

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

DEPARTMENT OF GOVERNMENT

*The Limits of Communitarisation and the Legacy of Intergovernmentalism:*

*EU Asylum Governance and the Evolution of the Dublin System*

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Thesis submitted for the degree of Doctor of Philosophy

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## **Declaration**

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## Abstract

Situated as the cornerstone of the Common European Asylum System, the EU's Dublin system functions as the legal mechanism for determining Member State responsibility for the processing of asylum claims. Controversial from inception, it has been subject to extensive criticism that speaks not only to the distributional inequalities that it produces among the Member States, but also to its potentially detrimental impact on the human rights of asylum seekers. Despite these problems, however, the core features of the system as originally agreed in the 1990 Dublin Convention have remained remarkably resilient over the course of two reforms – one in 2003, and one in 2013. At the same time, the EU's governance landscape as it pertains to asylum policy-making has undergone a marked transformation. While Dublin I was the product of intergovernmentalism, both Dublin II and Dublin III were negotiated as part of the EU *acquis communautaire*, the former following the partial communitarisation of asylum policy-making and the latter following its full communitarisation. Though the specific changes to the institutional features of policy-making that this transition has entailed have been both theoretically expected and empirically proven to have a positive effect on EU policy output, the overall stability of the Dublin system in the face of these changes leaves it unclear as to what extent the 'promise of communitarisation' has been delivered in this particular case. How then do we explain the perseverance of a system that has not only failed to provide adequate standards of protection to those seeking it within EU borders, but which has also continually disadvantaged some of the very Member States party to its terms? And what impact, if any, has the communitarisation of asylum policy-making had on the attempts at its reform?

This research traces the evolution of the Dublin system from its initial formation through to its current state, by analysing the negotiations that produced each of the three Dublin agreements in order to explain both the system's emergence and its on-going stability. Using a rational choice institutionalist framework, it finds that the Dublin system's endurance can ultimately be credited to the deliberate choices that have been made by both the Member States and the EU's supranational institutions in pursuit of their preferences (bolstered or weakened by their relative strength of position) in the context of the (either empowering or constraining) institutional settings within which the reform negotiations took place.

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## Glossary of Abbreviations

AFSJ	Area of Freedom, Security and Justice
CAHAR	Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum and Refugees and Stateless Persons
CAP	Common Agricultural Policy
CEAS	Common European Asylum System
CEECs	Central and Eastern European Countries
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CLS	Council's Legal Service
COREPER	Committee of Permanent Representatives
EASO	European Asylum Support Office
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council for Refugees and Exiles
EESC	European Economic and Social Committee
EP	European Parliament
EPC	European Political Cooperation
EU	European Union
EURODAC	European Automated Fingerprint Recognition System
EUROPOL	European Police Office
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MEP	Member(s) of European Parliament
NGO	Non-governmental organisation
OLP	Ordinary Legislative Procedure
QMV	Qualified Majority Voting
SAP	Social Action Programme
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SIC	Schengen Implementation Convention
SEA	Single European Act
SIS	Schengen Information System
TCN	Third Country National
TEU	Treaty on European Union
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
WGII	Schengen Working Group II – Free Movement of Persons

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*“If the road to hell is paved with good intentions, the highway to Community harmonisation is littered with the debris of intergovernmental agreements.”*  
(Blake 2001: 95)

# 1 Introduction

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## 1.1 Background and Research Question

The spontaneous arrival of asylum seekers, and the often-volatile nature of their influx, has presented a persistent policy challenge for many European Union (EU) Member States. Though the scale of this challenge has varied considerably from country to country, Member States have been consistently confronted with the financial costs associated with asylum inflows (in terms of the processing of applications and the initial hosting of applicants) as well as the potential political and social costs that can emanate from less-than-welcoming (or sometimes even openly hostile) national populations. Set against international and EU-mandated human rights obligations, these costs have placed considerable strains on both national asylum systems and their respective governments.

The construction of the Schengen area<sup>1</sup> added an entirely new and collective dimension to this challenge. Aligned with the completion of the Single European Market, and similarly predicated on the principle of free movement, the creation of an internally border-free zone among the participating states promised to not only allow the unfettered passage of their own nationals across common frontiers, but also third country nationals (TCNs), including those intending to claim asylum. This meant that asylum seekers, by virtue of gaining access to one Member State's territory for the purpose of submitting an asylum claim, would now have access to all Member State territories. By facilitating the internal mobility of asylum seekers (and the inevitable costs associated with them), Schengen had therefore given rise to an entirely different problem, as the question of who should be ultimately responsible for handling an asylum claim was no longer a straightforward one.

The answer to this question has come in the form of the Dublin system, which functions as the legal mechanism for determining Member State responsibility for the processing of asylum claims. Introduced alongside Schengen, the Dublin system has been tasked with this

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<sup>1</sup> The Schengen area was founded on the basis of the 1985 Schengen Agreement, which called for the first-wave removal of internal border controls between its five original signatory states (France, Germany, Belgium, Luxembourg and the Netherlands). It has since expanded to include 22 EU countries and 4 non-EU countries.

particular function for almost 20 years. Despite the longevity of its tenure, however, its overall performance has been decidedly unimpressive.

From the outset, the implementation of the Dublin system has been plagued with on-going operational failures that have both undermined its overall efficiency and contravened its core objectives. At the same time, it has been widely denounced by asylum advocates for its unfavourable treatment of asylum seekers and for the often-injurious consequences that its application has entailed for human rights. And yet, one of the most frequent charges that has been levied against it is that it has disadvantaged some of the Member States themselves, by unfairly placing the 'burden of responsibility' primarily on those countries that are located along the EU's external border. However, regardless of these faults - and in spite of two separate attempts at reform to date - the Dublin system, as it was originally agreed, has remained more-or-less intact.

Within this context, the question guiding this research asks: *Why has the Dublin system endured despite its failures?* In addressing this question, this work will trace the evolution of the Dublin system from its initial formation through to its current state, by analysing the negotiations that have produced each of the three Dublin instruments agreed to date (the 1990 Dublin Convention, the 2003 Dublin II Regulation, and the 2013 Dublin III Regulation) in order to explain both the system's emergence and its on-going stability.

## **1.2 The Stability of the Dublin System: A Multi-Layered Puzzle**

This study, and the primary research question indicated above, is motivated by a multi-layered puzzle, which embodies both an empirical and a theoretical dimension.

### **1.2.1 The Empirical Puzzle**

Recent events off the coastlines of several southern Member States have catapulted the issue of EU asylum policy onto the forefront of the EU political agenda. A prominent feature of newspaper headlines, the EU's handling of the current asylum crisis has increasingly come under fire. Long-standing Member State anxieties over both the overall quantity of asylum

applications and their highly uneven distribution across the EU have been significantly amplified (and validated) in recent months and years on account of increasing pressures on the Common European Asylum System (CEAS) as a result of on-going instability and crisis in Africa and the Middle East. Estimates by the United Nations High Commissioner for Refugees (UNHCR) indicate that in the first half of 2014, over 75,000 refugees arrived by sea in Italy, Greece, Spain and Malta. Of this figure, over 60,000 individuals landed in Italy alone, with another 20,000+ arrivals just in the month of July (UNHCR, 2014a). By November of the same year, over 200,000 people had arrived by sea off the coast of the Mediterranean (compared to 60,000 in 2013), of which Italy again saw almost 80% of that total, and Greece almost 20% (marking a 300% increase on 2013) (UNHCR 2014b). The situation in 2015 was even more dramatic as a result of the escalation of the crisis in Syria, with UNHCR estimates putting the number of arrivals in the EU at upwards of 1 million asylum seekers (of which almost 700,000 were of Syrian origin), thereby surpassing by a considerable margin the previous record set in the early 1990s as a result of the crisis in the former Yugoslavia when the rate of applications reached a peak of just over 650,000 in 1992 (UNHCR 1999). As 2016 draws nearer to a close, the crisis shows minimal signs of abating.

The sheer scale of these recent migratory flows have served to dramatically highlight the on-going challenges facing the operation of the CEAS, and the disproportionate ‘burdens’ placed on certain Member States over others in the management of these flows in particular. As a result, the crisis has also worked to critically underscore the on-going inadequacies of the Dublin system<sup>2</sup> – the operation of which (as mentioned above) is generally seen to exaggerate this problem. Despite repeated pledges and the official articulation of “solidarity and fair sharing of responsibility” as a guiding principle of the CEAS<sup>3</sup>, the cries of an overwhelmed Italy and Greece have gone largely unanswered, leaving the rhetorical veil of solidarity seemingly thin and easily pierced. The continued stability of the Dublin system

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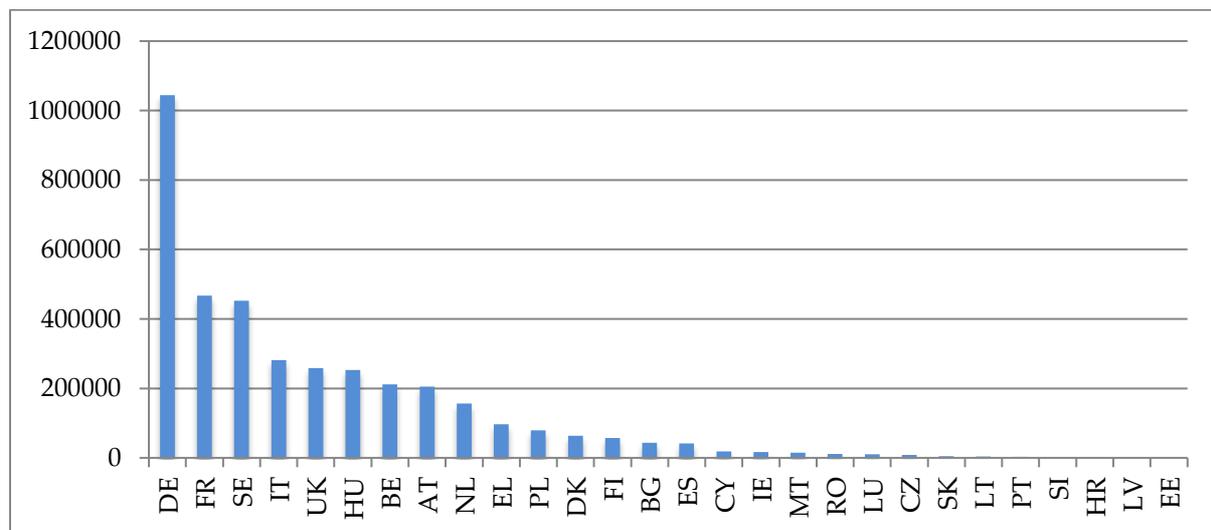
<sup>2</sup> ‘Of all the EU failures, its policy on asylum seekers is the worst’, *The Telegraph* 10 January 2015; ‘UK failing to share burden of migration crisis, says southern Europe’, *The Guardian*, 7 October 2011; ‘Dublin regulation leaves asylum seekers with their fingers burnt’, *The Guardian*, 7 October 2011; ‘Do not send me your huddled masses’, *The Economist*, 24 April 2015; ‘Behind the Iron Fence: Why Hungary’s Anti-Migrant Fence Will Be a Disaster’, *The Huffington Post*, 28 July 2015; ‘Why is the EU struggling with migrants and asylum?’, *BBC*, 26 June 2015.

<sup>3</sup> Article 63b of the Treaty of Lisbon states: “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications between the Member States”.

therefore begs the question as to how repeated political agreement has been possible on a mechanism that both amplifies existing distributional inequalities and imposes new pressures among several of its participating countries.

As mentioned above, concern over the uneven distribution of asylum applications across Europe is nothing new. After receiving approximately 65% of the total number of applications made in the EU in the aforementioned peak year of 1992, Germany had already begun to initiate proposals for the introduction of an EU-wide distribution system aimed at alleviating the pressures felt by the most affected Member States by ensuring a fairer distribution throughout the Union. Fast forward over twenty years to 2014, and Germany still received the highest number of applications at 202,834, followed by France and Sweden, with 101,895 and 95,578 applications respectively, while Ireland received only 2,705 applications for asylum and Portugal a mere 442 (UNHCR 2014).

Figure 1.1: Asylum Applications Lodged in EU Member States<sup>4</sup>, 2008-2015<sup>5</sup>



Source: Eurostat, 2008-2015 (Author's calculations).

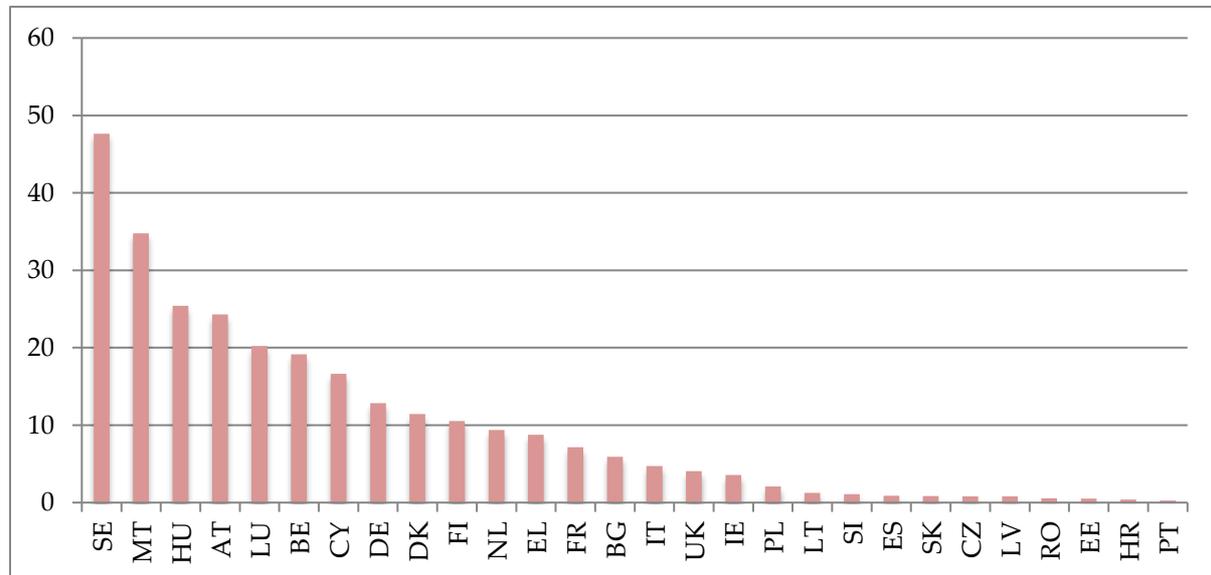
As the reception capacity of different Member States varies considerably throughout the EU, however, it is also important to consider the rate of applications on a relative basis. Taking population size into account, for example, Germany and France are no longer the highest

<sup>4</sup> See Appendix 1 for Country Codes.

<sup>5</sup> The selected time range (2008-2015) is reflective of the corresponding years for which the earliest and most recent uniform data on Dublin is available via Eurostat.

receiving countries and are instead replaced by smaller Member States such as Sweden, Malta, and Cyprus, despite the fact that countries such as Malta and Cyprus have a considerably lower reception capacity.

Figure 1.2: Asylum Applications Lodged in EU Member States per 1,000 Inhabitants, 2008-2015



Source: Eurostat 2008-2015, World Bank Population Database 2008-2015 Average (Author's calculations).

These inequalities have been arguably reinforced and even enhanced by the Dublin system, which is seen to place disproportionate pressures on those Member States with external borders and located closer to refugee-producing regions. At the foundation of the system lies the premise that whichever Member State played the greatest role in the entry of the asylum seeker into the EU (knowingly or unknowingly) should ultimately be responsible for processing their claim for asylum – a responsibility which often comes to lie with the first country of entry. Thus, contrary to the general aim of the CEAS to foster and improve burden sharing<sup>6</sup> among Member States, the implementation of the Dublin system has the potential to contravene that goal by instead resulting in a shifting of responsibility to those

<sup>6</sup> There has been a more recent push by various scholars and human rights groups to engage the term 'responsibility sharing' as opposed to 'burden sharing' to denote the international human rights *responsibilities* held by states and to avoid the entirely negative connotation that stems from referring to asylum applicants and the responsibility for hosting them as a *burden* (see: Thielemann, Richards and Boswell 2010: 26). While the author is indeed highly aware of the problematic nature of this connotation, this study nevertheless uses the term burden-sharing as it is a study oriented, in a large part, towards understanding the perspectives, preferences and motivations of Member States when it comes to the distribution of asylum responsibilities/burdens. As burden sharing is the term most often used by the Member States themselves, it is therefore a more accurate reflection of how they perceive their individual and collective obligations towards asylum seekers in a negotiation setting - that is, more of a burden, and less a humanitarian responsibility.

Member States located along the periphery of EU territory. Indeed, the European Commission (hereafter the Commission) has itself acknowledged that the “Dublin system may *de facto* result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location” (Commission 2007a: 10). It is therefore entirely unclear as to why those Member States that stood to be disadvantaged by the system’s operation ever agreed to it in the first place.

A brief look at some of the available statistics regarding Dublin’s application appears to verify these geographical disparities (Figure 1.3). Between 2008 and 2014, Italy received the largest number of incoming requests by a considerable margin, followed by other external border countries such as Poland and Hungary. These countries also experienced some of the highest rates of increase in the number of incoming requests over the same time period, with Italy, Poland, and Hungary each experiencing increases of 350%, 218% and a phenomenal 839% respectively. Yet also noteworthy in this regard was Cyprus, which similarly recorded a 510% increase in incoming transfer requests. The only reason that Greece does not also measure highly in this regard is due to the landmark European Court of Human Rights (ECtHR) ruling in 2011 (based on a 2009 asylum case<sup>7</sup>) that designated Greece an unsafe country for asylum seekers, which resulted in a suspension of transfers to Greek territory. This in turn explains the precipitous drop in incoming transfer requests to Greece from 9,506 in 2009 to just 74 in 2012; a figure that would otherwise arguably be much higher given Greece’s geographic position and the rate of arrivals on Greek shores.

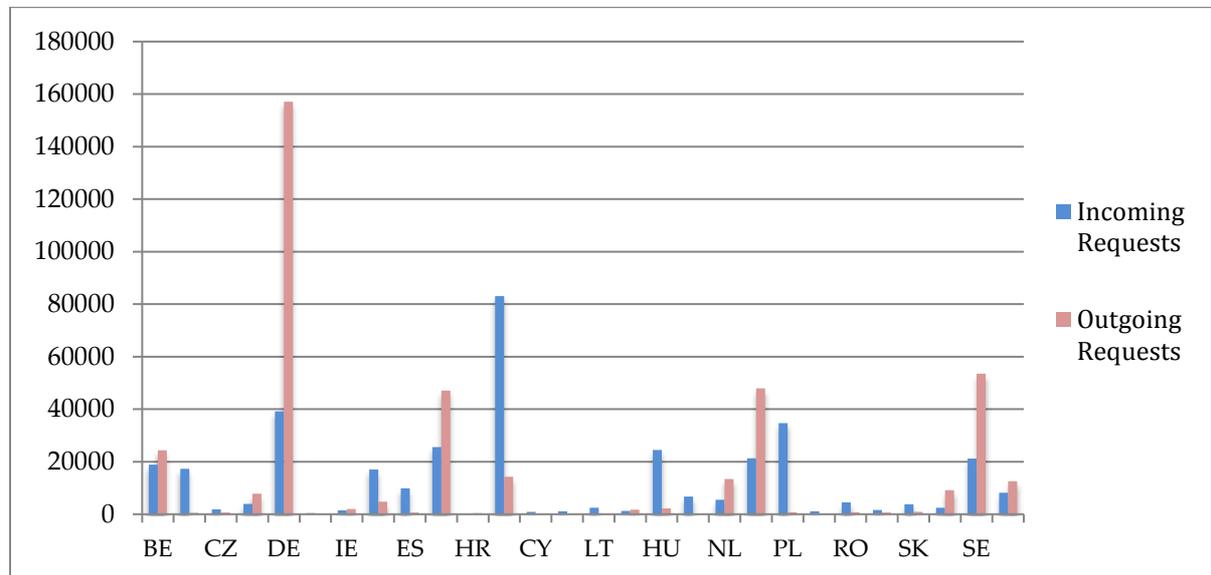
At the same time, Italy, Poland, and Hungary also show the highest degree of variation in the rate of incoming versus outgoing requests. While Member States such as Germany and France record similarly high rates of incoming transfer requests, they are nevertheless simultaneously outstripped by their respective rates of outgoing requests; a relationship which they share with other internal Member States such as Sweden, Austria and Belgium. Though it has been suggested that high rates of incoming requests in these internal states ultimately undermine accusations that Dublin systematically disadvantages external border

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<sup>7</sup> ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21/01/2011.

states (Fratzke 2015), the above-listed internal countries nevertheless remain net senders as opposed to their externally located net-receiving counterparts.

