Management (McDonough and Tsourdi 2012: 33), with a view to rendering the country Dublin-compatible after the suspension of transfers ordered by *MSS* in January 2011. Yet the process of bringing Dublin back to full health by remedying Greece’s ‘systemic deficiencies’ seems lengthy and financially onerous. Almost three years following the ruling in *MSS*, the CJEU’s ruling in *Puid* [2014] 2 WLR 98 hints that Greece remains an unsafe country for asylum seeker transfers.

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<sup>3</sup> This paper relies on data provided by ECRE, given that Eurostat and EASO statistics on Dublin transfers were not publicly available at the time of writing.

<sup>4</sup> Note *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, which rejects the requirement of ‘systemic deficiencies’ in reception conditions and the asylum procedure as a necessary condition for deeming a Dublin transfer incompatible with fundamental rights (per Lord Kerr, paras 41-42).

At the same time, increasing legal challenges endeavour to declare other Member States unfit for Dublin returns. Following unsuccessful attempts in *Hussein v the Netherlands and Italy* (2013) 57 EHRR SE1 and *Daytbegova v Austria* (2013) 57 EHRR SE12 to apply the MSS doctrine to Italy, the ECtHR found in *Tarakhel v Switzerland* App No 29217/12 (ECHR, 4 November 2014) that the transfer of a family from Switzerland to Italy would amount to inhuman and degrading treatment.<sup>5</sup> Transfers to Bulgaria form an equally hard case (UNHCR 2014: 16; ECRE 2014: 1) and have already been suspended by Denmark and Belgium in the face of systemic deficiencies in the country's asylum system (Danish Ministry of Justice 2014). Admittedly, the very existence of an early warning, preparedness and crisis management mechanism under Article 33 of the Dublin III Regulation also indicates that systemic deficiencies in any Member State, as well as the costs of their reparation, are expected to form running concerns around the future application of the Dublin system.

In any event, the ramifications of the implementation of the Dublin system on external border countries have exposed some degree of short-sightedness on the part of conceding Member States *vis-à-vis* the perceived public goods traded off for Dublin responsibility in 1990 and 2003. Greece forms an illustrative example of at least one Member State's failure to use ERF funds in such way as to counterbalance the burden imposed by Dublin responsibility (Papageorgiou 2012: 8). Even when allocated wisely, however, compensatory financial measures in themselves are far from a panacea. Thielemann *et al.* (2010: 47) highlight, for instance, that the full amount of ERF funds distributed to Member States in 2007 did not exceed 14% of the Union's total asylum costs for the same year. Accordingly, while it may provide insight into why sceptical Member States initially agreed to shoulder what may have been disproportionate responsibility under wishful expectations that burden would be counterbalanced by financial support and other policy advantages in the area of home affairs, or that the allocation criteria would not be applied as they were in practice, the public goods framework justification leaves question marks as to why these countries would continue backing up the mechanism.

Against this backdrop, it is crucial to note that the EU's institutional arena had lost much of its intergovernmental character when the Commission tabled the recast Dublin proposal in 2008. Following the 2004 and 2007 enlargement processes, Dublin was now debated between 27 Member States with even more diverse national positions. Further, policies on asylum and irregular migration were already subject to co-decision by Council and European Parliament ahead of the general incorporation of justice and home affairs in the ordinary legislative procedure under the Lisbon Treaty (Lopatin 2013: 740). Therefore the decision-making workings of the CEAS, and no less of Dublin, now involved a broader set of actors within the EU's 'compound democracy' (Fabbrini 2005: 188). Power dynamics behind Dublin III were dramatically different from those leading up to Dublin II, for the Council only required a qualified majority vote and the European Parliament wielded a veto power. For scholars such as Kostakopoulou (2010: 164), the changing institutional balance in the area of justice and home affairs signalled hopes for policy liberalisation through the increasing involvement of decision-making actors other than Member States' justice and interior ministries. Yet the Dublin recast process does not seem to meet these expectations. Both the re-balanced voting dynamics in the Council and the European Parliament's evolving role seem to have undermined any prospects of the reform's 'talking about Dublin'.

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<sup>5</sup> See further Costello, C. and Mouzourakis, M. (2015) 'Reflections on Reading Tarakhel: Is "How Bad is Bad Enough" Good Enough?' *Asiel en Migrantenrecht* (forthcoming).

The intra-institutional shift from unanimity to qualified majority in the Council intensified bargaining inequalities between Member States in the Dublin debate, given that the mechanism was no longer a policy option requiring the approval of all countries in the Union. As qualified majority voting weakened the negotiating position of Dublin opponents by stripping them of their previously held veto powers, 'periphery' Member States whose *consensus* had to be secured for Dublin II were no longer equally able to prevent the adoption of Dublin III unless they wielded sufficient leverage to form a blocking minority. This is not to assume that sceptical Member States were marginalised in the Council. It is rather to suggest that the new institutional setting enabled the Council to more easily talk dissenting delegations into agreement whilst dodging the hard questions surrounding the Dublin debate. Interestingly, against a highly critical background following the rulings in *MSS* and *NS*, the recast Regulation seems to have been agreed relatively painlessly in the Council when contrasted to its predecessor (Aus 2006: 21); the Greek 'no' vote was far from influential, for instance. In that light, the end of unanimity and of its *consensus*-seeking practices has confirmed fears of a sharper divide between the Union's North and South (Papageorgiou 2010: 510).

Such a conclusion should be nuanced to some extent. Ripoll Servent (2013: 45) has correctly stated that *consensus*-seeking efforts inside the Council have not disappeared but have rather spilled over to inter-institutional negotiations between Council and European Parliament. Following the introduction of the co-decision procedure, the European Parliament was entrusted with equal powers to the Council in the Dublin recast process. These powers came with expectations for the new legislator to tip the balance against Member States in order to promote those interests left undefended by the Council (Maiani and Vevstad 2009: 5). Similarly to Directive 2008/115/EC (Returns Directive), the negotiations on the Dublin III Regulation presented an important test for the Parliament's ability to challenge the policies backed by its fellow institutions, given that neither Commission nor Council had sought to question the faulty foundations of the Dublin system (European Commission 2008: 7). What does Dublin III tell us about how the Parliament adapted to its new clothes, however?