Figure 1.3: Total Incoming Requests, from all Partner Countries, by Receiving Country versus Total Outgoing Requests, from all Partner Countries, by Submitting Country, 2008-2015



Source: Eurostat.

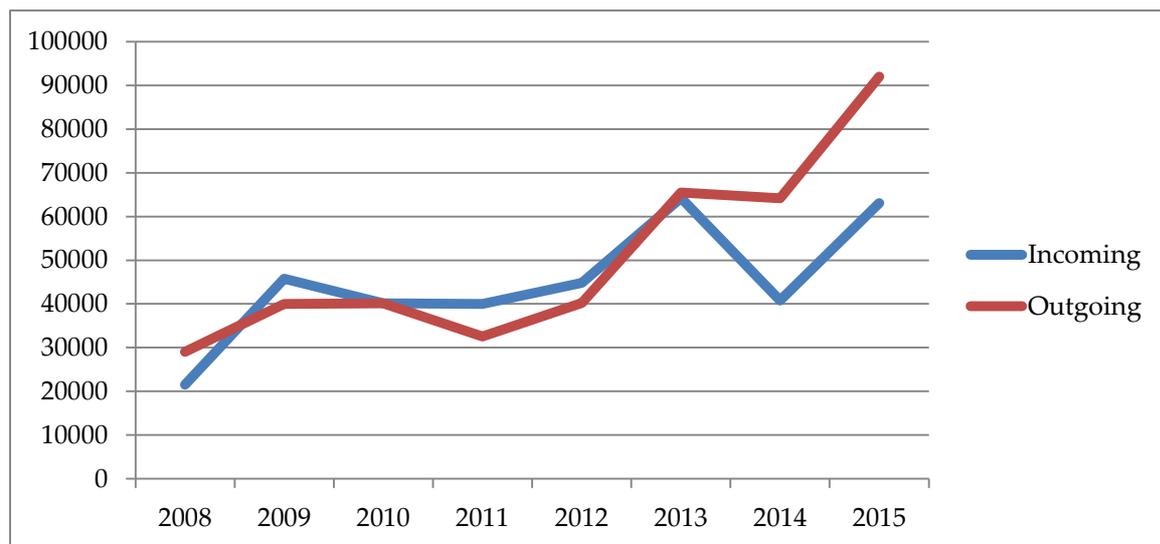
Note: Data on incoming requests unavailable for: BE (2015); CZ (2010, 2013-15); DK (2013, 2015); ES (2014-15); HR (2008-12, 2015); IT (2014); CY (2014); LT (2011-15); HU (2015); NL (2015); PL (2008, 2014); UK (2015). Data on outgoing requests unavailable for: BE (2015); CZ (2010, 2012-15); DK (2013, 2015); ES (2014-15); HR (2008-12, 2015); IT (2014); CY (2014-15); LT (2014-15); HU (2015); NL (2012-15); PL (2014); PT (2014); FI (2014); UK (2011, 2015).

While some of these trends in recent years may be attributable to the aforementioned troubles in the Middle East and Africa, a glimpse at statistics from earlier years seem to confirm the same pattern. In 2005, for example, Greece and Malta had a ratio of incoming to outgoing transfers of 58-1 and 39-1 respectively, while Germany had a 1-1 ratio and the United Kingdom (UK) 1-5.8. In the same year, Dublin transfers accounted for almost 20% of the asylum applications lodged in Poland, while they actually reduced those to be considered by the UK by 5% (Commission 2007b: 50, 52). The numbers therefore seem to confirm not only the highly inequitable distribution of asylum applications throughout the Union, but also Dublin's role in fuelling it.

In addition to accusations of redistributive unfairness, the Dublin system has also long been criticised for being neither particularly efficient nor effective. A source of often-considerable

financial and administrative burdens for the Member States, Dublin’s application has proved highly cumbersome, not only because of the resources its implementation requires, but also because of the length of time required to enact the procedure (which doesn’t even include the resources and time then required to actually process the application for asylum after responsibility has been determined). Furthermore, a continually high incidence of secondary movements and a perpetually low rate of effected transfers have been intrinsic characteristics of the system from its inception (contrary to its core objectives), due to the myriad difficulties and complications involved with and arising from its execution. While the rate of requests issued and received by participating countries has gradually increased in recent years (Figure 1.4), the actual rate of effected transfers continues to lag far behind (Figure 1.5).

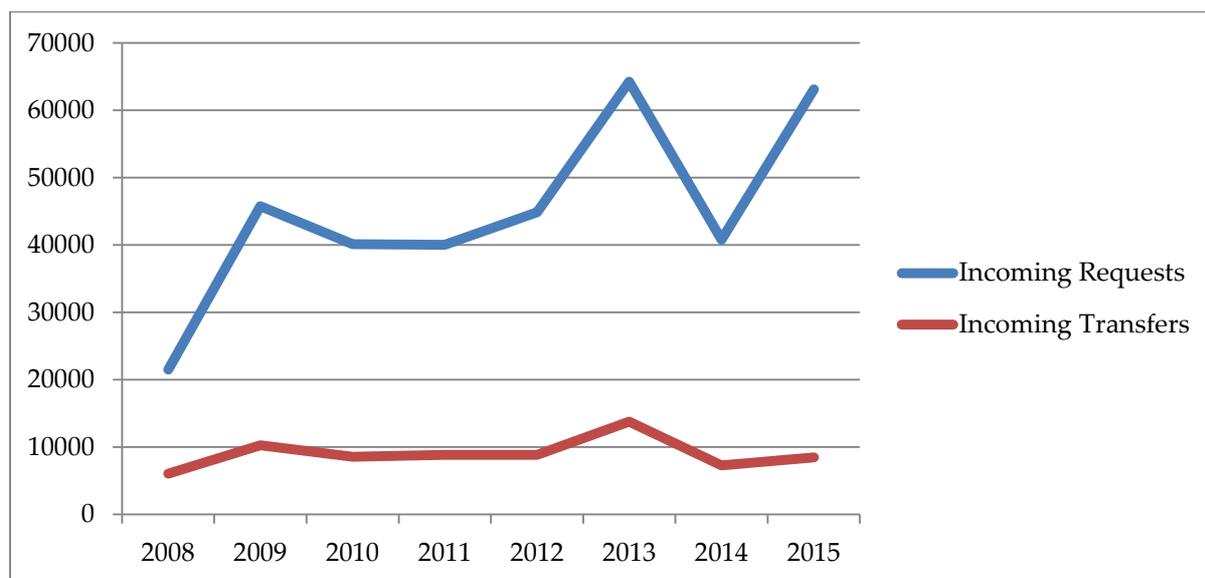
Figure 1.4: Total Number of Incoming and Outgoing Dublin Requests, 2008-2015



Source: Eurostat.

Note: The substantial drop in the 2014 figure for incoming requests is due to missing data as noted in Figure 3.  
 Note: Data on incoming requests unavailable for: BE (2015); CZ (2010, 2013-2015); DK (2013, 2015); ES (2014-15); HR (2008-12, 2015); IT (2014); CY (2014); LT (2014-15); HU (2015); NL (2012-15); PL (2008, 2014); UK (2015). Data on outgoing requests unavailable for: BE (2015); CZ (2010, 2012-15); DK (2013, 2015); ES (2014-15); HR (2008-12, 2015); IT (2014); CY (2014-15); LT (2014-15); HU (2015); NL (2012-15); PL (2014); PT (2014); FI (2014); UK (2015).

Figure 1.5: Total Incoming Requests versus Total Incoming Transfers, 2008-2014



Source: Eurostat.

Note: Unavailability of data on incoming requests same as Figure 1.4. Data on incoming transfers unavailable for: BE (2015); CZ (2010, 2013-15); DK (2008-13, 2015); EL (2008); ES (2014-15); HR (2008-12, 2015); IT (2014); CY (2014-15); NL (2012-14); AT (2014); LT (2015); NL (2015); HU (2015); PL (2014); PT (2014); FI (2009, 2014); SE (2008-09), 2015); UK (2015).

Though the lower rate of effected transfers may help in some way to minimise the distortive effects of the system, it still does not explain why Member States would deliberately agree on an allocation mechanism that is, in theory, redistributively inequitable, and in practice, difficult to execute; and yet, that is exactly what they have done, not once, but three times.

### 1.2.2 The Theoretical Puzzle

The empirical puzzle outlined above is all the more compelling and takes on a fundamentally theoretical dimension when situated within the context of broader scholarly debates on EU governance. An elaborate and highly complex policy-making machine, the EU has morphed from an exercise in purely economic cooperation to an economic, monetary and political union governed by supranational institutions and a vast network of formal and informal rules and procedures, with Community policy making now extending to even the most controversial and sovereignty sensitive of policy areas. This transformation has been achieved through successive reforms to the foundational EU treaties – the provisions of which have gradually modified the way that the EU governs and progressively expanded the scope of what it governs. These reforms have variably introduced new decision-making

processes, modified voting rules and determined the variable applicability of these processes and voting rules across different policy fields. At the same time, they have delegated significant powers and functions to the EU's supranational institutions, entrenched the roles of various actors within the EU decision-making apparatus and institutionalised the goals and central tenets that provide the foundations for EU cooperation. Alongside these formal developments, an emergent EU culture, on the basis of informal rules, shared norms and codes of conduct, has also gained significant traction as the extent and regularity of interaction between national and EU level actors has increased.

Questions as to the resonance of these changes have dominated the scholarly debate on the EU over the last several decades. Much of the focus has centred on their impact on the nature of the EU policy-making *process*. Academics have analysed at length how different decision-making procedures and voting rules have variably altered the relative level of influence and the balance of power between EU actors and their ability to shape legislation (Tsebelis 1994, 1996; Tsebelis and Garrett 1996, 2000; Crombez 1996; Moravcsik 1993; Sandholtz and Stone Sweet 1998; Pollack 1997, 2003; Tallberg 2002, 2003, 2004, 2008). Particular attention has been paid to the evolving roles of the EU's supranational institutions and their growing capacity for influence both in terms of the overall trajectory of integration as well as day-to-day policy-making – largely at the expense of Member State control (Thatcher and Stone Sweet 2002; Pollack 2003; Garrett and Weingast 1993; Stone Sweet et al. 2001; Beach 2004, 2005; Kaunert 2005, 2007, 2011; Stone Sweet and Sandholtz 1997, 1998). The political dynamics and internal machinations of the institutions and the dense and expanding network of committees, parties and working groups that comprise the policy-making machinery of the EU has also garnered significant interest among scholars (Beyers and Dierickx 1998; Nugent 1999, 2001; Peterson and Bomberg 1999; Hix et al. 2007; Hooghe 2001).

Yet an on-going tension between the national sovereignty of the EU's constituent Member States and the expanding reach of supranational governance has belied the evolution of European integration. Communitarisation has been considerably harder won in some policy areas (such as the Common Foreign Security Policy (CFSP)) as a result of Member States not

wanting to surrender jurisdiction over policy-making and enforcement to the supranational institutions. Challenges have also been made to the predominance of the Community method through more recent efforts at “renewed” (Allen 2002) and “reinvented” (Lavenex 2010) intergovernmentalism by virtue of the continued availability of more Member State-dominated methods of governance such as enhanced cooperation.<sup>8</sup>

The concurrent existence of multiple methods of governance has therefore allowed, and continues to allow, the EU policy-making system to oscillate between the exercise of more intergovernmental governance arrangements and more supranational ones. Through the highly political intergovernmental conferences (IGCs) that comprise EU treaty negotiations, Member States have consciously agreed to the institutional design of these methods of governance and consciously selected when and where they will apply.

These are not neutral choices. The flexible exercise of different governance arrangements in different policy areas has clear consequences for the institutional configurations that provide the structure for EU decision-making, which, in turn, have the power to shape actor preferences and strategies, alter the dynamics in the EU negotiation arena and ultimately influence the content of resulting policies. This has therefore also raised important questions as to how the progressive communitarisation of EU policy-making has impacted the substance of EU policy *outputs*. Are certain outputs more likely under certain governance arrangements? Has the communitarisation of EU policy-making necessarily resulted in the agreement of ‘better’ policies?

Taking on a more normative angle, various authors have sought to investigate how the application of different methods of governance has influenced the nature of cooperation. Much of the early work in this field initially feared that the transition to collective EU policy-making would systematically result in negotiation deadlock and suboptimal policy outcomes as a result of the predominance of intergovernmental methods of governance

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<sup>8</sup> Enhanced cooperation permits Member States to advance cooperation at different speeds towards different goals, while respecting the legal framework of the Union. The procedure was introduced in the Maastricht Treaty and refined by the Amsterdam, Nice and Lisbon Treaties. It allows a minimum of nine Member States to step outside of the EU framework to negotiate agreements aimed at furthering the objectives of the Union. Resulting agreements are not a part of the EU *acquis communautaire*.

(Scharpf 1988). More recently, however, these fears have largely dissipated in favour of more positive assessments of the impact of increasingly supranational ones (Ibid; Majone 2005). As the primary mode of governance<sup>9</sup> employed by the EU is regulation via the Community method<sup>10</sup> (Majone 1994, 1997, 2002b), the predominant focus of the academic discussion to date has investigated the relationship between evolving governance methods and the level of regulatory standards achieved by policy harmonisation. In this vein, the progressive communitarisation of different policy fields and the transition to more supranational governance arrangements has generally been applauded as a way to overcome collective action failures and regulatory competition (a 'race to the bottom'), while curtailing policy coordination in line with lowest common denominator standards in favour of more effective and progressive policies, thereby creating an ostensibly linear relationship between the transition to supranational governance arrangements and the adoption of higher standard policies (Pollack 2003; Thatcher and Stone Sweet 2002; Scharpf 1988, 1999; Majone 2005) – an expectation that has been empirically borne out in various policy fields. This has also been true in the case of the EU's more limited redistributive policies, such as the Common Agricultural Policy (CAP) and cohesion policy, which, despite substantive criticism and prolonged periods of stagnation, have similarly experienced successful reforms in the wake of communitarisation<sup>11</sup>.

This has been a particularly pertinent discussion in the realm of more contentious policy fields such as Justice and Home Affairs (JHA), which has faced a constant tension between Member State sovereignty and supranational control as well as an underlying strain that has pitted internal security concerns against the protection of liberties and human rights (Lavenex 2001: 852). Initially resistant to official Community-level cooperation and guarded as matters for exclusively Member State control, JHA did not even come to exist as a common area of EU policy until the 1993 Maastricht Treaty (when it was incorporated under the intergovernmental third pillar). The 1999 Amsterdam Treaty subsequently transferred it

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<sup>9</sup> For clarification and classification as to different modes of EU governance, see Treib et al. 2007.

<sup>10</sup> The Community method refers to the most integrated method of governance for EU decision-making. It is characterised by the Commission's monopoly on the right of legislative initiative, the use of qualified majority voting in the Council, a strong level of influence for the European Parliament, and the right of interpretation and enforcement of Community law by the Court of Justice of the European Union.

<sup>11</sup> These examples, alongside more specific regulatory examples, will be discussed in further detail in Chapter Two.

into the first Community pillar, albeit with various caveats and restrictions. While JHA policies were to become subject to EU decision-making procedures with higher levels of involvement for the supranational institutions, various intergovernmental provisions, such as unanimity voting, still remained<sup>12</sup>. It wasn't until the entry into force of the Lisbon Treaty in 2009 that JHA policy-making became fully communitarised<sup>13</sup>. While advancements in this area have consequently entailed a proverbial tug-of-war between intergovernmental and supranational governance and have been "riddled with compromises" (Lavenex 2010: 458) on account of Member State reservations, JHA policy-making has nevertheless experienced one of the most rapid transitions from purely intergovernmental cooperation to full communitarisation. Acquiring its "place among the more extraordinary phenomena of the integration process" (Monar 2001: 747), Lavenex (2010: 458) has captured the gravitas of its emergence and maturation, arguing that:

The development of a common response to immigration and asylum-seekers, the joint management of the external borders, the increasing coordination of national police forces in the fight against crime, the approximation of national criminal and civil law, and the creation of specialised EU bodies...constitute a new stage in the trajectory of integration. These processes reflect the increasing involvement of EU institutions in core functions of statehood and concomitantly, the transformation of traditional notions of sovereignty and democracy in the Member States.

Cooperation under JHA has therefore become not only a "central treaty objective...but also one of the most dynamic and expansionist areas of EU development in terms of generating new policy initiatives, institutional structures and its impact on European national actors" (Monar 2001: 748). Now constituting the most prolific area of policy-making in the EU, with profound institutional capabilities (Monar 2006: 499), it has been estimated that within the first ten years of its existence, up to forty percent of the material working its way through the

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<sup>12</sup> Despite this formal move into the first pillar, and following on from the legacy of the intergovernmental 1985 Schengen Agreement (whereby five EC States independently agreed the gradual abolition of internal border controls for the purpose of completing the Single Market), several Member States have continued to demonstrate a willingness to pursue cooperation outside of the EU's legal framework in this field. In a bid to speed up and enhance police cooperation and data exchange among Member States for the purpose of more effectively combating terrorism and cross-border crime, for example, Germany, Spain, France, Luxembourg, the Netherlands, Austria and Belgium agreed the intergovernmental 2005 Prüm Treaty. Notwithstanding established procedural guidelines regulating enhanced cooperation, the participating Member States didn't even attempt to invoke this procedure and instead proceeded to reach agreement entirely outside of the EU without any involvement from the EU institutions (Guild and Geyer 2006); yet regardless of this, and like Schengen before it, the Prüm Treaty has since been absorbed into the EU *acquis* despite its dubious legal origins (Ibid).

<sup>13</sup> JHA's complicated path to communitarisation will be explored in further detail in the following chapter.

Council at any given time was dealing with the “burgeoning” JHA agenda (Wallace 2001: 589).