Proponents of the European Parliament's involvement in the area of asylum and migration argue that the new legislator has managed to renew debate on asylum and to oppose the Council's restrictive positions (Espinoza and Moraes 2012: 185). Quite to the contrary, however, several scholars (Shackleton 2000; Ripoll Servent 2010; Lopatin 2013) suggest that increasing legislative authority has rendered the European Parliament more convergent with the Council and less liberal with regard to immigration and asylum policies. For instance, the Union's liberal party, the Alliance of Liberals and Democrats in Europe (ALDE), exhibited a radical shift in 2005 from its more liberal approaches to immigration to a strict conservative stance on asylum and irregular migration (Lopatin 2013: 751). Numerous examples of parliamentary concessions to the Council's positions are in fact to be found in the recent reform of the Common European Asylum System. The European Parliament abandoned the exemption of victims of torture and unaccompanied minors from accelerated and border procedures in the Asylum Procedures Directive and gave in to the Council's wish for police and Europol access to EURODAC for law enforcement purposes under the EURODAC Regulation. More importantly in this context, however, the Parliament relinquished the compulsory objective of intra-EU relocation in the Asylum, Migration and Integration Fund (AMIF) Regulation. This could have marked a turning point in the Union's approach to burden-sharing by requiring Member States to engage in relocation schemes for international protection beneficiaries and asylum seekers in order to benefit from EU funding in the area of asylum and migration.



The Dublin context is no less illustrative of these shifting institutional dynamics. The Parliament lost the most decisive battle in the recast's negotiations revolving around the emergency suspension clause under Article 31 of the Commission's proposal (European Commission 2008a: 52). The Council's success in bypassing the suspension of transfers through the introduction of the early warning mechanism in Article 33 of the Dublin III Regulation was only symbolically tempered by the European Parliament through the codification of the ratio of *NS* in the new Article 3(2). This amendment adds no substance to the judicial doctrine of suspension developed in *NS* and *Puid*. Conversely, the Parliament prided itself on obtaining more protection in Dublin procedures through enhanced procedural guarantees. As will be discussed below, however, these improvements could paradoxically lead to lengthier and more cumbersome Dublin procedures and result in making the Dublin system even less suitable to promote rapid and efficient processing of asylum applications. The Parliament's victories in the Dublin III Regulation are thus likely to be losses in disguise.

The real workings of co-decision may reveal four surprising features in this regard. Firstly, the Parliament's newly attributed legislative competence has had a strong impact on voting patterns by driving tactics of coalition-building between its different parties, with the aim of securing a majority vote. Contrary to submissions that centre-left parties often form progressive majorities in asylum and migration matters (Espinoza and Moraes 2012: 172), these dynamics have tended to favour the right-wing majority party in the EU legislature, the European People's Party (EPP). Hence liberal parties such as ALDE, for instance, were increasingly pressured by the EPP to vote for the adoption of the Returns Directive (Ripoll Servent 2013: 53). Similarly, the rapporteur for the Dublin III Regulation, ALDE member Cecilia Wikström, had to obtain the allegiance of the EPP in order to secure a majority vote in the Civil Liberties, Justice and Home Affairs Committee (LIBE) to adopt the Regulation.

Secondly, political pressure on the Parliament may often come directly from Member States. National governments have considerable influence in lobbying their MEPs to support their own country's interests (Acosta 2009: 38; Ripoll Servent 2013: 51). Accordingly, the European Parliament's shift towards restrictive tendencies equally rests on its 'responsibility to be more attentive to Member States' agendas' (Lopatin 2013: 753).

Thirdly, the new institutional balance in the Union required both legislators to reach pragmatic compromise in the aim of getting laws rapidly adopted at first reading (Héritier 2012: 41). Therefore 'the [European Parliament] faced a choice after the introduction of co-decision: it could either maintain its previous confrontational behaviour but risk ending up with no text or it could accept an imperfect text' (Ripoll Servent 2013: 51). This could have broader implications on the Parliament's conduct, as stalling negotiations beyond a first-reading agreement with the Council or blocking adoption would potentially cost its image as a responsible co-legislator actively committed to getting laws passed. The broader context of the CEAS reform played a central role in pressing the two institutions to adopt the recast instruments. In light of the EU's failure to respect the 2010 deadline set by the Hague Programme for the adoption of second-phase harmonisation measures (European Council 2005: 1.3), the Stockholm Programme postponed the completion of the CEAS to '2012 at the latest' (European Council 2010: 6.2.1). Bearing in mind that the Union had not reached agreement on the asylum package until early 2013, the risk of jeopardising or further delaying the adoption of the Dublin III Regulation was therefore one the Parliament sought to avoid.

Finally, however, the European Parliament's shifting stance on asylum and immigration could reflect a more important lesson. Its stricter position on Dublin and other legislative proposals

in this field comes as a disillusion for advocacy groups which sought to have their views expressed by the Union's new co-legislator. Yet it does not seem at odds with the positions of the dominant national political parties producing MEPs or the prevailing opinion on asylum among the European electorate that MEPs are called to represent, however tenuous the electoral connection between Parliament and EU voters (Hix and Hoyland 2013: 184). As will be discussed below, the Dublin debate revolves considerably around EU citizens' rising fears *vis-à-vis* uncontrolled migration into the Union. These concerns have understandably found their way into their democratically elected representatives' decisions when called to 'talk about Dublin'. Expecting more liberal policies in the recast process through the involvement of a body representing the very citizens whose expectations national governments strive to meet may therefore have been wishful thinking on the part of advocates for Dublin reform.

### 3 The efficiency objectives

As Betts (2006: 152) has explained, the meaning of 'efficiency' in asylum policies remains highly opaque. In this context, however, efficiency is used as an umbrella term to describe an array of aims pursued in the EU. In an undoubtedly obscure passage in the *NS* judgment, the CJEU attempts to capture these objectives envisioned by the designers of the Dublin system:

*It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003... in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States (NS v Secretary of State for the Home Department, para 79; Abdullahi v Bundesasylamt, para 53).*

These aims need be disentangled and examined individually. The Court mentions two challenges declared in the Preamble of the Dublin Convention: the need for rapid processing of asylum claims and the problem of multiple asylum applications (Hurwitz 1999: 648). However, the issue of 'forum shopping', presented as 'the principal objective of all these measures', seems to raise a third discrete objective.

#### **Rapid processing of asylum claims**

The first objective relating to the swift examination of applications has commonly been framed as a solution to the problem of 'asylum seekers in orbit'. It confronts a straightforward issue concerning asylum seekers who run the risk of being left unprotected due to Member States' deflection of responsibility to examine their claims. Against a backdrop of unilateral and unpredictable 'safe third country' practices, a common mechanism was deemed necessary in order to ensure that an asylum application would rapidly be processed by a country in the EU to prevent applicants from being perpetually shifted from one state to another. By mandating that an asylum application has to be examined by a single Member State, the Dublin system purports to 'guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications', as per Recital 5 of the Dublin III Regulation. Albeit not subject to a precise time-limit, the aim of 'rapid processing' should now be read in light of the requirement for a regular asylum procedure to last no more than 6 months under Article 31(3) of the Asylum Procedures Directive.

Dublin purports to meet this objective by imposing a duty on the single responsible Member State to ‘take charge of’ or ‘take back’ an asylum applicant. However, the feasibility of efficiently tackling the ‘asylum seekers in orbit’ question through such a system of allocation of responsibility has been a contentious point ever since the mechanism’s inception. The Dublin system seems to rely on the assumption that a procedure determining the Member State responsible and transferring an applicant thereto forms the most efficient route for the rapid examination of her claim. Yet neither the EU legislator nor the Court in *NS* and *Abdullahi* seem to have convincingly distinguished ends from means on this occasion. Insofar as the ‘asylum seekers in orbit’ objective is concerned, the transfer of applicants should only be a tool towards the rapid processing of their claim rather than the system’s aim *per se*.

Dublin’s premise may therefore be questioned to the extent that any physical transfer of an asylum seeker from the country in which she is present to another country delays her access to the asylum procedure and *a fortiori* hinders the swift processing of her application. On that point, the CJEU has adopted an illuminative interpretation of Dublin’s ‘asylum seekers in orbit’ objective in *MA v Secretary of State for the Home Department* [2013] 3 CMLR 49, whereby, to guarantee the best interests of children to have their claims rapidly processed, ‘as a rule, unaccompanied minors should not be transferred to another Member State’. Beyond carving special rules on responsibility in respect of certain unaccompanied minors under Article 8(4) of the Regulation, *MA* therefore prompts critical reflection on the appropriateness of the Dublin system in responding to the ‘asylum seekers in orbit’ challenge as a whole. The ruling hints that an asylum seeker’s claim would be more rapidly processed if examined by the Member State in which she is currently present.

Moreover, the Court’s insight in *MA* seems in line with practical realities in relation to applicants’ effective access to the procedure. A look at early practice reveals severe deficiencies in the implementation of the Dublin Convention which often accounted for Dublin responsibility-determination procedures lasting significantly longer than an ordinary asylum procedure (Noll 2000: 194). While EU institutions have strived to render procedures swifter under the Dublin III Regulation by imposing tighter deadlines for submitting and responding to ‘take charge’ or ‘take back’ requests,<sup>6</sup> the recast Article 29 retains the deadline for performing a transfer at 6 months, with a possibility of extension in case of the applicant’s absconding.

Quite to the contrary, the EU institutions’ efforts to level up fundamental rights guarantees in the Dublin III Regulation seem to have borne counter-intuitive effects to ensuring the rapid processing of applications, as Dublin procedures are likely to become lengthier and more administratively demanding. Under the recast Article 3(2), a Member State must assess the situation of the *prima facie* responsible Member State’s asylum system to ensure that the applicant would not be exposed to a risk of *refoulement* due to systemic deficiencies. Yet there is no concrete evidence to rule out the need for national authorities to systematically examine this criterion on a case-by-case basis. The idea that ‘the principle of mutual trust may not be placed under question through systematic examination’ advocated by Advocate-General Jääskinen in *Puid* was not echoed in the Court’s interpretation of the Dublin Regulation, as the Court remained silent on that point in *Puid*. Furthermore, the new Regulation renders

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<sup>6</sup> Under Articles 21-25 of the Dublin III Regulation, the regular deadline for submitting a request is 3 months, while requests based on data obtained by EURODAC are subject to a 2-month deadline. The deadline for responding to ‘take charge’ requests is 2 months, while Member States must respond to ‘take back’ requests within 1 month or 2 weeks for requests based on data obtained by EURODAC.

responsibility-determination procedures heavier through the requirement of a personal interview with the applicant under Article 5, tighter rules on notification under Article 26 and a duty to provide judicial appeals with suspensive effect for certain categories of transferees under Article 27.

Accordingly, Member States run the risk of being faced again with Dublin procedures much lengthier and more cumbersome than ordinary asylum procedures. To add further charges to the 'Dublin bill', during these procedures, the sending Member State is required to provide the applicant with the material reception conditions set out in Directive 2013/33/EU (Reception Conditions Directive) in accordance with the Luxembourg judgment in *Cimade and GISTI* [2013] 1 CMLR 11. This implies that the expenses associated with an asylum seeker's reception would be incurred by the sending Member State throughout the duration of a Dublin procedure, only to be incurred again by the receiving Member State which will process her application.

Dublin's appropriateness to guarantee the 'asylum seekers in orbit' objective becomes even less justifiable in far-from-exceptional cases where transfers are not carried out. According to ECRE (2013: 21), less than 35% of accepted responsibility requests actually resulted in transfers during the period 2009-2010. Member States' inability to transfer an asylum seeker may be due to a number of factors such as failure to comply with time-limits in Dublin procedures. Such delays have mostly been reported in Austria and Germany, in spite of the fact that Germany has one of the most amply staffed Dublin units across the EU (ECRE 2013: 92).