The trajectory of JHA cooperation and the content of JHA policies have therefore garnered a substantive amount of scholarly attention. With the emergence of JHA on the European policy platform and with increased policy coordination aimed at establishing an Area of Freedom, Security and Justice (AFSJ)<sup>14</sup>, the resulting policy regime has been accused of heavily favouring the security component and for being characterised largely by notions of restriction and exclusion. Speaking specifically to the initial transfer of migration policies into the EU arena, Guiraudon (2000) has famously argued that the only reason that Member States were even willing to do so was a result of the desire to pursue more restrictive policies at the EU level than were possible at the national level (due to domestic legal and political constraints)<sup>15</sup> and to help legitimise and entrench a rights-diminishing orientation. With regards to the EU’s border regime more broadly, the focus on the provision of security for EU nationals has led to an implied dichotomy between a ‘safe inside’ and a purportedly ‘unsafe’ outside – with border controls presented as the primary tool for ensuring their separation (Monar 2001: 762). As a result, increased cooperation among EU Member States has been argued to have resulted in the ‘securitisation’<sup>16</sup> of migration (Bigo 1998, 2001; Huysmans 2000; Guild 2009) and the creation of ‘Fortress Europe’ (Geddes 2000; Peers 1998), with cooperation primarily aimed at the buttressing of the EU’s external frontiers, the proliferation of security controls aimed at detecting illegal immigrants, the toughening of conditions relating to access to asylum, and the general institutionalisation of discrimination targeted at outsiders (Bigo 1998: 155-158). This restrictive nature of cooperation in terms of the general content of JHA legislation has been largely credited to the strong intergovernmental bias of policy-making in this field in its early years (Ripoll-Servant and Trauner 2014: 1142).

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<sup>14</sup> The creation of the AFSJ was called for in the Amsterdam Treaty and the 1999 Tampere Council Presidency Conclusions.

<sup>15</sup> This is referred to as venue-shopping theory, whereby states strategically pursue “policy venues more amenable to [certain] ends” (Guiraudon 2000: 258).

<sup>16</sup> Derived from the Copenhagen School of security theory, this refers to the process whereby policy objects come to be presented as security threats (Buzan 1991; Buzan et al. 1998).

The proclivity towards restrictiveness has been particularly troubling as it pertains to EU asylum governance, with the increasingly harsh provisions regarding access to asylum quickly eliciting both concern and condemnation on account of the internationally protected right to seek asylum and Member State obligations under international humanitarian law (Hathaway 1993). In light of the need to circumvent this restrictive and exclusionary trend in the field of asylum policy, the 1999 Tampere programme specifically called for the development of a CEAS, which sought to harmonise asylum legislation among the Member States. The system was to elaborate “common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status” (European Council 1999). Given the continued application of intergovernmental arrangements at this point in time, the particularly contentious nature of asylum policy on account of perceived abuses of the system and its implications for national sovereignty (as determining who is and who is not permitted onto its territory is a primary function of the nation state), and with initial concerns as to a potential ‘race to the bottom’ in this field having been realised in the infancy of policy coordination in this field<sup>17</sup>, it was consequently feared that despite rhetorically avowed intentions otherwise, the harmonisation of asylum policies would ultimately follow a ‘lowest common denominator’ logic, aligning new EU standards with the practices of the lowest standard countries (Monar 2001; Lavenex 2001; van Selm-Thorburn 1998).

Empirically, however, these assumptions haven’t been entirely borne out. More recent research has actually shown that, even with some continued intergovernmental elements of governance, the emergence of the minimum standards directives has resulted in the introduction of new rights and the upgrading of existing standards in many of the Member States (Thielemann and El-Enany 2008, 2011; Thielemann and Zaun 2011, 2013; UNHCR 2007). Despite the elevated costs of higher standard regulations in the area of asylum, “these new EU policies have generated significant adaptation pressures in most, if not all, Member

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<sup>17</sup> Prior to the introduction of several Community initiatives pertaining to asylum, the highly uneven distribution of asylum seekers throughout Europe had worked to stimulate regulatory competition on asylum policy, as Member States tried to limit their relative ‘burden’ by introducing policies that were harsher and more restrictive than those of their neighbours out of a desire to deflect asylum seekers away from their territory and in the direction of countries with more lenient policies.

States” (Thielemann and Zaun 2011: 2). As the communitarisation of asylum policy-making has progressed, the aforementioned expectations as to the beneficial impact of the transition to supranational arrangements on policy outputs have therefore intensified in this field, in the hopes that communitarisation would ensure the further upgrading of asylum standards as a result of on-going coordination. More specifically, as the EU’s supranational institutions have moved from the “side-lines to the centre stage” (Uçarer 2001a), the increased influence of the Commission, the European Parliament (EP) and the Court of Justice of the European Union (CJEU) over the policy process has been expected to augment the rights-based traits of asylum regulations (Thielemann and El-Enany 2011) and has arguably “reinforced the liberal character of the asylum venue” in turn making the “adoption of more restrictive asylum provisions less likely” (Kaunert and Léonard 2012: 1405) – expectations that seem to have materialised in the more recent recasts of the minimum standards directives after the entry into force of the Lisbon Treaty.

At the same time, one of the other central goals of asylum cooperation – alongside policy harmonisation - has been to achieve a fairer level of burden sharing between the Member States in light of on-going problems pertaining to the highly uneven distribution of asylum applications throughout the EU. As such, the evolution of EU asylum policy has come to embody both a regulatory and a (re)distributive dimension<sup>18</sup>. With regards to the former dimension, the main policy instruments have included the aforementioned minimum standards directives, which govern the relationship between Member States and asylum applicants in terms of the responsibilities of Member States vis-à-vis those claiming protection. With regards to the latter dimension, the Dublin system<sup>19</sup> has been the primary

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<sup>18</sup> In fact, these goals are directly intertwined, as policy harmonisation has in and of itself been seen as a tool for achieving a more equitable distribution of asylum ‘burdens’. Policy harmonisation has been framed from early on as a means for achieving burden-sharing, as the equalisation of standards across Member States has been presented as a way of minimising the discrepancies in standards among the Member States, thereby reducing the incentives for asylum applicants to engage in secondary movements from traditionally low standard Member States to traditionally high standard destination countries (i.e. ‘asylum shopping’).

<sup>19</sup> It is important to note, however, that the Dublin system was not conceived as a responsibility-sharing mechanism as such, and was instead designed exclusively as a way to allocate the responsibility for processing an application for asylum to a single Member State (this will be discussed in further detail in Chapter Three); yet its operation is intrinsically linked with EU responsibility-sharing efforts. The more explicit EU instruments aimed at burden sharing include financial burden sharing instruments, via the European Refugee Fund (what is now the Asylum, Migration and Integration Fund) and physical burden-sharing instruments, via the Council Resolution on burden sharing (OJ C 262, 7.10.1995) and the Temporary Protection Directive (in the event of mass influx (OJ L 212/12, 7.8. 2001) .

instrument responsible for governing the relationship between Member States in terms of their responsibilities vis-à-vis one another, with the capacity to internally redirect asylum applicants between countries. And while recent studies have successfully demonstrated the rights-enhancing impact of 'more EU' on the CEAS' minimum standards directives, as outlined above (Thielemann and El-Enany 2008, 2011; Thielemann and Zaun 2013), it is not altogether clear as to what extent this 'promise of communitarisation' has been delivered in the case of the Dublin system, which itself possesses both regulatory and (re)distributive components.

Controversial from inception, the Dublin system has been at once "lauded as the cornerstone of the [CEAS]" and "vilified as a failure of solidarity and burden-sharing among [EU] Member States" (Fratzke 2015: 1). It's questionable configuration and troubled implementation has inevitably attracted a considerable amount of scholarly attention – the substance of which has been almost universally critical. Primarily evaluative in nature, much of the academic criticism directed at Dublin has been either conceptually focused on its flawed principles and assumptions (Hurwitz 1999; Blake 2001; Kjaerum 1992; Bhabha 1995; Hailbronner and Thiery 1997; Barbou des Places and Oger 2004) or realistically based on its negative practical effects (Hurwitz 1999; Marx 2001; Noll 2001; Lavenex 2001; Blake 2001; Vink and Meijerink 2003; Neuman 2003; Neuman 1992; Schuster 2011; Papadimitriou and Papageorgiou 2005). Various authors have also approached Dublin from an intrinsically legalistic point of view by critically appraising its intersection with, and implications for, both international human rights law and domestic case law (Noll 2001; Hurwitz 1999; Kjaergaard 1994; Costello 2005; Battjes 2002).

What has been noticeably absent from the discussions on Dublin, however, is an understanding of how these flawed principles and assumptions originated, and why, in light of their negative practical and legal repercussions, the overall composition of the Dublin system has remained so stable. This latter question is particularly pertinent given the significant changes that have been made with regards to EU asylum governance over the course of its evolution. Initially a product a pure intergovernmentalism, the original Dublin

Convention of 1990 has since been absorbed into the EU *acquis communautaire*<sup>20</sup> and has undergone two subsequent reforms – one after the *partial* communitarisation of asylum policy-making, the Dublin II Regulation of 2003, and one after *full* communitarisation, the Dublin III Regulation of 2013. Yet, despite the manifold problems associated with its implementation, *and* despite the significant changes that have been made to the governance arrangements presiding over two separate rounds of reforms, the Dublin system has nevertheless proved remarkably impervious to substantive alteration.

Within this context, and expanding on the research question stated above (*Why has the Dublin system endured despite its failures?*), this research therefore also addresses a broader research question, which asks: *Why has the Dublin system endured despite its failures and despite the communitarisation of asylum policy-making?* In asking this question, this research ultimately aims to disentangle the dual empirical and theoretical puzzle that Dublin's persistence presents. In so doing, this work seeks to fill the aforementioned gap in the literature on Dublin by providing a comprehensive account of both its emergence and its stability, while also contributing to the wider literature on EU (asylum) policy-making and the impact of communitarisation, by taking advantage of the unique opportunity provided by Dublin to systematically examine the role of EU governance arrangements in shaping policy outcomes, as it has been negotiated on three separate occasions in three entirely different governance contexts.

### **1.3 The Argument in Brief**

This study argues that the Dublin system has been able to endure despite its failures and despite the communitarisation of asylum policy-making because of the deliberate choices made by both the Member States and the supranational institutions in pursuit of their preferences (bolstered or weakened by their relative strength of position<sup>21</sup>) in the context of the (either empowering or constraining) institutional settings within which the reform

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<sup>20</sup> The *acquis communautaire* refers to the entire collection of EU treaties, legislation, declarations, resolutions, etc.

<sup>21</sup> Determined on the basis of the credibility and intensity of their positions, with the former measured on the basis of their expertise with immigration regulation and their credibility of commitments (i.e. compliance record) and the latter measured on issue salience in terms of exposure to both asylum inflows generally as well as Dublin transfers more specifically.

negotiations took place. Within the context of a rational choice institutionalist framework, the findings of the empirical chapters lend extensive support to the conceptualisation of EU actors as inherently rational actors with varying degrees of positional strength, engaged in strategic interactions in the pursuit of their preferences, to which end, they are either helped or hindered by the dense network of institutional rules and norms that ultimately structure the EU asylum policy-making process – the causal result of which is then reflected in policy output. Summarised crudely: the Dublin system emerged because of actor interests and actor opportunities and it has endured because of actor interests and actor limitations.

#### **1.4 Chapter Outline**

The remainder of this thesis is organised as follows:

Chapter Two establishes the theoretical foundations of the study, and reviews the relevant bodies of literature that have informed its underlying theoretical puzzle and framework. Situated within the new institutionalism, it builds a specifically rational choice institutionalist framework for the study of EU asylum policy-making and the Dublin system in particular. It also provides an overview of this work's guiding research design and methodology.

Chapter Three introduces the empirical part of the study by outlining the core features of the Dublin system and examines why each of these features are at once problematic and puzzling, thus providing a more comprehensive introduction to the study's dependent variable(s).

Chapter Four analyses the formation of the Dublin system, first through the negotiation of the 1990 Schengen Implementation Convention's (SIC) provisions on asylum, and second through their reproduction in the 1990 Dublin Convention. It discusses how the various interests of the actors involved, combined with their intergovernmental institutional settings, ultimately shaped the system's emergence and the problematic form that it took.

Chapter Five analyses the first attempt at reforming the Dublin system, which took place following the *partial* communitarisation of asylum policy-making and which resulted in the adoption of the 2003 Dublin II Regulation. It discusses how the various interests of the actors involved combined with their relative strength of position and their institutional setting under the consultation procedure to ultimately shape the output of the negotiations, thereby ensuring Dublin's stability through this first attempt at reform.

Chapter Six analyses the second attempt at reforming the Dublin system, which took place following the *full* communitarisation of asylum policy-making and which resulted in the adoption of the 2013 *recast* Dublin III Regulation. It discusses how the various interests of the actors involved combined with their relative strength of position and their institutional setting under the co-decision procedure to ultimately shape the output of the negotiations, thereby ensuring Dublin's continued stability through this second attempt at reform.

Chapter Seven concludes this work by drawing together the findings of the empirical chapters into a comprehensive analysis of the Dublin system's evolution within the context of this study's overarching framework, while also highlighting the broader contributions and implications of this research.

## 2 Theoretical Framework: A New Institutional Approach to the Study of EU Asylum Policy-Making

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This chapter presents this study's theoretical framework, which is based within the broader paradigm of the 'new' institutionalism. Within the context of this framework, the chapter will formulate several 'institutions'-based expectations regarding actor behaviour in order to account for asylum policy output at the EU level – specifically the Dublin II and Dublin III regulations (it will also specify several baseline expectations regarding initial policy formation in the case of the original SIC asylum provisions and Dublin Convention). These expectations are derived from existing theoretical literature developed within the field of EU policy-making, and situated within the context of EU asylum policy-making.

The fundamental premise of institutionalist thinking is that institutions affect outcomes – a message that has become so prevalent and accepted within the academic community that it has led some scholars to assert that “we are all institutionalists now” (Pierson and Skopcol 2002: 706; Aspinwall and Schneider 2000: 1). According to institutionalist thinking, “political struggles are mediated by prevailing institutional arrangements” (Bulmer 1994: 355) as institutions serve to “structure political actions and outcomes” by encompassing both formal and informal configurations that ultimately influence actor behaviour in an “either constraining or empowering” fashion (Aspinwall and Schneider 2000: 4). By providing the framework within which actors interact (Ibid) (i.e. the ‘rules of the game’), institutional features ultimately play a crucial role in influencing both preferences and policy outputs (Shepsle 1989: 135).

While ascribed as the 'new' institutionalism within the comparative political science literature, the core assumption that *institutions* matter is neither particularly 'new' nor specific to political science, as political scientists, sociologists, economists and international relations scholars alike have long considered the importance of institutions. Within the field of political science in particular, the 'old' institutionalism “consisted mainly, though not exclusively, of detailed configurative studies of different administrative, legal, and political structures” (Thelen and Steinmo 1992: 3). Acknowledging that the focus on purely formal

(and often constitutional) structures could not fully account for political behaviour or outputs, scholars seeking to overcome this rather narrow 'old' institutional paradigm sought to expand the scope of interpretation as to what constitutes an 'institution' to also include more informal structures. As "social, political and economic institutions have become larger, considerably more complex and resourceful, and prima facie more important to collective life" (March and Olsen 1984: 734), the 'new' institutionalists have therefore sought to simultaneously examine the impact of both the formal organisations, rules and procedures that structure and guide political activity as well as the "beliefs, paradigms, codes, cultures and knowledge" that are often found embedded within institutional settings (March and Olsen 1989: 26). This framework has therefore found a natural application in the case of the EU, as the highly institutionalised setting within which European cooperation occurs naturally lends itself to the merits of institutional analysis.

Despite the prevalence of its application, however, one of the main critiques facing the institutionalist research agenda relates to its lack of theoretical clarity, as it has been accused of being characterised by a "clear lack of conceptualisation of what institutions are or how they can be defined" (Keman 1997: 1) and a "considerable promiscuity" in the way "in which researchers [have dealt] with different facets of rule-based behaviour" (Aspinwall and Schneider 2000: 2). However, Hall and Taylor (1996: 936) argue that "some of the ambiguities surrounding the new institutionalism can be dispelled if we recognise that it does not constitute a unified body of thought" as the evolution of new institutionalist thinking has consisted of the simultaneous evolution of three constituent schools of thought, each of which presupposes a different definition of 'institutions' and a different understanding of how those institutions exercise impact. Thus, while they are all united in their ultimate goal of "elucidat[ing] the role that institutions play in the determination of social and political outcomes" (Hall and Taylor 1996: 936), rational choice institutionalism, sociological institutionalism, and historical institutionalism go about this aim in different ways on the basis of different assumptions<sup>22</sup>.

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<sup>22</sup> While their crucially different presuppositions inherently limit the possibilities for any high level theoretical convergence, with a "crude synthesis" neither "immediately practical or even necessarily desirable" (Hall and Taylor 1996: 24), several authors have argued that these approaches can arguably 'learn' from one another as not

This study adopts the first of these three schools of thought as its underlying theoretical framework and asserts that rational choice institutionalism (hereafter RCI) provides the best explanatory lens through which to view the Dublin case study and with which to address the research questions at hand. Prior to developing an RCI-grounded framework specific to the analysis of asylum policy-making, this chapter will first open with a brief review of the literature that informed this study's choice of framework. It will therefore look at how institutions-based explanations more generally have been applied to account for policy output in other EU policy fields – both in terms of initial policy formation as well as subsequent policy reform. It will then proceed with an outline of the study's framework as per above. The chapter will conclude with a discussion on research design and methods.

## **2.1 Contextualising the Dublin Puzzle: The Impact of Institutional Arrangements on Policy Output in other EU Policy Areas**

As indicated above, this section reviews institutions-based explanations for policy outputs in EU policy areas other than asylum. Looking at both regulatory and redistributive policy examples with varying degrees of political sensitivity, it will specifically highlight how communitarisation and the transition to more supranational governance arrangements has been seen to have had a generally positive impact on the overall strength of EU policy outputs. In so doing, this section serves to further contextualise the theoretical puzzle outlined in Chapter One prior to setting out expectations as to why attempts at reform in the case of the Dublin recast regulations have not enjoyed similar success.

### **2.1.1 *Regulatory Ambition: Elevating Standards in Environmental and Social Policy***

One of the main justifications employed by EU policy-makers to legitimise the transition from intergovernmental to supranational governance is the superior capacity of EU policy-makers to solve problems in a more effective and efficient manner than continued national action (Hooghe 1998: 464). To a large extent, this is arguably true. Regulatory competition and collective action failures resulting from increased market integration, the breakdown of national boundaries and the creation of the single market are theoretically best solved by re-

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one of them can actually be said to be “substantially untrue” given that each of them seems to reveal something different about how institutions impact behaviour (Ibid: 22-24; see also Aspinwall and Schneider 2000).

regulation at the European level and by the delegation of regulatory powers to supranational institutions (Scharpf 1996; Thatcher and Stone Sweet 2002) – whose legitimacy, as regulators, is derived from their commitment to the improved efficiency of policy outputs (Majone 1997). Initial predictions as to how this transition might variably progress generally anticipated that integration would face considerable Member State resistance on account of diverse interests and the need for “explicit political legitimization” in the Council due to the predominantly intergovernmental institutional arrangements that dictate their agreement (Scharpf 1996: 19). Thus, if and where coordination was possible, agreement should be expected to harmonise at the lowest common denominator of existing national standards.

Yet the EU has aptly demonstrated its robustness as a regulatory body, given that EU policy harmonisation has actively expanded its reach to include areas such as the environment, consumer protection, workplace health and safety, and even social policy to some extent (Majone 1993). Not only that, but it has managed to do so in a way that has achieved a higher standard of regulation than expected, in many cases securing the adoption of more advanced legislation than had previously existed in any of the Member States (Garrett and Tsebelis 1996: 287). Despite not even being mentioned in the 1957 Treaty of Rome, EU environmental policy, for example, now boasts “some of the most progressive...policies of any state in the world...and adds up to considerably *more* than the sum of national environmental policies” (Jordan 2005: 1-2). As the Member States came to acknowledge the environmental repercussions of market integration in the late 1960s and early 1970s, the need for Community-wide environmental legislation became increasingly apparent – an opportunity not missed by the EU’s supranational institutions. Despite the absence of an official treaty mandate, approximately 200 regulations, decisions and directives were introduced between 1967 and 1987 (Majone 1994: 85). Yet much of this period has been referred to as the ‘dark ages’ of EU environmental policy, as intergovernmental decision-making requirements predictably resulted in harmonisation at low level standards and only dealt with those issues relating directly to market integration (Jordan 2005: 5). When the Single European Act (SEA) came into force in 1987, however, environmental legislation became an official EU objective subject to the cooperation procedure and qualified majority

voting (QMV) on market integration issues. It also came to include new environmental issues – the resulting policies for which largely went “beyond any conceivable standards that would be strictly necessitated by a concern to ensure a single functioning market” (Weale 2005: 128). As a result, the EU quickly came to adopt “more environmental statutes than in the previous 20 years combined” (Jordan 2005: 6).

Looking to another example, while the accomplishments of EU policy-making have varied across the wide spectrum of social policy areas, cooperation has achieved marked success on several issues. Unlike traditional redistributive social policies characteristic of sovereign nation-states, the Treaty of Rome initially called for an alternate form of social policy – one which was “concerned with market-making rather than market-correcting, aimed at creating an integrated European labour market and enabling it to function efficiently, rather than correcting its outcomes in line with political standards of social justice” (Streeck 1996: 72). As such, EU jurisdiction over social policy was originally limited to technical matters of “social conscience” (Ibid: 72). However, the fear that increased labour mobility would jeopardise the national competitiveness of those Member States with considerably higher standard social systems helped to expand this agenda, not through the institutionalisation of uniform supranational rights, but through the coordination of national regimes (Ibid: 74). While this was made difficult by intergovernmental decision-making requirements, some agreement was achieved in the form of the 1972 Social Action Programme (SAP). Though not altogether effective, the SAP did enable the EU to have an “impact on national labour regimes which may [have been] fragmented and contested but which nonetheless cannot be discounted” (Teague 2001: 21). Of the ten directives passed via the SAP, three of them dealt with equal opportunities for women, which worked to significantly advance rules regarding sex discrimination (Ibid: 11) and which had a “discernible impact on Member States...[who] were forced to introduce enabling legislation” (Addison and Siebert 1991: 602 quoted in Streeck 1996: 76). New rules regarding health and safety standards in the workplace were also set at a level that required considerable upwards adaptation for many Member States despite unanimity requirements, “possibly because of the reticence on the part of Member States to embrace the notion that the right to have lower health standards is a valid means of labour market competition” (Ibid). The resulting make-up of regulations certainly goes

against lowest common denominator expectations and has instead made it “difficult to find equally advanced principles in the legislation of major industrialised countries inside and outside of the [European Community (EC)<sup>23</sup>]” (Majone 1993: 167). With the introduction of the SEA, workplace health and safety legislation became subject to QMV and a ‘social dimension’ was included in the internal market programme – the components of which have been expanding ever since.

On a basic level, the proliferation of EU legislation in these two examples has been possible because of the willingness of Member States to transfer regulatory policy-making to the supranational level in order to correct market failures resulting from deepening economic integration as well as their readiness to delegate powers to the supranational institutions in order to overcome credible commitment problems and to achieve a level of expertise in complicated regulatory fields (Majone 1997; Thatcher and Stone Sweet 2002; Pollack 2003). With regards to accounting more specifically for the actual standard-improving content of these regulations, explanations have focused on largely institutional considerations. In the case of environmental policy, institutional activism has been argued to have played an instrumental role in advancing EU legislation, both prior to the official delegation of policy-making powers and after. As Rehbinder and Stewart (1985: 400) note:

Using a pragmatic and incrementalist approach, and concentrating on problems where the benefits of common action were evident, [the Community institutions] have, step by step, established a network of...legislative texts for the protection of the environment, thereby creating a mosaic of precedents... which will be hard to overrule.

Achieving ‘integration by stealth’ (Majone 2005; Jordan 2005), actions taken by the CJEU throughout the 1960s and 1970s worked to legitimise the activist agenda of the Commission, whilst also creating new entry points for intervention by the EP and solidifying a framework for ensuring compliance (Jordan 2005: 7). Armed with its right to legislative initiative, the Commission went about actively proposing environmental legislation that either met or exceeded the existing standards in the most environmentally progressive Member States, while the EP consistently acted as a champion of higher environmental standards, by exploiting both its formal and informal influence and by opening doors to environmental

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<sup>23</sup> This study variably refers to the EC (pre-1993) and the EU (post-1993).

activist groups that would have otherwise been denied access to the policy process (Jordan 2005: 7; Burns 2005).

The same has been argued in the case of the aforementioned social policy examples, in that Community institutions have endeavoured to develop a body of EU law that “has obliged Member States to change in one respect or another [their] domestic labour law regimes” and by actively framing issues at the European level in a way that had repercussions for domestic conversations (Teague 2001: 11). Where the traditional community legislation has not been an achievable objective due to the EU’s institutional limitations and domestic sensitivities, developments in social policy have been a topic of particular interest on account of their reliance on new modes of governance, such as the Open Method of Coordination and the use of non-binding recommendations of ‘best practice’, to encourage some degree of high-standard harmonisation. While these measures may be considered less than ideal on account of their lack of enforceability and ambiguous legal standing, they have nevertheless functioned as an effective source of social pressure among Member States to upgrade standards by generating considerable social costs for low standard regimes not only in terms of their relationship with fellow Member States but also their own citizens.

The ability for EU policy-making to escape intergovernmental deadlock (Héritier 1996) and the ‘joint-decision trap’ (Scharpf 1988) in these policy areas has also crucially depended on how the diverse constellation of Member State interests have navigated the institutional confines of EU decision-making (Scharpf 1996). Authors such as Héritier (1996) have argued that the higher standard orientation of certain policies can also be credited to the work of activist Member States within the EU governance framework. Looking to the case of environmental policy, she has argued that high-standard countries have an incentive to get involved in the agenda setting stage of policy-making in order to exploit ‘first mover advantage’ by working to define and frame the problem on the EU level in order to propose their own existing regulatory standards as the best solution to that problem (Ibid: 151-154)<sup>24</sup>. This strategy allows high standard countries to dictate the terms of cooperation in line with

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<sup>24</sup> The importance of agenda setting, problem definition and issue framing will be returned to in more detail in section 2.2.

their existing preferences and helps to avoid any potential adaptation costs of having to alter domestic legislation, instead placing those costs on low standard countries that are instead required to upgrade. Such an incentive arguably also applies in the case of social policy. As mentioned above, high standard countries may be concerned that the on-going provision of high standards may compromise their competitiveness against low standard countries, which may therefore motivate them to push for the establishment of European standards that align with their own.

### ***2.1.2 Reforming Redistribution under the CAP and Cohesion Policy***

Much like the case with the regulatory policy fields discussed above, there is also a seeming consensus in the literature that institutional arrangements have similarly influenced policy output in the case of both the CAP and cohesion policy, and more specifically, that the transition to more supranational institutional arrangements in both cases have ultimately enabled policy reforms that have substantially improved the efficiency and equitability of the EU's two most significant redistributive policies.

Majone (1997) has famously argued that the claim to legitimacy that the EU holds with regards to regulatory policy-making does not necessarily apply to redistributive policy-making. As redistributive policies create clear winners and losers, and are thus naturally *pareto-inefficient*, he argues that decisions surrounding distributive issues should remain in the hands of elected officials rather than supranational non-majoritarian institutions. However, built into the very infrastructure of the EC are two such policies, which represent the two primary areas of expenditure from the (albeit limited) central EU budget. Established as a core EU policy in the 1957 Treaty of Rome, the CAP was created to increase agricultural productivity, ensure a reasonable standard of living for farmers, stabilise the market, ensure the availability of agricultural products and ensure that those products were affordable to consumers (EC Treaty Title II Art. 33). In order to achieve these goals, a system of indirect income support for European farmers was developed, which was to be funded by European taxpayers via the EU's budget and by European consumers via increased prices levied on imported agricultural products. Also originating from the Treaty of Rome, the EU's cohesion policy was established to promote economic and social cohesion among

Member States and involves the administration of various structural funds designed to reduce disparities among regions and countries.

As the political dynamics involved in redistributive policy-making are expected to be considerably different than those accompanying regulatory policy-making (Freeman 2006) – resulting in bargaining-style negotiations over distributive spoils as opposed to efficiency-oriented problem-solving (Majone 2007) – the potential impact of changing institutional arrangements is all the more interesting when it comes to negotiations surrounding redistributive policies. While purely intergovernmental governance arrangements are expected to largely reflect relative bargaining power in negotiations (Moravcsik 1993), the shift to more supranational institutional arrangements and the heightened interference of the supranational institutions necessarily modifies the ‘rules of the *zero-sum* game’ in a game that inherently embodies a ‘fairness’ dimension.

Perhaps unsurprisingly, both of the aforementioned policies have proved a major source of contention among the Member States and have been subject to widespread criticism in terms of their effectiveness and redistributive impact. Put into practice, the CAP has been widely criticised for straining the EU’s budget, incentivising inefficient production, significantly distorting transfers between and within Member States, hindering global free trade, and for destabilising and depressing world prices (von Witzke 1986: 157; Patterson 1997; Pokrivcak et al. 2006; Josling 2008). While based on a sound normative goal, the actual effectiveness of cohesion policy in achieving its objectives has also been constantly questioned. Initially critiqued for its limited scope, scale and impact (Hooghe 1998), regional funding has been accused of being overly focused on growth (Manzella and Mendez 2009: 3). As funds are primarily aimed at converging regional economies rather than regional incomes (Anderson 1995), very little has been done to reduce inequalities between social groups and individuals, inherently limiting the ability of the policy to realistically reduce economic and social disparities (McAleavey and DeRynck 1997), leading to accusations that cohesion policy has actually worked to perpetuate, and potentially even exaggerate, regional disparities instead of reducing them (Menzella and Mendez 2009: 3; Fagerberg and Verspagen 1996; Hooghe 1998).

Despite the widespread problems facing the operation of the CAP and repeated calls for change, it remained completely immune to any substantial reform for thirty-five years. Likewise, cohesion policy – which, while introduced in the Treaty of Rome, didn't become officially subject to EC jurisdiction until the late 1960s – was also resistant to any significant reform for a similarly impressive thirty-one years. In seeking to explain, firstly, how the CAP and cohesion policy remained resistant to reform for so long, and secondly, what factors eventually enabled reforms, the accounts provided by various scholars are ultimately united by the common thread of the importance of the influence of changing EU institutional arrangements (see, for example, Patterson 1997; Rodden 2002; Kauppi and Widgren 2004; Daugbjerg and Swinbank 2007; Pokrivcak et al. 2006; Coleman and Tangermann 1999).

In both cases, resistance to reform has generally been attributed to more intergovernmental modes of governance and a high level of Member State control. The product of a Franco-German bargain and a hard-won case of intergovernmentalism (Patterson 1997: 136), the CAP's successful resistance to reform for so many years has been credited to the insistence on unanimity voting in the Council<sup>25</sup> and the willingness of Member States to exercise their veto under pressure from powerful domestic agricultural lobbies (Moyer and Josling 1990). In the case of cohesion policy, initial Member State insistence on retaining autonomous and intergovernmental control over regional policy and the administration of regional funds effectively blocked the emergence of a Community regional policy and resulted in its virtual impotence until the 1998 reforms (Manzella and Mendez 2009).

Equally, the fact that substantive reforms were ultimately possible has been credited to the shift towards more supranational institutional arrangements and the empowerment of the EU's supranational institutions in particular. While various international and domestic pressures have been shown to have placed significant pressure on the need for CAP reform

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<sup>25</sup> While the Treaty of Rome provided for majority voting on agricultural policies, controversy over voting rules led France to declare that all decisions relating to agriculture were so vital to its national interests that unanimity voting should be required. Member States soon after adopted the 1966 Luxembourg Compromise, which led to virtually all decisions relating to agriculture price policy being made by unanimous vote in subsequent years with majority voting only resuming in the 1982 annual price review.

after decades of inertia (Patterson 1997; Daugbjerg and Swinbank 2007), the reduced ability of Member States to create blocking minorities on account of voting rule changes (Swinbank 1999) has been credited with helping to facilitate reform. It has also been suggested that the variable success of different reforms has been partly attributable to the choice of institutional setting for negotiations, in that the Council of Agricultural Ministers has proven a more conducive setting for achieving reform than the Council (Daugbjerg and Swinbank 2007)<sup>26</sup>. Perhaps the most emphasis, however, has been placed on the role of the Commission in shaping reform on account of increasing levels of influence and agenda-setting power. In turn, this has created windows of opportunity for individual Commissioners to exercise influence in driving change. Commissioner MacSharry played a fundamental part in making the 1992 reforms a reality, and the ambitious agenda of Commissioner Fischler in the 2003 reform proposals prompted the Member States to actually accuse him of going beyond his Council-assigned mandate (Pokrivcak et al. 2006). Ultimately, the role of the Commission in articulating the goals of reform and in tabling specific proposals (Daugbjerg and Swinbank 2007) has allowed it to exercise considerable entrepreneurial leadership (Patterson 1997) in pushing for substantive reforms that eventually altered the foundations of the system, reduced incentives for inefficiency, and which significantly lessened the distortions in the redistributive effects of the policy.

Similarly, the EU's current cohesion policy "owes most of its distinctive features to the major reform...[that] took place in 1988" (Armstrong 2001: 400) and which was also largely a triumph of the efforts of the Commission. Capitalising on fears that the 1992 programme on the completion of the single market would exacerbate existing inequalities between Member States and regions, and "to ward off the threat of a two-speed Europe" (Commission 1992: 10), Jacques Delors acted as the main advocate for reform (Delors 1992; Ross 1995), using this window to institutionalise regulated capitalism through the reform of cohesion policy (Hooghe 1998: 461). Pushing ideas of solidarity and partnership (Ibid: 459), and with strong backing from majorities in the Commission and the EP (Hooghe and Marks 1998), the

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<sup>26</sup> Daugbjerg and Swinbank (2007) suggest that the choice of institutional setting is often a strategic move by farm ministers and government representatives in order to avoid backlash against unpopular policies. This line of argument is consistent with the venue-shopping thesis introduced in Chapter One, in that actors will pursue the institutional venues for policy-making that best serve their objectives.

Commission argued that the reform of the structural funds was essential in order to “give the weakest regions the resources to catch up progressively by making more rapid progress than the others, in spite of their handicap” (Commission 1992: 10). In order to achieve this, the Commission essentially appointed itself as the ‘general manager’ of cohesion policy (Hooghe 1998: 459), by dictating the criteria for funding eligibility on the basis of Community-determined objectives, and by making funding conditional on the production of jointly determined programmes by the Member States and the Commission as to the use of the funds (Bachtler and Mendez 2007: 547). The 1998 reforms therefore marked a watershed point, as cohesion policy officially became a Community-based regional policy with significant interference from the Commission in order to ensure the efficiency of the policy’s operation and to ensure that funds were distributed in a manner that reflected the goal of solidarity and equality among regions. While it has been argued that reforms since have represented some degree of an intergovernmental backlash against the 1988 reforms through attempts to renationalise cohesion policy (Pollack 1995; Peterson and Bomberg 1999; Allen 2000; Keating and Hooghe 2001), the fundamental achievements of the 1988 reforms have remained largely intact (Bache 1998; Hooghe and Marks 2001; Sutcliffe 2000; Marks 1996) and the move to renationalise principally blocked on account of Commission imperative and majority voting rules (Bachtler and Mendez 2007)<sup>27</sup>.

The importance of institutional arrangements in influencing (and explaining) policy outputs can therefore be ascertained from each of these examples. Moreover, the academic contributions outlined above appear to provide considerable support for the ‘promise of communitarisation’, as the transition to more supranational institutional arrangements have been seen to produce a standards-enhancing and/or redistribution-improving impact on policy outputs in these different cases, due to the variable influence of both formal and informal institutions. Yet, as outlined in Chapter One, the progressive communitarisation of asylum policy-making has seemingly not produced similar results in the case of the Dublin system over the course of two attempts at reform - the improvements to which have been marginal at best. Despite this apparent discrepancy, this study asserts that the prevailing

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<sup>27</sup> Those Member States who have benefited the most from the principles introduced by the 1988 reforms and Commission control have been able to create blocking coalitions against renationalisation under majority voting rules.

institutional arrangements are still key to explaining policy output in the case of both of the Dublin regulations, but that RCI, in particular, is best equipped to account for this specific puzzle.

## **2.2 A Rational Choice Institutional Framework for Analysing EU Asylum Policy-Making in the Case of the Dublin System**

Originally inspired by behavioural paradoxes in the United States Congressional system and efforts to examine the potential impact of legislative rules on voting outcomes (Riker 1980; Shepsle and Weingast 1981, 1987), RCI – as its name suggests – is based on an inherent assumption of actor rationality. Borrowing from rational choice theory more generally, actors are assumed to operate on the basis of a fixed set of rationally determined preferences and will endeavour to maximise the attainment of those preferences by interacting in a strategically calculated manner that incorporates the anticipated strategies and actions of other actors, *but which is also mindful of and/or in accordance with the relevant dictates of their institutional setting* (Shepsle and Weingast 1987; Hall and Taylor 1996; Aspinwall and Schneider 2000). Institutional settings are themselves also assumed to be the product of rational action; as politics is viewed as a sequence of collective action dilemmas that will ultimately produce collectively suboptimal outcomes as a result of continued individual action (Hall and Taylor 1996: 945), “states desiring gains from cooperation, therefore, create and maintain institutions to lower the transaction costs associated with inter-state activity, such as incomplete contracting, imperfect information, and the ability to monitor and enforce agreements” (Aspinwall and Schneider 2000: 11)<sup>28</sup>.

On the basis of these fundamental tenets, RCI has itself developed two distinctive strands of inquiry: one which treats institutions as exogenous variables and is interested in studying

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<sup>28</sup> Rational choice institutionalism therefore embodies an inherently functionalist approach to institutional formation and delegation in line with principal-agent theory, whereby (state) agents collectively agree to empower institutional agents to perform certain functions on their behalf in order to amplify the potential gains from cooperation. All such principal-agent relationships come with an inherent risk of ‘agency loss’, however; as agents inevitably come to develop their own interests (and possess an informational advantage in this regard as they know more about their own interests than their principals do), they are likely to pursue their own preferences rather than those of their principals in cases where those interests conflict (what is referred to as ‘shirking’ in principal-agent vocabulary). Principals can nevertheless attempt to minimise the likelihood for agency loss through deliberate institutional design by introducing *ex ante* or *ex post* controls, which work to monitor agent activity and which threaten sanctions should they misbehave (Thatcher and Stone Sweet 2002).

their effects; and one which treats institutions as endogenous (outcome) variables and is interested in studying “why particular institutions exist, evolve, and survive” (Weingast 2002: 691). This latter strand has constituted one of the newer and more unique contributions of RCI. Moreover, the questions specific to it have borne particular relevance and interest for EU scholars, given that one of the truly distinguishing features of the EU - when compared against other examples of regional or international cooperation - is the extent to which Member State governments have created and maintained/modified institutions, while repeatedly delegating increasingly crucial functions and powers to the EU’s supranational institutions in particular. This approach has therefore played a central role in the literature on EU integration, with several key scholars engaging these concepts in order to explain why sovereign governments have voluntarily elected to do this<sup>29</sup>.