Furthermore, even where an asylum seeker is transferred to the responsible country, the blame-based reading of Dublin responsibility discussed above may often motivate those Member States receiving the bulk of 'take back' requests, based on irregular entry and first asylum grounds, to evade responsibility by engaging in questionable tactics which hamper the rapid processing of Dublin returnees' applications. In the first years following the adoption of the Dublin II Regulation, for instance, Greece systematically interrupted the examination of Dublin returnees' asylum applications and stripped them of their asylum seeker status on the ground that they had abandoned their place of residence (Papadimitriou and Papageorgiou 2006: 309). This approach is particularly alarming, no less given that the interruption of processing of claims by Greece, *de facto* leaving 'Dubliners' with no access to the asylum procedure, was carried out after the applicant had re-entered Greek territory from sending Member States (Papadimitriou and Papageorgiou 2006: 310; Garlick 2006: 606). Similar cases have been recently reported in Bulgaria (UNHCR 2014: 5). This form of *mala fide* enforcement of responsibility rules leads applicants to indefinite legal limbo, undoubtedly at the cost of rapid and efficient processing of asylum applications.

### **Prevention of multiple applications**

The second declared objective of the Dublin system relates to a more controversial issue. At first reading, the prevention of multiple asylum applications by the same claimant seems grounded in legitimate concerns *vis-à-vis* the administrative costs of Member States' duplicated efforts to examine the same asylum claim. In that regard, the Dublin system could be welcomed for adopting a 'one shot rule' grounded in a 'division of labour' logic (Nicolaidis 2007: 689) which pays due consideration to preventing unnecessary mobilisation of national asylum systems' financial and human resources. By mandating that an asylum application has to be examined *by a single Member State*, the Dublin Convention codified an exclusivity principle to ensure that no multiple applications will be made by the same applicant (Boccardi 2002: 43).

To what extent, however, is Dublin the best-placed instrument to prevent multiple asylum applications? This objective could be reached through an array of different and potentially more efficient measures. Centralised processing of applications would streamline all refugee status determination procedures into a single institution and thereby preclude the possibility for an asylum seeker to lodge the same claim before different asylum authorities. Alternatively, other models of allocation of responsibility could tackle the multiple applications challenge more efficiently than Dublin, whilst retaining national competence over refugee status determination. The responsible Member State could be designated based on the asylum seeker's free choice, subject to a 'one shot rule' preventing her from selecting more than one country (ECRE 2008: 29). Introducing the applicant's choice of preferred Member State in the allocation of processing responsibility would have a strong impact on the multiple applications problem, as it would considerably reduce incentives for applicants to engage in secondary movement within the Union in order to make subsequent claims.

Similarly, introducing transfer of protection and mutual recognition of positive asylum decisions would render multiple asylum applications less appealing by conferring upon refugees and beneficiaries of subsidiary protection the right to free movement across the EU. Following the adoption of all second-phase harmonisation instruments of the CEAS in 2013, the commitment to establish a 'uniform asylum status, valid throughout the Union' under Article 78(2)(a) TFEU should be given serious consideration by EU institutions. In keeping with this target, the European Commission's Policy Plan on Asylum had announced the exploration of a mechanism of transfer of protection either within Directive 2011/95/EU (Qualification Directive) or as part of a separate instrument (European Commission 2008: 6). However, current efforts, if any, towards discussing transfer of protection and mutual recognition of positive asylum decisions do not seem particularly strong, as the relevant Commission Communication expected within the course of the Irish-Lithuanian-Greek Presidency trio (Council of the European Union 2012a: 111) has not yet been published. Moreover, the only moderate step towards free movement of refugees throughout the EU, achieved by Directive 2011/51/EU which extended the scope of Directive 2003/109/EC (Long-Term Residents Directive) to cover beneficiaries of international protection, only seems to intensify the Union's reluctance to endorse a uniform asylum status. This indirect right to free movement conditioned upon permanent residency connotes that international protection beneficiaries are 'third-class citizens' (Durieux 2013: 242) less worthy of inclusion than other third-country nationals such as highly-skilled migrants who enjoy direct rights of intra-EU mobility under Directive 2009/50/EC (Blue Card Directive). In the eyes of Member States, it thus seems that refugees and beneficiaries of subsidiary protection are the last in line to be granted rights exercisable throughout the Union.

There is therefore little to support the position that Dublin provides the most appropriate deterrent for multiple applications. Yet the 'multiple asylum applications' facet of the Dublin system does not stop there; the Union's political reluctance to allow asylum seekers to choose their country of asylum or to give protection beneficiaries rights to free movement is grounded on deeper concerns.

### **Multiple applications as 'asylum shopping'**

As the Court hints in *NS* and *Abdullahi*, the problem of multiple claims is often framed in terms of dissuading 'forum shopping' or 'asylum shopping', also understood as an applicant's tactic of lodging multiple applications in an effort to seek asylum in the country offering the most attractive regime of protection. As Lavenex (2001: 862) explains, countries such as France and Germany have framed the asylum problem as one of negative redistribution of asylum seekers in a 'porous *Europe passoire*'. By construing multiple applications as a



manifestation of ‘asylum shopping’, the EU connects the efficiency objectives with the aim to safeguard the integrity of the CEAS, as it links the Dublin machinery to broader national concerns around ‘pull’ factors and abuse of Member States’ asylum systems by unmeritorious claimants. It is thus not unexpected to see the ‘asylum shopping’ argument appear in different ‘Dublin-type’ arrangements across the world such as the Canada-US Safe Third Country Agreement 2002 (Gonzalez-Settlage 2012: 150). Through this component, the drafters of the Dublin Convention and its successors construed multiple applications not only as a logistical problem but also as a fundamentally normative one.