The former strand, on the other hand, is the more traditional and more prominently applied mode of analysis, and as mentioned above, has been primarily motivated by the desire to explain particular outcomes through the examination of the *intervening effect* of institutional variables on actor behaviour. It, too, has found prominent application in the EU context, and has been used extensively in the literature on EU policy-making in order to analyse and ascertain how the institutional labyrinth that is the EU policy-making process ultimately impacts upon decision-making and the multitudinous actors involved in decision-making, and thus by extension, the actual outputs of decision-making as well. Given the objectives of the present study, it is therefore a particularly apt lens through which to analyse the case at hand. Before devising a more detailed framework specific to the purposes of this research, however, it is important to first review in further detail how the ‘new’<sup>30</sup> RCI has come to define and understand institutions and institutional impact within this particular mode of analysis.

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<sup>29</sup> See, for example: Pollack 2003; Moravcsik 1998; Majone 2001.

<sup>30</sup> One of the key criticisms that has often faced RCI is that it can be *too* structured in its approach to political analysis - which, incidentally, has also been treated as one of its more valuable attributes (in other words, the parsimony and analytical rigor that the approach ultimately boasts has often come at the cost of ‘missing things’). More recent contributions to RCI, however, have helped to guard against some of these criticisms by relaxing traditional assumptions of canonical rationality (absorbing other concepts such as ‘bounded rationality’ – see, for example, Shepsle 2008a: 11 or Ostrom 1998) and by expanding the definition of what constitutes an ‘institution’ (thus, arguably learning from the other new institutionalist schools as per footnote 22).

According to the RCI literature, there are two now-standard ways of viewing institutions and institutional impact. The first takes a more traditional approach to the understanding of institutions as exogenous structures, i.e. tactile constraints on actor behaviour. In this view, “institutions are the rules of the game in a society...the humanly devised constraints that shape human interaction” (North 1990: 3). These constraints can be either formal in nature (i.e. official rules, responsibilities, procedures, etc.), or informal in nature (i.e. established customs, conventions, codes of behaviour, etc.) (Shepsle 2008a: 1033). Methodologically speaking, this definition translates “into studying how institutions constrain the sequence of interaction among actors, the choices available to particular actors, the structure of information and hence beliefs of the actors, and the payoffs to individuals and groups” (Weingast 2002: 661). In other words, the institutional arrangements in any given setting constitute the game form, which then becomes a game once player preferences are added. Within this context, actors will seek to exploit the institutional setting (game form) in the pursuit of their preferences. Institutions can therefore be at once constraining and empowering, while ultimately constituting “[venues] for strategic social interaction and choice” (Shepsle 2008a: 1034).

The second approach is subtler in nature and alternatively understands institutional constraints as more endogenous and less structured. The “rules of the game in this view are provided by the players themselves; they are simply the ways in which the players want to play” (Shepsle 2008b: 2). Thus, instead of obligating compliance, institutions in this sense (i.e. established patterns, procedures or norms of engagement), command (rational) observance on the basis of their collective acceptance and the expectation that everyone will abide by them. Institutions can therefore also simply represent an equilibrium way of doing things (Ibid: 3). Capturing this approach, Calvert (1995: 73-74) writes:

[There] is, strictly speaking, no separate animal that we can identify as an institution. There is only rational behaviour, conditioned on expectations about the behaviour and reactions of others. When these expectations about others’ behaviour take on a particularly clear and concrete form across individuals, when they apply to situations that recur over a long period of time, and especially when they involve highly variegated and specific expectations about the different roles of different actors in determining what actions others should take, we often collect these expectations and strategies under the heading *institutions*.

The main advantage of this broad understanding of institutions is that regardless of whether institutions take a ‘constraint’ or an ‘equilibrium’ form, seeking preference attainment while playing within the ‘rules of the game’ ultimately appeals to the same sense of rationality (albeit often bounded<sup>31</sup>); we can therefore expect to see an ‘optimising response’ from actors as they adapt in a way that is reflective of their institutional environment<sup>32</sup> (Shepsle 2008a: 1035) and in keeping with a (relaxed) ‘logic of consequentiality’ (March and Olsen 2008). The remainder of this section develops a framework specific to the case at hand on the basis of these assumptions. Drawing on existing literature on EU policy-making and EU asylum policy-making in particular, it will therefore first establish the relevant institutional setting and the relative capacities of EU actors within that (changing) setting. It will then add actor preferences to the equation, and derive several expectations regarding actor behaviour from the anticipated (causal) intersection between institutions and interests in the case of the Dublin regulations.

### ***2.2.1 Institutionally-Set Interactions: The Variable Influence of EU Actors and the Changing ‘Game Form’ of the EU Asylum Policy-Making Process***

As per the above discussion, RCI deems the institutional setting (or the ‘game form’) essential for understanding EU policy output, as it provides the context for the policy-making process. Examining the variable strength and capacities of different EU actors to exercise influence at different stages of this process, as well as their specific patterns of interaction – as determined by the institutional setting – can therefore help to explain how and why policies develop in the way that they do.

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<sup>31</sup> The notion of bounded rationality assumes that in complex decision-making settings, the rationality of actors is constrained by limited information, limited time, and limited cognitive/computational abilities.

<sup>32</sup> Rational choice institutionalism and sociological/historical institutionalism have often been differentiated within the literature on the basis of their dichotomous logics of actor behaviour (March and Olsen 2008), with the former embodying a logic of ‘consequentiality’ and the latter embodying a logic of ‘appropriateness’ (the joint application of these two logics has been quite prevalent in the EU literature and in the Europeanisation literature on the politics of domestic change in particular – see, for example, Börzel and Risse 2000, 2003). While often treated as competing accounts, these logics are not necessarily mutually exclusive; indeed, on the basis of the definition outlined above, they can be seen to coalesce within highly institutionalised settings (such as the EU) in that acting ‘appropriately’ based on established institutional practices, expectations, etc. is inherently rational in that not acting appropriately may carry certain consequences (political, social, monetary, or otherwise).

As discussed in Chapter One, the institutional setting and governance arrangements surrounding JHA policy-making have changed markedly and rapidly over the last 20+ years. Yet at the same time, the communitarisation of JHA has followed a uniquely protracted – and carefully managed – path, due to Member State reluctance to transfer competence in this area and given the particularly high level of political salience attributed to JHA’s component policies and asylum cooperation in particular. Given that this path has coincided with the concurrent development of the CEAS, the institutional setting surrounding the negotiation of its first phase (of which Dublin II was part)<sup>33</sup> differed considerably from that of the second phase (of which Dublin III was part)<sup>34</sup>, with the former taking place under a partially communitarised set-up for asylum policy-making, and the latter taking place under full communitarisation (whereas the Dublin Convention was agreed intergovernmentally as an international convention rather than as EU legislation). This means that while the EU’s supranational institutions can be expected to have enjoyed full access to the legislative procedure in the case of Dublin III, with a considerable capacity for influence over policy output, institutions other than the Council (i.e. the Commission and the EP) can be expected to have had limited impact in the case of Dublin II (and absolutely no influence in the case of the Dublin Convention, which was entirely Member State dominated). This sub-section examines how and why this is the case, by reviewing how different institutions and institutional arrangements have been understood to structure the EU asylum policy-making process, how different EU actors can work to influence policy output during the stages of this process, and how this has changed over time as a result of communitarisation.

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<sup>33</sup> The development of the first phase of the CEAS was called for in the European Council’s 1999 Tampere Programme, and was to include “a clear and workable determination of the State responsible for the examination of an asylum application” (i.e. Dublin II), as well as “common standards for a fair and efficient asylum procedure, common minimum conditions of reception for asylum seekers, and the approximation of rules on the recognition and content of the refugee status” (i.e. the minimum standards directives) (Council 1999: Chapter II).

<sup>34</sup> The second phase (initiated via the 2005 Hague Programme) was to involve “the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection”, which was to be built on a thorough and complete evaluation of the legal instruments...adopted in the first phase” (Council 2005: Chapter III, Section 1.3). This resulted in the recast Dublin III regulation, as well as the recast minimum standards directives.

### *Early Influence over Asylum Policy Content: Who Sets the Policy Agenda and How?*

Agenda setting constitutes a vital stage in the policy-making process. On a fundamental level, agenda setting involves determining which issues make it onto the legislative agenda and which ones don't. On a more substantive level, agenda setting involves recognising and defining the problems that need to be addressed by a given policy and identifying the potential policy options that might successfully confront that problem. This can be achieved through either formal or informal means (Pollack 2003: 47).

*Formal Agenda Setting.* Formal agenda setting power entails the ability to set the *procedural* agenda by putting forward legislative "proposals that can be more easily adopted than amended, thus structuring and limiting the choices available to legislators and the range of possible legislative outcomes" (Ibid). The actual degree of formal agenda setting power that an agenda setter can exercise therefore also crucially depends on the rules that govern how legislators (the decision-makers) vote on proposals and how they can seek amendments to them. As such, the influence of an agenda setter will, "*ceteris paribus*, be greatest where the voting rule is some form of majority vote" (Ibid: 48). Nevertheless, the role of formal agenda setter is an extremely crucial one – whoever holds the power to propose legislation has the power to shape it (Peters 1994).

With regards to EU policy-making, the Commission typically acts as the formal agenda-setter, entrusted with the sole right of legislative initiative. It's capacity for influence, however, has varied considerably depending on which legislative procedures apply in which policy areas<sup>35</sup>. In the case of asylum policy-making, the Commission's path to obtaining the sole right of legislative initiative has been a tricky one on account of Member State resistance to supranational delegation in this policy field. Indeed, asylum policy only came to exist as a matter of Community competence under the 1993 Maastricht Treaty, which saw the introduction of the EU's three-pillar governance structure, whereby two new intergovernmental pillars were established (dealing with the CFSP and JHA) to stand alongside the pre-existing (first) Community pillar. Prior to this point, asylum policies had

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<sup>35</sup> See: Tsebelis and Garrett (1996).

remained under the exclusive jurisdiction of the Member States (making them the de facto formal agenda setters), and subject to intergovernmental cooperation. The creation of the third pillar consequently lifted asylum policy-making “out of its *semi-clandestine* institutional set-up and integrated [it] into the institutional structure of the [EU]” (de Lobkowitz 1994: 99). As indicated above, however, various intergovernmental caveats still applied. Firstly, the Commission had only gained a ‘shared’ right to legislative initiative alongside the Council. This meant that while the Commission had gained formal agenda-setting power over asylum policies, it was not able to single-handedly define the starting point for negotiations, which arguably weakened its position as agenda-setter relative to situations where it possessed that right exclusively<sup>36</sup>. Secondly, unanimity voting still applied, which served to significantly limit the Commission’s manoeuvrability as formal agenda-setter (as per above), and effectively nullified the ability of the Commission to propose any legislation that deviated substantially from the status quo, as the most recalcitrant proponent of the status quo could simply block any such proposal on account of their individual right to veto (Pollack 1997; Garrett and Tsebelis 1996).

While the Amsterdam Treaty worked to transfer asylum policies from the third intergovernmental pillar to the first Community pillar<sup>37</sup>, the agenda-setting formula for asylum policy-making (i.e. shared power of initiative with unanimity voting) was nevertheless maintained for a five-year holding period following the treaty’s entry into force, which continued to limit the Commission’s formal agenda-setting capabilities (as proposals were *not* easier to adopt than amend)<sup>38</sup>. It wasn’t until the 2007 Lisbon Treaty that this formula was actually overhauled, at which point asylum policy-making became subject to the co-decision procedure (the ordinary legislative procedure or OLP). This meant that the Commission would now possess the sole right of legislative initiative, and that its proposals would be subject to QMV as opposed to unanimity voting. Although it is of course always

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<sup>36</sup> See Pollack 1997: 122.

<sup>37</sup> Asylum policy was therefore no longer merely a matter of ‘common interest’ (as per the Maastricht Treaty), but was instead an official Community objective under the new Title IV on ‘Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons’.

<sup>38</sup> While the Commission was set to automatically gain the sole right of legislative initiative after the five-year holding period, the Council would still be required, after this point, to vote unanimously as to whether co-decision (and therefore QMV) should be introduced in this policy area.

prudent for the Commission to be mindful of Member State positions/preferences in the process of drafting legislation, this transition nevertheless promised to grant the Commission considerably more freedom and influence over asylum policy-making, as any new proposals need only gain the support of a qualified majority in the Council, thus making the adoption of proposals that deviate from the status quo more likely. As outlined in Chapter One, this expectation has rung true in the case of the minimum standards directives, as the Commission has been able to successfully advance and pass proposals that have gone beyond the lowest common denominator of the existing standards in the Member States.

*Informal Agenda Setting.* Informal agenda setting, on the other hand, consists of the capacity of “a ‘policy entrepreneur’ to set the *substantive* agenda for a group of legislators, not through her formal powers but through her ability to define issues and present proposals that can rally consensus among the final decision makers” (Ibid). Thus, even where formal sources of influence are absent, informal influence can be captured by ‘policy entrepreneurs’ who seize on ‘policy windows’ created by the ascent of a problem onto the policy agenda. Acting as “advocates willing to invest their resources...to promote a position” (Kingdom 1984: 181), policy entrepreneurs actively “propagate ideas that will define problems and solutions in ways that other actors find convincing and useful” (Stone Sweet et al. 2001: 11).

In the case of EU policy-making, access to informal influence over the policy agenda is less circumscribed to a specific actor(s). Indeed, the entrepreneurial capacity of all three of the EU’s main supranational institutions - the Commission, the EP, and the CJEU - has been well established in the literature, in terms of achieving both broader integration objectives<sup>39</sup> and more specific policy ones (Garrett and Weingast 1993; Sandholtz 1992; Stone Sweet and Sandholtz 1997, 1998; Stone Sweet et al. 2001; Beach 2004, 2005; Kaunert 2005, 2007, 2011). Regarding policy agendas in particular, considerable attention has been paid to how the Commission has been uniquely able to combine its formal and informal agenda-setting powers to become a highly influential supranational policy entrepreneur. By actively framing issues in certain ways and by constructing new norms (van Selm 2003; Kaunert

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<sup>39</sup> See, for example: Pollack 2003 and Beach 2005.

2011), the Commission has been able to systematically shape the way that certain policy issues are discussed, which it can then translate into formal policy proposals – an ability that has progressively increased alongside communitarisation. At the same time, Member States within the Council are also likely to try to exert informal influence at this early stage of the policy development process by advancing their own problem definition/problem solution in order to guide the policy agenda in their preferred direction (in line with a ‘first mover strategy’) (Héritier 1996: 150)<sup>40</sup>.

*The Role of Policy Frames.* Policy framing is therefore a crucial tool for influencing legislation through both of these channels, as the application of a particular policy frame to a particular policy problem can determine the discourse that guides the policy-making process. Rein and Schön (1991: 262) define policy framing as “a way of selecting, organising, interpreting, and making sense of a complex reality so as to provide guideposts for knowing, analysing, persuading and acting”. Policy frames accordingly provide “a perspective from which an amorphous, ill-defined problematic situation can be made sense of and acted upon” (Ibid). In other words, policy frames represent “the ideational core of a particular field”, which embodies “the dominant interpretation of the underlying social problem” and which signals paths for action (Lavenex 2000: 4). As policy frames become embedded in certain issue areas, they can themselves gain the status of ideational institutions with the capacity to alter actor perceptions and calculations of costs and benefits. They can also legitimise or delegitimise certain ways of thinking about or talking about different issues. As such, the act of framing can itself be a politically competitive process, as different actors will try to advocate policy frames that best reflect their respective interests. Consequently, whoever is able to successfully champion what becomes the dominant policy frame is then also in a dominant position to influence legislative output.

With regards to framing in the case of EU asylum policies, their overall purpose can be (and has been) framed in very different ways, often presented either as instruments for the fulfilment of human rights obligations or as instruments for deterrence (by seeking to

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<sup>40</sup> In cases where the Commission holds the right to legislative initiative, it acts as the ‘gatekeeper’, whereby first mover strategies must be selected by the Commission in order to be successful (Héritier 1996: 150).

discourage abuses of the asylum channel and the submission of fraudulent or undeserving applications). In the case of the CEAS, the development of common EU asylum policies has been framed as a way to achieve both of these functions. Moreover, the pursuit of common EU asylum policies and the progressive harmonisation of asylum legislation has been framed from very early on (and even prior to EU-level cooperation) as a way to achieve better burden sharing between the Member States – a frame which has been actively championed by both the Commission and the EP as well as several key Member States (many of whom have then also sought to subsequently exert informal agenda setting power in order to align resulting EU asylum policies with their national *status quo*)<sup>41</sup>. Burden sharing, and the need for improved solidarity, has itself become an important policy frame and a sort of normative mantra, situated as one of the core objectives guiding asylum cooperation. The Commission has also been credited with playing an important role in helping to *avoid* the application or transfer of particular frames to asylum policy-making. For example, while security has been used as an especially powerful policy frame through which to forge closer cooperation in other AFSJ policy fields, the Commission has managed to simultaneously achieve closer cooperation on asylum policy under the CEAS (but absent the sense of political urgency that often accompanies security-related issues) whilst maintaining a primarily human rights-based orientation to asylum policy-making (Kaunert 2011: 122-123).

### ***Determining Asylum Policy Output: How are decisions reached?***

The decision-making stage of the policy-making process is similarly governed by various institutional rules and practices (both formal and informal), which dictate how decisions are to be taken, and how agreement on policy proposals put forward by the agenda setter is to be reached.

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<sup>41</sup> A clear articulation of the underlying logic of policy harmonisation as a means to achieve better burden sharing can be found within the Commission's 2007 Green Paper (Commission 2007a: 11), which reads: "Further approximation of national asylum procedures, legal standards and reception conditions, as envisaged in creating a [CEAS], is bound to reduce those secondary movements of asylum seekers which are mainly due to the diversity of applicable rules, and could thus result in a more fair [sic] overall distribution of asylum applications between Member States."

*Voting Rules in the Council.* Typically, the Council has been viewed as the most important and most influential actor in EU policy-making, as it “represents the final decision-making organ with respect to the introduction of new legislation” (Hosli 1993: 629). As such, voting rules within the Council act as a crucial institutional constraint for policy output. Given that it is near impossible to understand how policies are agreed where divergent preferences exist without considering the potential impact of veto players (Thomas 2009), the application of unanimity voting within the Council has been argued to have had a significant impact on early EU policy-making, as every Member State represented a potential veto player regardless of their relative strength. This was in turn expected to significantly slow down the decision-making process by leading to a gridlock in cooperation, as the Member State least in favour of any change to the status quo could hold the policy process ransom. In such situations, it was also expected that the only way of overcoming policy gridlock would be through the use of side-payments and/or package deals in order to ‘woo’ veto players away from the potential use of their veto (Carrubba 1997; Moravcsik 1993). As a result, where voting rules in the Council allow a proposal to be easily blocked (by just a single Member State), the right to veto legislation arguably trumps the right to propose. This is not the case, however, under QMV, as the loss of individual Member State veto power makes the adoption of legislation that deviates from the status quo (and/or the lowest common denominator of potential cooperation) inherently easier and more likely, thereby increasing the power of the proposer (i.e. the Commission)<sup>42</sup>.

Reticent to forfeit their veto power over asylum policy-making, many of the Member States were unsurprisingly resistant to the shift from unanimity voting to QMV in this area. As mentioned previously, unanimity voting was to be maintained - alongside the shared right of legislative initiative – for a five-year holding period following the entry into force of the Treaty of Amsterdam (and despite the transfer of asylum policies from the third intergovernmental pillar to the first Community pillar). The prospective transition to QMV on asylum matters was dealt with again by the Treaty of Nice, signed on 26 February 2001 by the then-EU-15 - the main purpose of which was to prepare the EU for the accession of

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<sup>42</sup> As such, Marks et al. (1996: 361) have argued that “the successive extension of [QMV]” has marked “the most transparent blow to national sovereignty” stemming from EU cooperation.

the central and eastern European countries (CEECs) and to ensure that EU decision-making remained functional with an expanded membership. One of the main changes instigated by the Treaty therefore involved the expanded applicability of QMV<sup>43</sup>, which would now apply to 27 new policy areas; however, in the case of Title IV of the EC Treaty (Visas, Asylum, Immigration and Other Policies Linked to the Free Movement of Persons), the Member States also agreed on a partial/deferred transition to QMV at the IGC, which could only be achieved by virtue of different political instruments and subject to certain conditions. As a result of this decision, the Nice Treaty did effectively mandate the transition to QMV for asylum policy-making (by virtue of a protocol on Article 67 that was annexed to the treaty), yet this move was to be postponed (again) until after 1 May 2004 and following the successful adoption of EU legislation establishing common rules/principles in this area<sup>44</sup>. With the approval of the Hague Programme in November 2004, the European Council reaffirmed the intention to move to QMV and requested that the Council adopt a decision no later than 1 April 2005 as to the implementation of this changeover. As a result, the Council agreed as to the applicability of QMV on asylum policies as of 1 January 2005 (Council 2004). This decision was then codified into EU statute with the signing of the Lisbon Treaty on 13 December 2007.

It is also worth noting that one of the key impacts of the move to QMV is the increased likelihood for coalition formation within the Council (Wallace 1990; Elgström et al. 2001). Unlike under unanimity voting (where every actor possesses veto power), actors operating under QMV must more carefully consider the positions of other actors in order to reach voting thresholds. The higher tendency for coalitions under majority voting systems has arguably also been exaggerated by enlargement, as changes to the number of voters and voting weights have worked to intensify negotiations. As Hosli (1993: 634) writes, “the influence of single members in the [Council] in terms of absolute and relative voting weights has continually decreased: enlargements have caused a rise in the total number of votes

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<sup>43</sup> Alongside a new formula for QMV, which would require 232 of 321 votes to pass (applicable as of 1 November 2004). The distribution of votes in the Council was agreed as followed: Germany, UK, France, Italy – 29; Spain, Poland – 27; Netherlands – 13; Greece, Czech Republic, Belgium, Hungary, Portugal – 12; Sweden, Austria – 10; Slovakia, Denmark, Finland, Ireland, Lithuania – 7; Latvia, Slovenia, Estonia, Cyprus, Luxembourg – 4; Malta – 3.

<sup>44</sup> It was also stipulated that the application of QMV would not immediately apply to policies on burden sharing or the conditions for entry and residence of TCNs.

while the relative leverage of the individual member state has declined. Accordingly, more states are required to form a blocking minority". As an increased number of Member States increases the likelihood for policy conflict, increasing levels of policy conflict therefore "imply increased propensities for coalition building" (Elgström et al. 2001: 111). This trend towards coalition building in the Council has been demonstrated empirically (Ibid: 114), as Member States must seek to align their interests with others not because a vote will necessarily always take place, but because it could (Wallace 1990: 222).

*The Council's Culture of Consensus.* Linked to the above point is the fact that, despite the formal changeover to QMV, decision-making as it pertains to asylum policies is likely to follow the Council's deeply embedded 'culture of consensus' (Heisenberg 2005). According to this culture, the Council has – irrespective of the elimination of unanimity voting – enshrined a system whereby it prefers to obtain a consensus among the Member States wherever and whenever possible, and "abhors a majority [vote]" if collective agreement can be otherwise achieved (Westlake 1995: 111). This has proven to be a very powerful norm, and indeed, the notion that obtaining a consensus ought to be the preferred method for reaching agreement is considered to be "perhaps the most powerful of any [norm] in EU decision-making" (Peterson and Bomberg 1999: 58). Thus, while unanimity and consensus are not necessarily synonymous, the aim of achieving universal agreement among the Member States on proposed legislation has not actually declined with the move to QMV (which brings with it the ability to outvote dissenting Member States) (Westlake 1995; Hayes-Renshaw et al. 1997). Negotiations consequently continue for as long as it takes to reach consensus (Nugent 1999), as it is seen to ensure that cooperation functions smoother in the long term while making implementation and compliance more likely<sup>45</sup>. Demonstrating the pervasiveness of this culture, Hayes-Renshaw, Aken and Wallace (2006) showed in a study of Council voting between 1994 and 2004 that almost 80% of decisions that were technically subject to QMV were never brought to a vote nor even contested at a ministerial level. The Council's working culture is also said to embody a club spirit (Nugent 1999), a characteristic that has become further entrenched over many years of close cooperation. This

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<sup>45</sup> Thus, despite hopes that the move to QMV in the Council would help to speed up and improve the efficiency of decision-making, the insistence on 'decisions by consensus' has meant that the speed of EU decision-making has not substantially improved.

is because much of the Council's activity is shaped by the activity of Council committees and working groups, which demonstrate "a spirit of cooperation and mutual understanding" or "an *esprit de corps*" (Beyers and Dierickk 1998: 290). As an estimated 70-80% of the Council's work is resolved within the working groups (Hayes-Renshaw and Wallace 1995; Wessels 1991), it has been argued that actors within the Council become increasingly socialised (Kerremans 1996; Hayes-Renshaw and Wallace 1995), which in turn leads to a progressive decline in the difference between national and transnational interests (Beyers and Dierickk 1998: 292; Marks et al. 1996: 362), and the definition of national interest defined "to a considerable extent" on the basis of "interactions between Member States' representatives and supranational actors" (Beyers and Dierickk 1998: 292).

*The Council President as 'Broker'.* Nevertheless, discord in the Council is still prevalent given the range of interests and issues involved. In cases of considerable disunity among the preferences of Member States (a state of affairs that can be reasonably expected in the case of asylum policies), and where decision-making consequently faces the risk of negotiation failure, the Council president is expected to take on the informal role of 'broker' in order to secure consensus and reach agreement (Bjurulf and Elgström 2005: 51). Due to the superior information resources and formal procedural abilities possessed by the office of council president,<sup>46</sup> council presidencies are able to use their privileged knowledge of actor preferences to determine negotiating positions and potential points of agreement (Tallberg 2004) thereby advancing agreements that sit along the pareto frontier. While council presidents are expected to attempt to direct agreement along that frontier in the direction of their own preferred outcomes, they are ultimately bound in this influential informal role by similarly influential informal norms of effectiveness and neutrality (Ibid: 1002-1006). Expected to advance the Council agenda in an efficient and effective manner, the president is therefore required to act as an 'honest' broker (Elgström 2003), carefully navigating the waters of agreement in order to reach a solution acceptable to all parties.

*The Council's Composition under JHA.* It is also worth noting that the Council's internal composition has differed under JHA when compared to other policy areas. While the

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<sup>46</sup> Which operates on a rotational basis among Member States every six months.

Council's working structure is typically composed of three tiers (the relevant Council body, the Committee of Permanent Representatives (COREPER) and the working groups), JHA actually operates with four tiers<sup>47</sup>, with the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) situated in between COREPER and the working groups – one of which is the Asylum Working Party (AWP). This can be expected to either ease or complicate coordination<sup>48</sup> (with the Council President expected to traverse between the layers depending on the cooperation needs of a particular dossier at any given time). This extra layer marks an important “sign of the intergovernmental legacy of JHA cooperation” and makes it “an anomaly under the first pillar” (Lavenex 2010: 464).

*The Growing Power of the EP.* Over time, the EP has also come to be a crucial actor in decision-making, alongside the Council. Much like the Commission, its ability to influence legislative output has similarly evolved in accordance with the changing applicability of different decision-making procedures. In the early years of asylum cooperation, the role of the EP was that of a largely background actor; technically present, but limited in its capacity for effective influence. Initially subject to the consultation procedure, the EP was to be formally involved in the legislative process in that it was to be kept informed of all policy developments pertaining to asylum and would be able to provide the Council with suggestions/amendments pertaining to any proposed legislation. The Council was therefore obligated to ‘consult’ with the EP prior to adopting any policies. While a marginal victory for the EP (as it had been previously uninvolved in asylum policy coordination under intergovernmental cooperation), its role as ‘consultant’ came with little real power, however, as the Council was ultimately under no obligation to take the EP’s views or positions on board.

The EP consequently remained a largely background actor on asylum matters up until the Council’s aforementioned decision regarding a changeover in procedure by 1 January 2005 (following the adoption of the European Council’s Hague Programme), at which point

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<sup>47</sup> This is true as of the Amsterdam Treaty. There were previously five tiers under Maastricht.

<sup>48</sup> As per the CAP example in section 2.1, certain institutional settings/layers (such as CoAM) are seen as more conducive to achieving policy coordination than others and can therefore function as strategic venues. At the same time, however, the need to coordinate agreement on multiple issues across multiple levels could equally work to complicate cooperation.

asylum policy-making became subject to the co-decision procedure. The EP's capacity for influence under co-decision is markedly different from that under Consultation<sup>49</sup>, as it holds the role of co-legislator alongside the Council. This means that the Council is required to pay much greater heed to the position of the EP, as no legislation on asylum can be passed without its explicit approval (with all proposals and amended proposals subject to consecutive readings within both bodies<sup>50</sup>). Thus, under co-decision, the Council and the EP are positioned as more equally powerful actors jointly holding the final say over any and all proposed legislation.

### *The Capacity for Asylum Policy Enforcement and Potential Feedback Loops for (Future) Policy Formation*

Both the agenda setting stage and the decision making stage of the policy process can be rendered ineffectual, however, without sufficient means to monitor and enforce the successful implementation of and compliance with EU policies once they have been agreed. While this research is not explicitly concerned with national level implementation as such, it is fundamentally interested in how institutional arrangements pertaining to monitoring and enforcement (as well as previous activities in this regard) may in turn influence actor behaviour/strategy in the course of policy formation.

*Courts as Constraints.* According to the literature on institutional delegation in the EU, the Member States are assumed to have delegated authority over implementation to the CJEU in order to solve problems of incomplete contracting in the treaties, to monitor the implementation of EU legislation and to enforce Member State compliance with EU law (Pollack 2003: 155). Initially assigned this authority under the 1957 Treaty of Rome (and granted jurisdiction over all areas of policy covered by the EC at that time), the CJEU was granted: the right of interpretation and powers of judicial review over EU legislation; the right to initiate infringement proceedings against Member States found to be in violation of

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<sup>49</sup> This development was made more significant by the fact that the Council had not always been particularly diligent in its obligation to consult with the EP; indeed, the EP had actually filed official complaints previously with the CJEU regarding the Council's failure to comply with consultation requirements (Lavenex 2010: 466).

<sup>50</sup> In terms of coordination between the two co-legislators, a dossier-specific rapporteur from within the EP liaises with the presiding Council president in order to achieve agreement.

EU law (and who have been referred to the Court by the Commission for this purpose<sup>51</sup>)<sup>52</sup>; and the right to issue preliminary rulings on issues brought forward by national courts with regards to implementation (Albors-Llorens 1998: 1274)<sup>53</sup>. As a result, the CJEU can exercise considerable influence over both current policy implementation (via the threat of infringement proceedings<sup>54</sup>) as well as future policy formation (via interpretation and judicial rulings). With regards to the latter, the courts – both European<sup>55</sup> and national<sup>56</sup> – can therefore function as important institutional constraints on EU policy makers, by “creating a rule-based context for policy making” which “set[s] the parameters for future initiatives” (Bjurulf and Elgström 2005: 53), as actors are unlikely to pursue policy measures that would run counter to existing EU or national-level jurisprudence. In the case of asylum policy-making, international law – and the international refugee protection regime in particular (which has a presence in international law unrivalled by any other forms of migration) (Roos and Zaun 2014) - can also be expected to constrain EU policy makers as a result of Member State obligations under various human rights treaties<sup>57</sup>.

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<sup>51</sup> The Commission therefore acts as the monitor for implementation. One of its key assets in this role is its informational advantage as to the overall state of implementation/compliance across the Member States (see, for example: Mendrinou 1996; Tallberg 2002).

<sup>52</sup> Initially, this capacity for enforcement via the invocation of infringement proceedings was primarily symbolic in that the CJEU had no official recourse to impose formal sanctions on Member States found to be in violation of EU law. It only gained the right to impose financial sanctions on non-compliant Member States under the Maastricht Treaty.

<sup>53</sup> Afforded this seemingly *carte blanche* delegation of authority under the Treaty of Rome, the CJEU was quick to engage in “activist jurisprudence” (Pollack 2003: 156) in order to expand the weight and applicability of EU law. Thus, shortly thereafter, the CJEU was able to successfully introduce the EU’s fundamental legal principles of *direct effect* and *supremacy* by virtue of two landmark decisions (Van Gend en Loos in 1963 and Costa v. ENEL in 1964). These rulings solidified the superiority of EU law over existing national legislation and also meant that individual citizens and companies could now directly invoke EU laws before national or European courts regardless of whether or not the Member State in question had yet transposed the relevant legislation.

<sup>54</sup> Which is, indeed, a credible one. As “no Member State wants to have infringement proceedings in front of the [CJEU] against it” (European Commission official quoted in Tallberg 2002: 617), Member States have a clear incentive to quickly align itself with EU legislation following a warning from the Commission (which is why only 11 percent of infringement cases found by the Commission between 1978 and 2000 were actually referred to the CJEU for official proceedings, of which 90% of the judgments rendered ultimately favoured the Commission (Tallberg 2002: 618)).

<sup>55</sup> Member States are also subject to judicial rulings from the European Court of Human Rights (ECtHR), which enforces Member State obligations under the European Convention on Human Rights (ECHR) (to which all Member States are signatories).

<sup>56</sup> Which are generally seen to take a more liberal (or at least, less restrictive) stance on asylum policies than most national governments (see Guiraudon 2000).

<sup>57</sup> While it may be the case that not all Member States are always compliant with their human rights obligations in practice, we can assume that policy-makers would not seek (nor be able) to inscribe anything in EU law that would constitute a violation of these commitments.

Unsurprisingly then, the Member States were not exactly readily willing to automatically grant the CJEU with this degree of influence over asylum policy (via the Maastricht Treaty, under the newly created JHA third pillar). The CJEU was therefore entirely excluded from any involvement regarding the interpretation or enforcement in this field (with the Commission also denied the supervisory powers that it possessed in other policy areas). While the Treaty of Amsterdam had the “unquestionable merit of [subsequently] extending the jurisdiction of the Court to areas where such jurisdiction had been previously denied” (as a result of the transfer of JHA from the third pillar to the first Community pillar, where the CJEU enjoyed full authority), it continued a system of jurisdiction – and communitarisation - *a la carte* (Albors-Llorens 1998: 1291). Though the CJEU would gain powers of interpretation over secondary legislation, it would not have this right over JHA-related provisions in the treaties. The applicability of the principle of direct effect was also expressly denied to framework decisions in this area. Moreover, while the court would now have the ability to issue preliminary/advisory rulings on questions of interpretation brought to it by Member States where judicial remedies did not yet exist under national law (Article 68), these decisions were not considered binding, as Member States were required to issue an accompanying declaration accepting the Court’s jurisdiction and ruling (Ibid: 1281-1282). Jurisdiction over the creation of the AFSJ, in particular, was also placed on a five-year hold. Thus, while the extension of the CJEU’s mandate to cover JHA matters was a welcome development, all of the caveats placed on its authority were ultimately “bound to seriously undermine the uniformity in the interpretation and application of this area of EU law” (Albors-Llorens 1998: 1291).

As the unfettered empowerment of the CJEU was the last outstanding obstacle to the full communitarisation of JHA, one of the main achievements of the Lisbon Treaty was therefore the abolishment of the three-pillar structure, which “[endowed] the EU with a single institutional framework”; thus, “as a matter of principle, the jurisdiction of the EU courts [now extended] to EU law as a whole” (Barents 2010: 717). Once again, however, this was to take a staged approach, with all measures that had been adopted under the previous intergovernmental third pillar subject to limited jurisdiction for a transitional period of five years (whereas jurisdiction now applied to all new legislation agreed under co-decision).

Following the expiry of this period, the CJEU would *finally* gain full jurisdiction over all existing and new JHA legislation<sup>58</sup>.

### *Application to the Dublin Cases: Institutional Influence in Flux*

On the basis of this evolving institutional backdrop for policy-making in the field of asylum, we can derive certain assumptions about the institutional setting as it pertains to each of the three Dublin agreements. With regards to the Dublin Convention, it was negotiated in an entirely intergovernmental setting (as an international Convention) with next to no supranational institutional involvement. The Member States will therefore themselves be the key actors in policy formation, and face next to no institutional constraints at the EU level<sup>59</sup>. With regards to the Dublin II Regulation, we can assume that the Council will be the most influential actor in the policy-making process. While the Commission and the Parliament had both gained formal roles in the negotiations, their ability to actually exercise impact will likely be limited on account of the fact that the Commission's formal agenda-setting power will be hamstrung by unanimity voting in the Council and because any consultative opinions issued by the EP are not binding in the Council. With regards to the Dublin III Regulation, we can expect the playing field between these actors to be markedly more level; while the Council will still be a (if not *the*) decisive actor in negotiations (operating on the basis of consensus under QMV), the Commission and the EP should be able to exercise considerably more muscle as the Commission's agenda setting power will no longer be constrained by the threat of an individual veto and because the EP will play a decisive role alongside the Council as its co-legislator. The CJEU's newly gained jurisdiction may also have a reverberating effect on the negotiations.

### **2.2.2 *Strategic Interactions and Rational Choice: EU Actor Preferences on Asylum Policy and the Mediating Impact of Institutional Arrangements on Actor Behaviour***

Of course, no story of policy output can be told without considering its main input - i.e. actor preferences. Actor preferences are essential for understanding policy output, as they

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<sup>58</sup> However, the UK, Denmark and Ireland would all maintain their opt-out in this area, which would allow them to decide on a case-by-case basis whether or not to accept any rulings of the Court (Reh 2009: 634).

<sup>59</sup> They will, however, face institutional constraints at the national level, as international conventions must be ratified by national parliaments.

dictate both the need for and the content of resulting policies. According to the RCI framework, ((boundedly) rational) actors will seek to achieve the best possible attainment of their preferences in policy negotiations by interacting strategically with their fellow actors. Their ability to do this will, however, be either helped or hindered by their institutional setting. Having established the institutional setting for asylum policy-making (and the Dublin agreements in particular) in the previous sub-section, this sub-section will elaborate on the anticipated preferences of the actors involved in EU asylum policy-making and the expected (causal) intersection between institutions and interests in the case of the Dublin regulations.

### *Preferences in the Commission and the EP*

When it comes to asylum policies, we can assume that the supranational institutions generally have more liberal preferences than those of the Member States (Kaunert and Leonard 2012; Thielemann and Zaun 2011, 2013<sup>60</sup>; Thielemann and El-Enany 2011). Indeed, in the early years of asylum cooperation, the Commission was quite critical of existing policy measures for not providing sufficient safeguards for asylum seekers and for not adequately reflecting the unique humanitarian dimension of this policy area<sup>61</sup>. Furthermore, as guardian of the treaties, the Commission is directly responsible for ensuring that the EU's foundational commitment to respect human rights is upheld, while also specifically promoting fairer burden sharing in the field of asylum<sup>62</sup>.