Four objections should be raised against the reading of multiple applications as tantamount to ‘asylum shopping’, however. Firstly, despite its frequent use in EU policy discourse, ‘asylum shopping’ is a highly opaque concept open to widely different interpretations. As reality reveals, an asylum seeker could be ‘shopping’ for a number of different things in the Union. A claimant could seek to apply in a Member State offering high protection rates in order to have higher chances of obtaining refugee status. For instance, a Syrian national could be more inclined to apply in Germany, which offered protection to 89% of Syrian applicants in 2012, rather than Cyprus, which offered protection to 0% (EASO 2013: 28). Conversely, an applicant aware that her claim is likely to be unfounded might be more inclined to apply in a country with a lengthy and defective asylum process in hopes of prolonging her stay. Quite interestingly, this form of ‘asylum shopping’ would hinge on the inability of the Union to rapidly process applications and to respond to the issue of ‘asylum seekers in orbit’. In that light, the ‘asylum shopping’ argument seems to be invoked in vastly distinct contexts and does not depict the same risks for all Member States. Notwithstanding its conceptual obscurity, however, the notion of ‘asylum shopping’ is taken at face value as a risk to be tackled by the Dublin system both by political institutions (European Commission 2008: 7) and by the CJEU in *NS* and *Abdullahi*.

Secondly, the very notion of ‘asylum *shopping*’ implies that the motives behind an asylum seeker’s decision to apply for international protection in a country other than that of first arrival are the product of an inherently economic rational choice. An applicant would thus be driven to apply in a Member State offering higher material reception conditions and welfare support. Yet there is a wide array of legitimate reasons for which one person may prefer a specific country: the existence of support communities and diasporas, extended family or language affinity are indicative examples (Gonzalez-Settlage 2012: 150-151).

Thirdly, the ‘asylum shopping’ objective of Dublin rests entirely on a normative assumption by Member States that multiple applications reveal abusive intentions or expose calculated tactics on the part of the applicant (Bolten 1991: 25-26; Mitsilegas 2012: 335). Governments equate the multiple claims fact with a ‘shopping’ motive, ‘as if the lodging of more than one asylum request is conclusive evidence of fraudulent intentions or of trying to settle in the richest country’ (Boccardi 2002: 44). Dublin’s inherently ‘black or white’ approach to asylum claimants as legitimate or abusive (Byrne and Shacknove 1996: 198) may therefore result in a short-sighted view of asylum seekers’ engagement with the asylum process. Very often, an applicant may have no genuine opportunity to bring forward her case in her first asylum application, especially when confronted with highly expeditious procedures in several Member States. This should hardly seem surprising, bearing in mind the ECtHR’s finding in *IM v France* (2012) App. no. 9152/09 and *AC v Spain* (2014) App. no. 6528/11 that accelerated procedures in France and Spain are in violation of the right to an effective remedy under Article 13 ECHR. Against the backdrop of Member States’ increasingly accelerated asylum procedures, a subsequent application often becomes necessary for a claimant to be safeguarded against *refoulement*.

A final, albeit forward-looking, objection relating to the pertinence of the ‘asylum shopping’ risk may be raised from the evolution of the CEAS. Under the European Council’s Tampere Programme, a mechanism for the determination of the Member State responsible for examining an asylum application was only envisaged as a short-term measure (European Council 1999: 14). The ‘short’ lifespan of the Dublin system has not been entirely forgotten 15 years after the Tampere summit, as it is rather comically recalled in Recital 4 of the Dublin III Regulation. The justification of Dublin as a deterrent of ‘asylum shopping’ in Tampere was provided against a background of complete absence of harmonisation of asylum standards across the Union. Vast discrepancies in Member States’ protection standards and outcomes were understandably construed as an incentive for secondary movements of asylum seekers within the Union in an attempt to direct their applications to the most attractive destination countries, whatever the form of ‘shopping’ intended. Given this context, most Member States therefore deemed the Dublin system a necessary mechanism to the extent that asylum standards in the EU remained heterogeneous; read otherwise, an *interim* measure pending harmonisation of asylum standards in the EU.

What followed Tampere seems to be an unjustifiable paradox, however. Whilst first-phase minimum harmonisation measures on reception, qualification and asylum procedures were adopted through Directives 2003/9/EC, 2004/83/EC and 2005/85/EC, the European Council mandated second-phase legislative instruments under the Hague Programme (European Council 2005: 1.3), thereby signalling ongoing and increasing approximation of national asylum systems. However, the value of the Dublin Regulation as a necessary means of dissuasion of ‘asylum shopping’ was not questioned, as it should have been, by the advent of harmonisation (Maiani and Vevstad 2009: 5). On the contrary, the holistic re-conceptualisation of the EU’s asylum policy, triggered by the Green Paper on the Future of the Common European Asylum System, found the Commission and Member States doubting the effect of common standards on mitigating ‘asylum shopping’ and advocating that Dublin ‘will still be necessary’ (European Commission 2007a: 11; European Commission 2008: 7). That paradox was stretched even further when the Stockholm Programme, a Lisbon Treaty policy framework resting on much more solid institutional pillars and stronger harmonisation than the Tampere Conclusions, enshrined the Dublin system as ‘a cornerstone in building the CEAS’ (European Council 2010: 6.2).

Dublin’s ‘cornerstone’ status therefore seems to reveal dubious path dependence on the part of the EU. Certainly, asylum standards across all 28 Member States remain far from being uniform in practice. Nevertheless, if implemented correctly, the second-phase harmonisation instruments on status determination, reception conditions and procedures are expected to reduce disparities and secondary movements of asylum seekers within the Union, as foreseen in the Commission’s Policy Plan on Asylum (European Commission 2008: 7). Contrary to the Green Paper’s contentions, harmonisation should therefore temper incentives for ‘asylum shopping’ by bringing the CEAS closer to a state where ‘it simply does not matter, in terms of recognition rates and standards of treatment, where in the EU an asylum seeker’s claim is processed’ (Den Heijer 2012: 1752). Rather paradoxically, this is conceded by the Court in *Abdullahi*: ‘It follows that the rules in accordance with which an asylum seeker’s application will be examined will be broadly the same, irrespective of which Member State is responsible under Regulation No 343/2003 for examining that application’ (*Abdullahi v Bundesasylamt*, para 55).