The EP has similarly taken a traditionally “generous and liberal stance” on asylum policies (Lavenex 1999: 59). In a series of reports and resolutions issued throughout the late 1980s and early 1990s<sup>63</sup>, the EP actively promoted a human rights approach to asylum policy, which took into account the complicated root causes of asylum flows, rather than a security approach that centred on the repercussions of the removal of internal border controls. They

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<sup>60</sup> They suggest that one of the reasons for this is that supranational institutions such as the Commission represent a technocratic *élite* institution and are therefore (unlike the Interior Ministers in the Council) not required to respond or pander to the predominantly anti-immigrant attitudes of the broader electorate.

<sup>61</sup> See, for example: Commission 1994.

<sup>62</sup> See, for example: Maastricht Treaty, Articles K.1 and K.2; Amsterdam Treaty, Article 73k (2b); Lisbon Treaty, Articles 61 and 63.

<sup>63</sup> See, for example: EP 1987a; EP 1987b; EP 1987c; EP 1995b; EP 1992; EP 1993.

also advocated early on for common procedural standards and a burden sharing system (which would include financial redistribution). At the same time, the EP had been deeply critical of both strict visa requirements and readmission policies, on the grounds that they interfered significantly with the right and ability of asylum seekers to gain access to Member State territory as well as the intergovernmental nature of cooperation, which sidestepped both it and national parliaments in the construction of collective policies that have a fundamental impact on human rights (Lavenex 1999: 59-60).

With regards to the Dublin recast regulations, we can therefore expect that both the Commission and the EP will favour the introduction of policy provisions that promote both a high standard of protections/rights for asylum applicants (whilst also ensuring the efficient and fair handling of asylum claims) as well as a more even distribution of asylum burdens across the Member States, so as to ensure that the proper provision of those protections/rights is not jeopardised in any given state as a result of disproportionate pressures. We can also expect that both institutions – as EU institutions - will have a general preference for agreement (and the resulting adoption of EU legislation) over non-agreement.

### *Preferences in the Council*

Conversely, we can expect that the Council - on the whole - will generally have more restrictive preferences on asylum policies than those of the supranational institutions (see: Guiraudon 2000; Monar 2001; Bigo 1998; Ripoll-Servant and Trauner 2014; Hathaway 1993; Lavenex 2001; van Selm-Thorburn 1998); however, given the often diverse national interests of the Member States that it is composed of, the preference situation *within* the Council is inevitably a bit more complex. It is therefore helpful to first establish why sovereign nation states would be inclined to engage in policy coordination in the first place.

***Conceptualising Cooperation.*** In this sense, it has been argued that the need for asylum cooperation in the EU stems from collective action problems created by obligations under international human rights law, as Member States are obligated under the 1951 Refugee Convention to examine applications for asylum that are lodged within their territory. This can be a costly obligation for states, as both the initial processing stage and the subsequent

hosting stage (in the case of successful applications) triggers various entitlements for the applicant (Thielemann and El-Enany 2010: 210). As this obligation only applies once the applicant has successfully reached their territory, and given that states have traditionally viewed asylum seekers as rational 'law consumers'<sup>64</sup> (Barbou des Places 2003: 3), states consequently have an incentive to avoid or prevent individual access to their territory by adopting restrictive policies that encourage asylum applicants to seek protection elsewhere (or to engage in secondary movements to alternative destination countries upon arrival). This can in turn lead to regulatory competition and a 'race to the bottom' in protection standards, as states seek to minimise their costs and relative burdens in the provision of international protection, which has itself been characterised as a public good (Suhrke 1998; Betts 2003; Thielemann and Dewan 2006; Thielemann and El-Enany 2010) due to the increased security it provides<sup>65</sup>. As these security gains are ultimately non-excludable and non-rival, some states are therefore expected to try to limit their own contribution to the protection regime while still enjoying the benefits afforded by virtue of the contributions of others (Suhrke 1998; Thielemann and El-Enany 2010). Policy coordination is therefore necessary to circumvent these trends and to ensure a fairer sharing of costs and/or burdens between the contributing Member States.

As alluded to in Chapter One, the CEAS aims to achieve this by regulating both Member State obligations towards asylum seekers (via the minimum standards directives) and Member State obligations towards each other (via the Dublin system)<sup>66</sup>, with the former working to prevent a race to the bottom in protection standards and the latter working to prevent free riding in terms of the physical hosting of applicants. With regards to the latter, the erosion of internal borders arguably exaggerated the possibility for physical free riding, as prospective asylum applicants would be able to move freely among the Member States - as law consumers - in order to reach their preferred destination country. Dublin aims to rectify this by providing an insurance mechanism against free-riding, which places an

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<sup>64</sup> Who have an incentive to 'asylum shop' among the Member States on the basis of the level of protection(s) they provide, ultimately seeking out the highest standard providers as their destination states.

<sup>65</sup> By minimising the likelihood that flows of forced migrants may cause additional conflict or chaos (Suhrke 1998).

<sup>66</sup> In addition to these two forms of burden sharing (i.e. sharing policies and sharing people), burden sharing in the EU has also taken a third form via financial redistribution mechanisms (i.e. sharing money) (Thielemann and Dewan 2006).

increased focus on external border controls and which specifies the circumstances that should trigger the aforementioned obligations regarding the processing and hosting of asylum applicants. It can therefore itself be categorised as a collective action response to the potential problems emanating from the creation of a free movement area. However, unlike the more universal and non-excludable nature of the benefits provided by the international protection regime, the (primarily economic) benefits gained from access to a free movement area are conversely circumscribed to a limited set of actors. In this way, it is helpful to conceive of the Schengen area as a 'club good'<sup>67</sup>, which produces benefits that are excludable to those who are members and who contribute to its functioning (Thielemann and Armstrong 2013: 155-156). In this way, it is also helpful to conceive of Dublin as one of the 'tolls' that members must pay for access to the club good. Thus, in order to reap the benefits of free movement for their own nationals, Member States must be willing to bear the potential costs associated with the simultaneously occurring free movement of TCNs (including asylum seekers), by introducing stronger border control measures that effectively manage the access of TCNs to EU territory, and by incurring any costs associated with a failure to do so (i.e. accepting responsibility for any asylum applications that may result). Member States therefore have a rational incentive to participate in (or as the case may be, reluctantly accept) the Dublin system<sup>68</sup>.

Within this general framework of rationality, we can also arrive at more specific assumptions about Member State preferences in terms of how they would prefer this exercise in collective action to take shape.

***Minimising Costs/Burdens.*** Within this context of cooperation, we can assume that Member States will be inclined to try to minimise both the absolute costs and the relative burdens<sup>69</sup>

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<sup>67</sup> See: Buchanan 1965; Cornes and Sandler 1996; Sandler 2006.

<sup>68</sup> As the gains derived from Schengen membership arguably outweigh the toll price of Dublin.

<sup>69</sup> While this thesis refers to the (re)distributive nature of Dublin, it is important to reiterate that Dublin is not actually an explicit redistributive mechanism (as it does not gather all asylum applications together and then redistribute them among the States on the basis of a distribution key). Its provisions do, however, have a distinctly (re)distributive effect, by virtue of enabling Member States to internally re-direct asylum applicants on the basis of a set of criteria.

that they incur (*vis-à-vis* the other Member States<sup>70</sup>) through the implementation of the Dublin system. As Member States will likely be conscious of both their absolute and relative contributions to the EU's protection regime (as per above)<sup>71</sup>, they will therefore – in cases of prospective reform – seek to either advocate changes that maintain/reduce their overall contribution or prevent changes that would increase it.

Here, it is useful to refer to the 'misfit model'. Borrowed from the Europeanisation literature, the misfit model has been effectively applied in the EU policy-making literature<sup>72</sup> to explain Member State behaviour in EU level policy negotiations (as well as their subsequent transposition records) (see: Treib 2010; Börzel 2002; Héritier 1996). According to this theory, Member States are conscious of the potential 'misfit' (or mismatch) between their existing national legislation and potential EU legislation. This is because the degree of misfit will also determine the degree of adaptation pressure that a Member State faces as a result of EU legislation. Member States have an incentive to minimise this pressure, as any changes to their national legislation that are required by new EU legislation will impose both ideational and material costs. Member State preferences in EU negotiations will therefore generally reflect their national *status quo*. In other words, high regulating countries (i.e. countries with established backgrounds in regulating the relevant policy area) with high standard national policies will prefer the introduction of high standard EU policies and low regulating countries (i.e. countries with less established backgrounds in regulating the relevant policy area) with low standard national policies will prefer the introduction of low standard EU policies (or indeed, no EU policies). However, as high regulating countries have a stronger interest in common EU policies (which help to overcome the negative externalities of regulatory competition), they are therefore expected to try to 'upload' (or lock in) their national policy preferences at the EU level, by using first mover advantage, in order to avoid subsequent adaptation costs. As low regulating countries do not, on the other hand, have a

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<sup>70</sup> This is in contrast to the more classic redistributive cases of CAP and cohesion policy, where Member States seek to maximize their financial gains *vis-à-vis* one another.

<sup>71</sup> As they will seek to avoid 'exploitation' by potential free riders. In this regard, Olson (1965: 29) writes of the likely 'exploitation of the big by the small' in the provision of public goods, as state contributions are generally proportional to income and wealth. As a result, larger income countries will likely contribute a disproportionately higher amount to public goods production, while smaller states will contribute minimally, or not at all.

<sup>72</sup> Most prominently in the fields of environmental policy and social policy.

strong interest in common EU policies (as they generally benefit from regulatory competition), they will consequently be less able to influence the standards set by common policies, and will therefore likely instead resort to an ‘after the fact’ strategy of calculated non-implementation<sup>73</sup> in order to avoid potential adaptation costs (Ibid).

Looking at the case of Dublin specifically, the misfit model itself requires some subtle adaptation, as the Dublin regulations – unlike the first phase minimum standards directives, for example – were not necessarily replacements for existing national regulations, but were rather replacements for existing Member State commitments to each other (with regards to how the responsibility for asylum applicants should be allocated among them and the various obligations that stem from that responsibility)<sup>74</sup>. Nevertheless, we can still ‘download’ some of its core assumptions. The first one being that Member States will seek to minimise the potential adaptation costs associated with policy change/reform. As the processing of and hosting of asylum applicants is costly to begin with (as outlined above), Member States will likely try to curtail the creation of any additional costs associated with carrying out the Dublin procedure. With regards to the negotiations on the Dublin regulations, we can therefore expect that Member States will generally prefer the maintenance of the *status quo* to any ‘adaptations’ that may result in the imposition of additional or unknown costs (either through the introduction of new procedural obligations towards asylum seekers or through changes that would result in an increased likelihood for responsibility to be allocated to them). Second, Member States will be internally divided between established asylum regulators and less established asylum regulators<sup>75</sup>. Whereas, the established asylum regulators (who benefit most from a responsibility allocation

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<sup>73</sup> According to Héritier (1996: 154), Member States will agree to high cost policy commitments, as long as they can expect to evade implementation.

<sup>74</sup> Though in the case of the Dublin Convention, these were entirely new common commitments. As such, Member States are likely to refer to their national practice as their reference point for avoiding adaptation, as per traditional ‘misfit’ theory.

<sup>75</sup> In the case of asylum policy, however, this may not necessarily correspond to respectively high or low standard preferences (as is traditionally assumed in the case of the environmental and social policy examples), as an established asylum regulator may prefer more restrictive (low) standards and a less established asylum regulator may prefer more liberal (high) standards (and vice versa). States are therefore referred to here, in the asylum policy context, as established and less established regulators rather than high or low regulators in order to avoid the potential conflation with a corresponding preference for high or low standards.

system<sup>76</sup>) will likely try to ‘import’<sup>77</sup> their preferences into the EU policy-making arena (by locking in policy commitments from the less established asylum regulators) in order to ensure that they don’t face disproportionate costs in the overall provision of EU protection, the less established asylum regulators (who do not benefit from a responsibility allocation system<sup>78</sup>) will alternatively try to ensure more flexible and vague provisions that will ultimately provide them with more discretion in terms of future evasion and non-implementation possibilities<sup>79</sup> (in order to avoid costs).

### *‘Who’s Who?’ The Positionality<sup>80</sup> of Member State Preferences on Asylum*

*Credibility.* On the basis of the aforementioned distinction, who then are the ‘more established’ asylum regulators and who the ‘less’? Much of the literature on European immigration and asylum has referred to a North/South divide (see: Baldwin-Edwards 1991, 1997; Finotelli 2009; Finotelli and Sciortino 2009), dichotomously distinguishing between the traditionally stronger and more effective<sup>81</sup> policies of the northern Member States and the weaker and less effective policies of the southern Member States. On the basis of their wide-reaching analysis of the immigration ‘state-of-play’ in Europe, Triandafyllidou and Gropas (2007: 363) expand on this dichotomy to also include the more recent accession countries and instead develop a typology based on five categories of immigration countries: old hosts; recent hosts; countries in transition; small islands; and non-immigration countries. Absorbing this typology, but using the related ‘generational’ categorisation (Arango 2012), this study refers to first generation (north/old hosts), second generation (south/new hosts) and third generation (transition/island/non-immigration) countries, with the first generation constituting the more established asylum regulators, and the second and third generations constituting the less established asylum regulators. As such, and consistent with the misfit

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<sup>76</sup> As many of these states would otherwise be the intended destination countries for asylum law consumers in an internally border-free zone, and who would therefore also bear the brunt of the costs involved in providing EU protection.

<sup>77</sup> The word import is used here, rather than upload, to depict a more lateral transfer of preferences, as they may or may not be dictated by pre-existing national preferences/practice.

<sup>78</sup> As many of these states generally benefit from being primarily transit countries through which asylum applicants engage in secondary movements in order to reach other destination countries.

<sup>79</sup> See: Vedsted-Hansen 2005: 374.

<sup>80</sup> Positionality refers to an actor’s strength of position, which can be used as a power resource in EU policy negotiations (see: Bailer 2004).

<sup>81</sup> ‘Used in this context, ‘effective’ may, however, refer to either liberal or restrictive asylum regimes.

theory elaborated above, the more established regulators are expected to be in a stronger position to influence policy output due to their issue expertise and because their positions are considered as more credible and better informed (Héritier 1996).

At the same time, a state's credibility will arguably also depend on its perceived effectiveness as a policy follower (Börzel et al. 2010), as those states that are likely to actually uphold their policy obligations and comply with EU legislation will similarly occupy a stronger position in negotiations due to the higher credibility of their commitments. In this regard, we can also turn to existing categorisations within the EU literature, which group different Member States together on the basis of their compliance records. For their part, Falkner and Treib (2008) identify what they call the 'four worlds of compliance' in terms of the effective application of EU law. These include: the world of law observance<sup>82</sup>; the world of domestic politics<sup>83</sup>; the world of dead letters<sup>84</sup>; and the world of neglect<sup>85</sup>. While the first two worlds generally apply EU law properly, the latter two generally do not (Ibid: 309) (a reality that has often been attributed to their variable administrative/bureaucratic capacities<sup>86</sup>).

Taken together, we can expect that the combination of a Member States' relevant expertise and its anticipated effectiveness will ultimately impact its perceived credibility in negotiations, which will in turn impact its strength of position. On this basis, we can therefore also expect that policy output is more likely to reflect the preferences of higher credibility actors. The empirical chapters on the Dublin II and Dublin III Regulations will consequently employ the aforementioned studies and Member State classifications to establish which Member States are likely to be seen as either high or low credibility actors as it pertains to the negotiation of each of these agreements.

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<sup>82</sup> Where compliance goals typically take precedence over other concerns (Ibid: 296).

<sup>83</sup> Where compliance goals are but one of many, and are carefully weighed against domestic concerns (Ibid: 297).

<sup>84</sup> Where compliance goals are important, but where successful transposition is generally not followed by successful implementation (Ibid: 303).

<sup>85</sup> Where compliance is not really "a goal in itself" (Ibid: 297).

<sup>86</sup> See also: Börzel et al. 2010.

*Intensity.* Different Member States can also be expected to approach different negotiations with varying degrees of intensity. This can largely be attributed to issue salience. Salience refers to the level of importance or relevance that an actor attributes to a given issue, which can in turn determine “the proportion of an actor’s capabilities it is willing to mobilise in attempts to influence the decision outcome” (Thomson and Stokman 2006: 41) – and thus, by extension, the likelihood for bargaining success (Hirschmann 1978; Keohane and Nye 1989). Salience therefore often depends on an actor’s exposure to a given issue. In the case of asylum policy and the negotiations on Dublin, Member States are likely to assess this exposure on the basis of its overall magnitude, in terms of both the rate of asylum applications they receive as well as their past net rate of Dublin transfers. Where salience is high, Member States will have more intense preferences and will therefore adopt a stronger position (and a harder bargaining strategy) in order to achieve them. Where salience is low, Member States will likely be more passive in negotiations as they will be less willing to expend their capabilities or political capital on an issue less relevant to them; they will therefore likely opt to either ‘go with the flow’ or simply refrain from taking a position, or they may even decide to align themselves strategically with the more strongly-held position(s) of another Member State(s) in order to gain political capital that can be put towards more salient issues elsewhere.

As such, we can expect that the variable intensity of Member State positions on asylum and Dublin in particular (based on issue salience) will impact the strength of their position. We can therefore also expect that policy output is more likely to reflect the preferences of those Member States’ for whom the issue is most salient. The empirical chapters on the Dublin II and Dublin III Regulations will consequently use the relevant data pertaining to both asylum applications and net Dublin transfers in the years immediately preceding the start of negotiations in order to establish whether Dublin was of high or low salience to the relevant Member States as it pertains to the negotiation of each of these agreements.

Thus, setting aside formalities regarding institutional positions and corresponding access to influence (as determined by the institutional setting, such as voting weights in the Council), we can also generally expect that some preferences are likely to carry greater weight in

negotiations due to the actor that holds them, as certain actors will be in an inherently stronger *position* to push policy output in their favoured direction. As Member States are likely aware (at least to some extent) of the relative strength of their position vis-à-vis their negotiating partners, we might also anticipate that they will (rationally) adjust their behaviour accordingly in the context of their strategic interactions.

***Supranational Positionality.*** While the above sub-section has focused on the positionality of the Member States, it is also important to include a note on the (perceived) positionality of the Commission and the EP. In terms of credibility, while the Commission is typically viewed as an actor with substantial expertise (Hooghe 2001: 7) and is therefore likely to try to exert influence on this basis, the EP will not necessarily be able to make the same claims to expertise, as the EP is predominantly composed of ‘generalist’ MEPs who are responsible for multiple issues areas (see: Bouwen 2004: 476-477) and who consequently lack the same level of issue specific knowledge possessed by the Commission’s technocratic experts<sup>87</sup>, or, indeed, Member State representatives. In terms of intensity, while both the Commission and the EP are likely to attribute a high level of salience to asylum policies (due to their direct linkage with human rights and the respective responsibilities of these institutions in this regard), the supranational institutions are not themselves physically exposed to asylum inflows and do not bear the costs involved with the processing and hosting of asylum applications and applicants – a reality which is quite unlike that of the Member States for whom this issue is most salient. We can therefore assume that the Commission will occupy a weak(er) position than the Member States, while the EP will occupy a weak position.