Taking a step back, let us assume that preventing ‘asylum shopping’ constitutes a legitimate objective, as suggested by the Policy Plan on Asylum, *NS* and *Abdullahi*. On that basis, the allocation of processing responsibility should understandably not be determined by the applicant’s free choice. Yet the Dublin system attempts to tackle ‘asylum shopping’ by

adopting an asymmetrical ‘one shot’ rule: while one Member State’s positive asylum decision does not bind others, a rejection decision does (Guild 2006: 636). Member States have therefore opted for a rather selective and distorted version of mutual recognition (Costello 2012: 335). One country trusts another enough to rely on its negative determinations in order to find a claimant unworthy of protection EU-wide, yet not enough to deem its recognition of an applicant as a refugee sufficient evidence of the well-foundedness of that applicant’s claim. It therefore seems that the ‘principle of mutual confidence’ hailed by the CJEU in *NS* and *Abdullahi* promotes less trust between Member States than it promises.

Furthermore, the Dublin system may in that way generate perverse effects *vis-à-vis* the asylum seeker’s compliance with the responsibility rules by creating two incentives for irregular secondary movement within the EU; assuming that the asylum seeker is a rational ‘shopper’, as the Union depicts her. Firstly, bearing in mind that the criterion of irregular entry and stay forms the prevalent ground for determining the responsible country, applicants are more inclined to enter the first Member State undetected and to move irregularly to a second Member State before lodging an asylum claim and being fingerprinted in EURODAC (UN Human Rights Council 2013: 70). Secondly, the rule of mutual recognition of negative but not positive asylum decisions leaves an applicant with relatively poor options: following the decision of the first country of asylum, she can either be rejected throughout the entire Union or be confined within the boundaries of the Member State which granted her protection. Accordingly, asylum seekers are equally encouraged to irregularly enter a second Member State and make a subsequent asylum claim there before the first Member State decides on their case (Costello 2012: 315). As the Jesuit Refugee Service (JRS)’s findings suggest, the majority of asylum seekers subject to Dublin procedures have in fact irregularly moved across various European countries (JRS 2013: 129). The perverse impact of Dublin in encouraging applicants’ decisions to engage in irregular migration therefore dispels its value in preventing the problem of multiple applications and ‘asylum shopping’.

These observations support a straightforward conclusion that the Dublin system ‘simply does not work’ to deliver its stated objectives of rapid processing of claims and prevention of multiple applications and ‘asylum shopping’ (Costello 2005: 42). However, the realisation of Dublin’s inefficiency opens up further questions around the rationality of the EU’s choice of model for allocation of processing responsibility. It reveals that the Dublin system is perhaps about something fundamentally different from allocating responsibility between Member States. Its underlying objective seems to escape the instrumental lens through which one would normally evaluate whether an institution or mechanism efficiently delivers its aims. One could here recall similar enquiries made by Leerkes and Broeders (2013: 81) in the context of immigration detention: ‘why increasingly invest in immigration detention, if it does not lead to more expulsions?’ The value of ‘informal functions’ should not be underestimated in the Dublin context. Even failing to deflect claims, guarantee swift processing of applications or to prevent multiple claims and ‘asylum shopping’, Member States may look to Dublin to derive peculiar benefits which would not be secured under a burden-sharing model of responsibility.

## 4 The control objective

Even where it fails to physically transfer an undesirable asylum seeker to the responsible country, the Dublin system affords the sending Member State the benefits of claiming the ability to do so. EU countries thus look to this mechanism to assert their power to control their territory by apprehending, identifying and detaining, even without ultimately expelling,



unwanted entrants (Leerkes and Broeders 2013: 96). The symbolic appeal of Dublin's *non-entrée* value proves to be a fundamental feature in Member States' approach to the securitisation of migration. One should not lose sight of the fact that the EU's policy on immigration and asylum 'is part of a political spectacle in which the criteria of belonging are contested' (Huysmans 2000: 762). The aura of 'high politics' surrounding these issues (Hix and Hoyland 2011: 292) is largely fuelled by heated feelings of insecurity, injustice and xenophobia among EU citizens who look to their governments for reassurance that their country's borders are sufficiently guarded to prevent unwanted entry.

Interestingly, this psychological element makes an almost explicit appearance in the Union's policy objective of creating an 'area of freedom, security and justice' in the internal market. As Huysmans (2000: 759) explains, with the elimination of internal border controls following the Schengen Agreement of 1985 emerged a perceived need to strengthen external border management in order to guarantee sufficient control over entrants in the space of free movement. Yet the abolition of internal controls in the Schengen area was not necessarily seen by governments as a virtual certainty that irregular movement would increase at the Union's external borders. The establishment of Schengen rather meant that 'the formal opening of these borders would make them *appear* more open to illegal activity, expose the myth of control, [and] undermine the credibility of state authority' (Andreas 2000: 116). Striking analogies may be drawn between the symbolic value of state control in the evolution of the EU's internal market and US-Mexico economic integration under the North American Free Trade Agreement (NAFTA), given that, in both cases, the retreat of the state in the face of market liberalisation was matched by a reassertion of state control in the name of market securitisation (Andreas 2000: 140-141). When Baldaccini *et al.* (2007) therefore asked 'whose freedom, security and justice' the EU aims at promoting, the Stockholm Programme's response was unambiguous: it aspires to create 'an open and secure Europe serving and protecting *citizens*' (European Council 2010). Accordingly, Dublin may be a performative instrument primarily intended to reassure EU citizens by equipping a Member State with powers – even if only in theory – to alleviate its nationals' insecurities through demonstrations of its ability to swiftly remove asylum applicants for whom it is not responsible under the Regulation's criteria.

For those reasons, the individualistic approach to asylum processing responsibility adopted by Dublin is a central element to Member States' embedded interests in asserting national control over immigration. For a government to reassure its citizens that *they* wield the democratic power to decide who enters the country to seek protection, as Walzer (1983: 31) would suggest, a model of responsibility based on burden-sharing would not do. Regardless of their practical potential for the Union, collective solutions such as relocation of asylum seekers, joint processing of applications or even mutual recognition of positive asylum decisions would shift the onus of entry decisions from the domestic level to Brussels. Similarly, a model allocating responsibility on the basis of the applicant's free choice would place the admission decision in her control rather than the hands of the host country. For those reasons, Member States specifically support the Dublin system's reading of responsibility which recognises the Member State as the sole legitimate entity to exercise control over entry in its territory. Dublin could therefore act as a symbol of Member States' preserved sovereignty by appearing to safeguard 'national prerogatives as far as protection-granting is concerned' (Council of the European Union 2014: 4). Pondering, however, on the extent to which the granting of international protection is in fact a 'national prerogative', especially in the CEAS, would highlight the largely symbolic value of the control objective.

Whether at the sending or receiving end of Dublin transfers, Member States seem to play equally active parts in this political spectacle. EURODAC is an illustrative example. The

practice of fingerprinting bears powerful normative connotations *vis-à-vis* the relationship between the EU and asylum seekers, as it serves to strip applicants of their agency in choosing where they will seek international protection by legally confining them within the boundaries of the Member State of first entry.

Moreover, beyond assisting the implementation of the Dublin Regulation, the fingerprint database offers all countries the technological means to visibly brand asylum seekers and irregular migrants as a distinct category of undesirable persons in the Union. EURODAC thus seems to resemble a form of ‘*banopticon*’ used by states to categorise entrants as risk profiles (Bigo 2002: 81; Lyon 2009: 54). The nexus between identification of asylum seekers and Member States’ security agendas has been made even more manifest following the recent introduction of access by national police authorities and Europol to the database for law enforcement purposes under Article 1(2) of the EURODAC Regulation.

The link between Dublin and detention of asylum seekers equally evokes control as the mechanism’s prevalent objective. Austria, Bulgaria, France, Germany, Hungary, Slovakia and the Netherlands made standard use of detention for the purposes of carrying out transfers, notwithstanding the absence of express powers to detain transferees under the Dublin II Regulation (Costello 2012a: 286; ECRE 2013: 82-83), and in potential violation of human rights law. As UNHCR (2012: 8-9) has argued, detaining asylum seekers for the purposes of carrying out their deportation under the Dublin Regulation is contrary to Article 5(1)(f) ECHR, given that the Strasbourg Court’s ruling in *RU v Greece* (2011) App. no. 2237/08 has clarified that no asylum seeker may be detained for the purposes of being expelled from a state’s territory before her claim has been examined. Against that backdrop, the newly introduced detention clause under Article 28 of the Dublin III Regulation has served a twofold purpose: on one hand, it has curtailed Member States’ powers to detain ‘Dubliners’ by prohibiting detention on the sole ground of carrying out a transfer. On the other hand, however, it has controversially blessed them with legal basis. In that light, the Dublin system not only enables Member States to be seen to exercise control over entrants *de facto*, but also legitimises their demonstration of control *de jure*.

Moreover, Dublin’s symbolic objective is also manifested by the phenomenon of mutual transfers of asylum seekers between Member States. In 2010, by way of example, Germany sent 306 requests to and received 350 from Switzerland, while Sweden sent 482 to and received 458 from Norway (ECRE 2013: 21). Albeit perhaps an illustration of correct application of Dublin criteria, this case demonstrates the essentially optic functions of the Dublin system. Member States often incur considerable expenses and administrative effort to initiate lengthy Dublin procedures, detain asylum seekers and carry out transfers, only to end up with approximately the same number of asylum applications to examine. This indicates again that Member States may view the transfer of asylum seekers less as a means towards deflection or the rapid processing of applications and more as an end in itself.

Two critiques may be levelled against the control objective, however. Firstly, in the mind-set of national governments, the demonstration of a state’s power to control its national territory incontestably forms a legitimate political goal to be pursued in the interests of the citizens they account to. The performance of Dublin transfers may therefore be deemed an important end *per se*. Yet is this enough in itself? Can the psychology underlying Dublin’s control logic outweigh the potentially excessive costs borne by the very EU citizens it strives to reassure? The broader climate of unprecedented emphasis on the scarcity of EU countries’ financial resources should not be underplayed here (ECRE 2013: 24). Public debate and hostility towards asylum and immigration revolves significantly around concerns regarding costs and

taxpayers' contributions in the majority of Member States. A highly illustrative example could be drawn, for instance, from the Council's resource-related arguments on numerous contentious issues during the negotiations of the Asylum Procedures Directive. In that light, Member States are accountable to their citizens to ensure that resources invested in asylum policies are appropriately spent. Governments cannot therefore hold any comprehensive internal or EU-wide debate on individual or collective approaches to asylum responsibility without addressing Dublin's 'value for money'.

Against that backdrop, one is alarmed by the inability to date of both Commission and Member States to conduct an evaluation of the costs attached to the Dublin system (European Commission 2007: 13; ECRE 2013: 23-24). In broad terms, Dublin's costs involve the setting up, operation and maintenance of EURODAC, detention, transit zones, processing of transfer requests, preparation of proof and evidence, return costs (Thielemann *et al.* 2010: 45), as well as the establishment and staffing of specialised Dublin units within national asylum authorities. The issue of the 'Dublin bill', however, has fallen between the cracks of public debate not only in the inter-institutional negotiations of the recast Dublin III Regulation but, more surprisingly, in domestic discussions as well. Interestingly, recent parliamentary enquiries raised in Austria, Germany and Switzerland have failed to ascertain the detailed costs incurred by each country in operating the Dublin system (ECRE 2013: 24).

The control objective is therefore cast into dangerous obscurity when the Union 'talks about Dublin'. The symbolic interests entrusted by Member States in Dublin's model of allocation of asylum responsibility, pertinent as they may seem, rest on dubious grounds of legitimacy, given that they have not been adequately scrutinised or weighed against costs in any debate conducted at EU or national level. To phrase the issue differently, it is one thing for Member States to claim that the Dublin system keeps their citizens safe from uncontrolled migration. It is quite another, however, to admit that the Dublin system requires citizens to incur considerable expenses in critical times of economic austerity for their governments to wield symbolic powers of control which bring very little deterrent effects in practice.

Secondly, it would be hasty to submit that a collective approach to responsibility *a fortiori* weakens Member States' powers of control. As Kostakopoulou (2001: 133) insightfully argues, EU-wide solutions may require some loss of national sovereignty but confer upon Member States greater power to impose their security agendas and enhance their regulatory capacity beyond their borders. A burden-sharing model like relocation could in fact distribute responsibility on the basis of criteria such as reception capacity (Schneider *et al.* 2013: 6) or community ties and language affinity (ECRE 2008: 29), thereby giving a Member State significant say in the types of protection seekers who would access its territory. Conversely, the 'performance neutral' criteria set out in the Dublin Regulation, none of which refer to the will or capacity of any Member State to afford protection to an asylum seeker (Durieux 2013: 234), may serve some Member States whilst leaving others powerless to regulate the entry of asylum seekers in their territory. For countries situated at the external borders of the Union, for instance, the Dublin system rather connotes loss of national prerogative than the reinforcement thereof. In that respect, an asylum seeker's entry in the responsible country could end up being less spontaneous under a burden-sharing mechanism than it is under Dublin. Read carefully, a collective solution may therefore afford Member States sufficient control over regulating the distribution of applicants throughout the Union to counterbalance their 'invasion syndrome' (Kostakopoulou 2001:151).

## 5 Concluding remarks

There may evidently be little hope for substantive change in the EU's approach to allocation of responsibility for processing asylum claims in the short term. Notwithstanding Greece's best efforts to reconsider the Dublin system and to advocate for permanent burden-sharing mechanisms under its Council Presidency (Greek Presidency 2013: 3), the Union is not known for its readiness to reopen legislative files it has struggled to conclude. This may be due to various reasons. On one hand, in what remains to a large extent an intergovernmental arena in the Council, Member States opposed to the Dublin system do not wield sufficient bargaining power to change the EU's course as regards the distribution of processing responsibility.

On the other hand, in ways not necessarily intended by its original drafters, the Dublin system may have gradually acquired a life of its own. Notwithstanding their different institutional context, the aforementioned phases of adoption share one common feature: an overall difficulty on the part of the EU as a whole to revisit its *acquis* even in the face of blatant defects and changing Member State interests in play. Path dependence therefore seems an equally relevant factor in Dublin's transformation from a short-term measure to a 'cornerstone' of the CEAS (European Council 2010: 6.2). A historical institutionalist explanation of Dublin's embedded bureaucratic value could also account for the 'status quo bias' (Pierson 2000: 262) underlying the Commission's role in the recast's co-decision game. Helstroffer and Obidzinski (2013: 8) highlight that legislative proposals submitted by the Commission tend to favour the position of legislator closest to the *status quo*: the Council. In that respect, it is worth recalling that the overarching approach to the Dublin III recast in the Policy Plan on Asylum was developed on the basis of both Commission and Member States' preference of 'sticking to Dublin' expressed in the consultation launched by the Green Paper on the Future of the CEAS (European Commission 2008: 7). Any influence dissenting Member States and the European Parliament were to exercise in the Dublin III reform therefore had little room to challenge the system's pre-defined path.

In a CEAS regulated by multi-level governance, most substantive constraints on the Dublin system are thus left to be laid down through judicial channels (Peers 2012: 5). Admittedly, two of the most contentious innovations brought by the Dublin III Regulation, suspension of transfers under Article 3(2) and special responsibility rules for unaccompanied minors under Article 8(4), had already been *de facto* reformed by the CJEU in *NS* and *MA*. Nevertheless, judicial reform may only intervene as a reactive measure to remedy practical deficiencies once these are litigated in court. Courts cannot engage with the foundational principles of the Dublin system in any comprehensive manner, although they can introduce various hurdles to render its application costly and cumbersome for Member States. However, courts may not always feel inclined to challenge Dublin's state-centric logic, as the Court's reasoning in *Abdullahi* reveals. Effectively revisiting responsibility for processing asylum claims can therefore only be carried out through political dialogue in the Union.

Has the effort to 'talk about Dublin' therefore been a quest in vain? Unveiling the embedded interests of Dublin proponents may have prompted avenues for critical reflection. This paper has argued that the deflection objective at the heart of the mechanism is not fulfilled in practice, given that the blame-based reading of processing responsibility incentivises Member States to defect from the Regulation's rules and that several of the external border Member States intended to receive the bulk of applications have become unfit for transfers. The mechanism seems equally ill-suited to deliver its efficiency aims better than a collective approach to responsibility based on burden-sharing. Transferring an asylum seeker from one

Member State to another seems a dubious means for ensuring rapid processing of asylum applications, particularly when read against the significant delays witnessed in the Regulation's implementation. Moreover, Dublin may be a counter-intuitive tool to prevent multiple applications and 'asylum shopping', as its underlying principle of negative mutual recognition of asylum decisions seems in practice to create perverse incentives for asylum seekers to engage in irregular secondary movement across the Union. Accordingly, the responsibility rules laid down by the Dublin system fail to bring functional benefits towards the distribution of asylum claims between Member States.

Perhaps the mechanism's primary purpose is not to be functional, however. This paper has explored the centrality of the control objective among the interests vested in Dublin. Member States look to the mechanism to reassure their citizenry that their 'national prerogatives' to determine entry and granting of protection have not been compromised, even in the face of a Common European Asylum System. The Dublin system backs this political spectacle through a number of demonstrations of control, ranging from tracking and containing asylum seekers through EURODAC to legitimising detention. Getting the EU to 'talk about Dublin' could therefore help to acknowledge the importance attached to the mechanism not as a functional instrument for the allocation of processing responsibility but rather as a system with symbolic significance for Member States.

If that view of the Dublin system is true, the collective challenge of the distribution of asylum claims therefore remains open. The Union still requires a mechanism to allocate processing responsibility between Member States, preferably in accordance with the precepts of solidarity and fair sharing of responsibility under Article 80 TFEU. The alternative solutions offered by burden-sharing undoubtedly deserve closer attention from EU policymakers and have hopefully not been exhausted. Admittedly, debates around mutual recognition of positive asylum decisions, relocation of asylum seekers or joint processing of asylum claims have not yet been fully taken off the negotiating table. The practical value of 'talking about Dublin', if any, is thus to encourage the Union to explore these policies as normative alternatives to the Dublin system rather than measures superimposed to an unquestioned policy path. One can only hope that the development of the CEAS and the collective challenges brought before Member States by large-scale international refugee crises will drive sounder policy decisions on the distribution of asylum responsibility in the Union's future.

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