### ***Application to the Dublin Cases: Preferences, Positions and Institutions - Expectations for the Dublin Regulations***

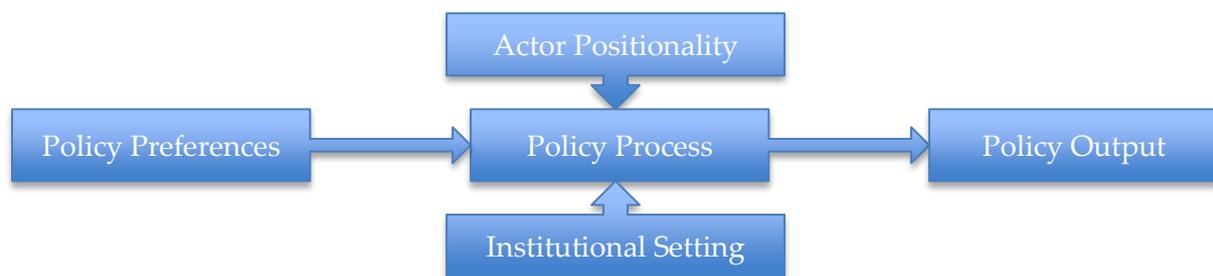
So what does this all mean for the purpose of this study? On the basis of the RCI framework elaborated above, the author’s analysis of the negotiations on both the Dublin II and Dublin III Regulation will integrate the preferences of the actors involved with their institutional setting (and positionality) in order to explain policy output in both cases. It deems actor

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<sup>87</sup> While McElroy (2006) does find that there is actually a tendency towards committee member specialisation in the EP’s committee appointment process (i.e. lawyers end up on the legal affairs committee), this is still unlikely to rival the more technical and highly specific expertise of Commission officials.

preferences as the main independent variables, which then intersect with the relevant institutional setting and the relative strength of actor positions within the context of the asylum policy-making process, which together constitute the causal mechanisms that ultimately shape policy output. This work therefore seeks to understand why policy output better reflects the policy preferences of some actors over others as a result of this causal process. Figure 2.1 provides a succinct overview of this framework.

Figure 2.1: Theoretical Framework



In order to address the broader question motivating this research (*Why has the Dublin system endured despite its failures and despite the communitarisation of asylum policy-making?*), the author has developed several hypotheses on the basis of the framework outlined above, which apply both generally and specifically to the negotiations on the Dublin II and Dublin III Regulations. While this study is also dedicated to explaining the system’s emergence through the development of the 1990 Dublin Convention (the examination of which appears in Chapter Four and similarly relies on the various theoretical concepts introduced in this chapter and the last), its primary analytic focus is geared towards explaining the system’s enduring stability through these two attempts at reform, which occurred against a backdrop of the communitarisation of asylum policy-making (covered in Chapters Five and Six).

Consistent with the framework elaborated above, the author has adopted the following general hypothesis:

*H1: EU actors will be either empowered or constrained in the pursuit of their policy preferences by their institutional setting and the relative strength of their positions.*

**Dublin II.** With regards to the negotiations on the Dublin II Regulation (following the partial communitarisation of asylum policy-making), the author has further adopted the following

specified hypotheses, as they pertain to the anticipated behaviour and influence of the EU actors involved, consistent with their roles and capabilities within the context of the consultation procedure:

*H2: The Commission will seek to exploit its role as formal agenda setter in the pursuit of its policy preferences; however, it will be constrained in this regard due to the applicability of unanimity voting rules and its weak(er) positionality (vis-à-vis the Member States).*

*H3: The EP will seek to exploit its role as consultant in the pursuit of its policy preferences; however, it will be constrained in this regard due to the non-binding nature of its recommendations and its weak positionality (vis-à-vis the Member States).*

*H4: Constituting the main decision-making body, the Member States will pursue policy outputs that best reflect their policy preferences. They will be individually empowered in this regard by the applicability of unanimity voting rules; however, notwithstanding veto power, strongly positioned Member States will be better able to exert influence over policy output than more weakly positioned Member States.*

**Dublin III.** With regards to the negotiations on the Dublin III Regulation (following the full communitarisation of asylum policy-making), the author has similarly adopted the following specified hypotheses, as they pertain to the anticipated behaviour and influence of the EU actors involved, consistent with their roles and capabilities within the context of the co-decision procedure:

*H5: The Commission will seek to exploit its role as formal agenda setter in the pursuit of its policy preferences; it will be empowered in this regard by the transition to QMV, however, it will still be constrained by its weak(er) positionality (vis-à-vis the Member States).*

*H6: The EP will seek to exploit its role as co-legislator in the pursuit of its policy preferences; it will be empowered in this regard by the binding nature of its recommendations (as its approval is now required for the passing of legislation), however, it will still be constrained by its weak positionality (vis-à-vis the Member States).*

*H7: Constituting the main decision-making body, the Member States will pursue policy outputs that best reflect their policy preferences. They will be either individually empowered or constrained in this regard as a result of the transition to QMV (and the culture of consensus); however, notwithstanding the impact of this transition, strongly positioned Member States will still be better able to exert influence over policy output than more weakly positioned Member States.*

Furthermore, and in light of the delegation of jurisdiction in this area (and the consequently higher capacity for enforcement alongside a growing body of jurisprudence), the author further anticipates:

*H8: There should be evidence of the courts and/or existing legal obligations having some form of exogenous impact (however limited) on the negotiations in a manner that either empowers or constrains the actors involved.*

### **2.3 Research Design and Methods**

In presenting the evolution of the Dublin system as a case of the potential impact of institutional arrangements on policy output, this study is inherently vulnerable to some of the traditional criticisms that have been directed towards case studies and single case studies in particular. The main thrust of these objections involve the lack of comparison/variance between cases and variables – which by extension may also lead to fewer potential observations – as well as the potential for selection bias and the limited generalizability of single case study findings given their possible overstatement or understatement of the explanatory power of a single causal variable<sup>88</sup>. However, these issues need not be seen as strictly detrimental to the value of single case studies, as there are various ways that these criticisms can be overcome and different ways that they can be of value. The author submits that the particular design of this study achieves both.

This work presents a single diachronic case study that focuses on the three incarnations of the EU's Dublin system: the 1990 Dublin Convention (derived from the 1990 SIC); the 2003 Dublin II Regulation; and the 2013 Dublin III Regulation. One of the key benefits of a diachronic case study is that its self-contained temporal variance allows for numerous potential observations and within-case comparisons, thereby overcoming – at least in part – one of the main criticisms aimed at single case research (Gerring 2007: 21). This is also achieved through the use of an expansive and nuanced definition of 'institutions' (as per the more recent developments in the RCI literature outlined in section 2.2), which further enables multiple observations and within-case comparisons within the intervening (causal) variable itself. Moreover, the Dublin system represents a deviant case with regards to the expected relationship between changing institutional arrangements and resulting policy output, as established in this chapter and the one previous. As communitarisation has been

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<sup>88</sup> For a general discussion on the potential pitfalls of case study design, see George and Bennett 2005: 22-34. For a specific discussion on single case studies, see King, Keohane and Verba 1994: 208-211.

generally expected to lead to stronger policy outputs (in both regulatory and redistributive terms), the overall stability of Dublin in the face of two reforms, and against a backdrop of communitarisation, makes it an outlier. The author’s decision to focus on Dublin was therefore based on its deviance from established theoretical and empirical expectations; in other words, the case was selected on the dependent variable (i.e. policy output). While this has often been a discouraged practice, selection on the dependent variable in single-case studies has been deemed appropriate in certain instances and “can serve the heuristic purpose of identifying the potential causal paths and variables leading to the dependent variable of interest” (George and Bennett 2005: 23). This study consequently probes the case of Dublin in the hope that the specific causal process within this deviant case may serve to illustrate something new (Gerring 2007: 105-106).

Given the temporal variation in this case (as discussed above), this research engages in longitudinal comparison (Gerring 2007: 153-155), or what is also known as the ‘Before-After’ design (George and Bennett 2005: 166). This particular research design looks at a specific case before and after an ‘intervention’, whereby the independent variable of interest is expected to undergo change as a result of said intervention, which is then expected to impact upon the dependent variable in a particular way. In this regard, a study of the three Dublin agreements provides a sort of natural experiment, as ‘intervention’ has occurred entirely without manipulation on two separate occasions as a result of EU treaty reforms, which have mandated changes to the institutional arrangements governing asylum policy-making.

Table 2.1: Research Design

	T <sub>1</sub>		T <sub>2</sub>		T <sub>3</sub>
Y	Policy Output (Dublin Convention)	I - Treaty Reform (Partial Communitarisation)	Policy Output (Dublin II Regulation)	I - Treaty Reform (Full Communitarisation)	Policy Output (Dublin III Regulation)
X	Actor Preferences (Institutional Setting = Intergovernmentalism)		Actor Preferences (Institutional setting = Consultation Procedure)		Actor Preferences (Institutional setting = Co-decision Procedure)

Code: Y – Dependent Variable of Interest; X – Independent Variable of Interest; T<sub>1</sub> – Pre-test (before intervention); T<sub>2</sub>/T<sub>3</sub> – Post-test (after intervention); I – Intervention.

Source: Adapted from Gerring 2007: 155.

One of the main challenges facing the “Before-After” research design, however, is that, for most phenomena of interest, more than one variable changes at a time (George and Bennett 2005: 166). This consequently violates the *ceteris paribus* assumption underlying causal analysis, which requires “that all peripheral factors that might affect the  $X_1/Y$  relationship of interest are held constant, before and after the intervention” (Gerring 2007: 156)<sup>89</sup>. As this is almost always a problematic assumption, process tracing has therefore been deemed the most appropriate method for this design, as it is necessary to not only trace the main causal variable(s), but to also gather the broader context (George and Bennett 2005: 166; Gerring 2007: 169). As such, one of the key benefits of process tracing is the depth that it lends to causal analysis, as it allows a researcher to make “within-case inferences about the presence/absence of causal mechanisms” that go beyond correlation and which more effectively capture the causal linkage between X and Y (Beach and Brun Pedersen 2013: 4-5). This is where the analytical value of RCI comes in, as it provides a clear framework for doing this. This study consequently uses process tracing to carefully capture the causal influence of institutional arrangements, as well as the strength of actor positions, while simultaneously considering the impact of other contextual considerations relevant to answering this study’s research questions.

The three core empirical chapters that follow are organised in accordance with this design. Following an introduction to the key principles and problems associated with the Dublin system in Chapter Three, Chapter Four begins by analysing the emergence of the pre-test case ( $T_1$ ) – the 1990 Dublin Convention. It begins by examining the various factors that prompted the initial formation of the Dublin system, and the intergovernmental foundations for cooperation. It then proceeds to analyse how the aforementioned principles were originally agreed, first via the asylum provisions in the 1990 SIC, and how they were then replicated in the 1990 Dublin Convention.

On this basis, Chapters Five and Six analyse the post intervention test cases ( $T_2$  and  $T_3$ ) – the Dublin II Regulation and the Dublin III Regulation respectively. For the sake of comparison,

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<sup>89</sup> An ideal depiction of the “Before-After” design (as adapted for this study in Table 2.1) would therefore also include an  $X_2$  control variable that remains constant before and after intervention (see Gerring 2007: 155).

both of these chapters follow the same structure. First, they examine the performance failures of the preceding agreement (as they relate to each of the principles established in Chapter Four). Second, they outline the implications of the 'intervention' that has occurred between cases (i.e. the institutional changes between T<sub>1</sub> and T<sub>2</sub>, T<sub>2</sub> and T<sub>3</sub>) as well as the anticipated positionality of the actors involved. On this basis, they then analyse, through a careful process tracing, the negotiations that resulted in each of the recast regulations in order to explain policy output in both cases.

### *Sources*

Consistent with recommended best practices for case study research (Yin 1994), and exercises of process tracing in particular (Checkel 2014; Bennett and Checkel 2014), this study relies on the triangulation of evidentiary material from multiple sources:

*Academic Sources.* Academic sources were consulted extensively, primarily for the purpose of establishing the necessary historical, political and institutional contexts for each of the within-case cases.

*Official Documents.* Information obtained from primary EU documents constitutes the bulk of the evidence presented herein. Such documents include: relevant asylum legislation; framework decisions; Commission white/green papers; Commission communications; policy papers; policy performance reviews; press releases; EP positions/reports; judicial rulings from the CJEU/ECtHR; Intergovernmental Organisation/Non-Governmental Organisation (NGO) reports; Council programmes; delegation notes; meeting summaries; meeting minutes; and negotiation transcripts. While the relevant documents pertaining to the negotiations on the Dublin II and Dublin III Regulations could be obtained via the Council's public register (which makes available documents from 1999 onwards), the same was not true as it pertained to the asylum provisions in the SIC or the original Dublin Convention. In both cases, special access had to be granted by the Council Archives and the Transparency division of the Council's General Secretariat, as these documents were covered by a holding period for public release. With regards to the former, the author was granted full access to all documents relating to the discussions within the General Secretariat

of the Schengen Group, the Working Group on the Movement of Persons and its subgroup on asylum, covering the years 1985 to 1990. The documents were available in German, Dutch and French only (in line with the participating Member States at the time), and were later translated from French to English by the author. With regards to the latter, the author was permitted very temporary viewing-only privileges of the relevant documents for the purpose of submitting a more focused access request, but has unfortunately not been able to obtain copies of these documents for further review prior to the time of submission. The events recounted herein are therefore based on this brief inspection<sup>90</sup>.

*Interviews.* The author conducted 17 unstructured interviews for the purpose of this research. Intended to supplement the evidence obtained from the primary documents outlined above, these interviewees were selected on the basis of their ability to answer questions regarding the negotiations that led to the agreement of the Dublin II and the Dublin III Regulations<sup>91</sup>. They included Member State representatives (from both EU delegations and interior ministries), European Commission officials, a Member of the European Parliament (MEP), and representatives from both the UNHCR and the European Council on Refugees and Exiles (ECRE) (See Appendix 2). The narrow focus of this research necessarily limited the potential number of interviewees, as did the high rate of actor turnover within Member State delegations. Given the highly political nature of asylum cooperation, and the controversial character of Dublin in particular, most of the interviewees were only willing to speak openly on the condition of individual anonymity. The author has therefore refrained from disclosing details regarding the interview subjects in most cases, save for general institutional affiliations as and when permitted. The interviews involved an assortment of open-ended questions relating to the specific issues pertinent to this study. The questions were phrased in a way so as to ensure that the respondent did not feel 'guided' in their response. An open discussion followed the prepared questions in order to obtain any other relevant details.

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<sup>90</sup> The author also pursued two separate Freedom of Information requests pertaining to these documents through the UK government, both of which were regrettably rejected.

<sup>91</sup> Due to the amount of time that has elapsed from the negotiation of both the SIC (1985-1990) and the Dublin Convention (1987-1990), as well as the intergovernmental nature of these negotiations, it was not possible to locate individuals involved in this earliest stage of cooperation.

## **2.4 Conclusion**

While an admittedly lengthy lead-in to the empirical portion of this thesis, this chapter has: introduced the theoretical foundations of the study; justified this choice by reviewing the application of institutionalist explanations in other policy fields; and developed an RCI-based framework specific to the case of asylum policy-making and tailored to an analysis of the Dublin negotiations. In so doing, it has clarified the various theoretical themes and analytical concepts that will be employed throughout the empirical portion of this study in the interest of answering this work's motivating question. On the basis of these theoretical foundations (and having also introduced this study's design and methods), the next chapter turns to introducing the empirical foundations of the Dublin system before embarking on this study's core investigation as to how and why this system emerged and how and why it has endured despite its failures.

### 3 The Foundations of the Dublin System: Principles, Processes and Problems

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The purpose of this chapter is to elaborate on the empirical puzzle motivating this study's research question by introducing the core features of the Dublin system and by highlighting the main difficulties and controversies surrounding them. In doing so, it provides the necessary backdrop for the empirical chapters that follow, which seek to explain how these controversial features were initially agreed upon and why they have remained largely unchanged.

Over the last few decades, the Member States of the EU – operating both inside and outside of its purview – have steadily, but fundamentally, transformed the institution of asylum (Byrne 2003: 336). The active part played by European states in the shaping of today's international refugee regime can arguably be attributed to their high regional stake in the matter given that in the two decades prior to the new millennium, European countries received approximately seventy-five percent of the eight million refugees that arrived in the industrialised world during that time (Ibid).

The introduction of the Dublin system has been a particularly notable innovation, as it was the first instrument of its kind within the existing global asylum practice that went beyond simply binding states to an international obligation of *non-refoulement*,<sup>92</sup> and which actually aspired to unequivocally allocate the responsibility for examining an application for asylum to a single state. It does so on the basis of several underlying principles and a set of criteria on which responsibility determination is to be based.

This mechanism for responsibility allocation now sits as the central hub binding the spokes of the CEAS together, with all Member States bound to its terms. As such, it is no stranger to controversy. The terms of cooperation under Dublin have proven highly divisive, both in

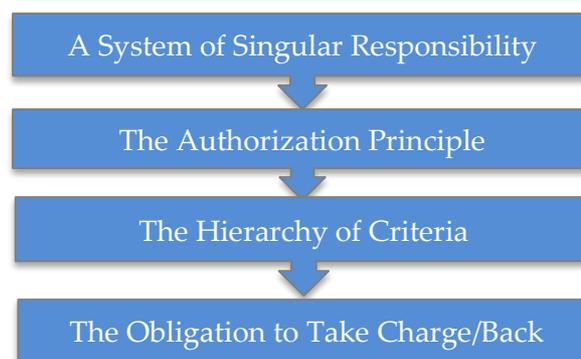
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<sup>92</sup> Article 33(1) of the 1951 Geneva Convention relating to the Status of Refugees states that: "No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

theory and in practice. While various actors in the European sphere continue to strongly defend its necessity, it has long been the subject of intense criticism spanning across its three incarnations. While some new guidelines have been introduced in subsequent recasts, the core axioms of the system that were agreed in 1990 remain in effect today. Thus, despite the levels of contention surrounding its operation, it has nevertheless remained relatively unaltered.

The chapter is structured around the four main organising features of the Dublin system. While elaborated as separate concepts, these four features are closely linked, each one stemming directly from the one before it.

*Figure 3.1: Dublin's Organising Features*



The first section reviews the concept of singular responsibility, which constitutes the core justification for the existence of a responsibility determination system. Extending directly on from this, the second section examines the principle that is in turn used as the basic rationale for attributing responsibility behind this system – the so-called ‘authorisation principle’.<sup>93</sup> The third section examines the hierarchy of criteria used for the specific allocation of responsibility to a single Member State, which are directly derived from and ordered in accordance with their perceived importance under the authorisation principle. As a direct consequence of this responsibility determination process, the fourth section outlines the

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<sup>93</sup> As will be elaborated on in the relevant section, the act of ‘authorising’ the entry of an asylum seeker into EU territory is deemed to be both active and passive.

ensuing Member State obligation to ‘take back’ or ‘take charge’ of an applicant for asylum for which they are deemed responsible. The fifth section concludes.

### **3.1 The Concept of Singular Responsibility**

Constituting a sort of umbrella concept for the entire Dublin system, the idea that only one Member State should be responsible for processing an application for asylum lodged within the EU serves as the key overarching principle that both warrants and guides the responsibility allocation process. Given that all Member States are party to the 1951 Geneva Convention relating to the Status of Refugees (hereafter the 1951 Convention) and the European Convention on Human Rights (ECHR), the notion of singular responsibility was justified on the basis of mutual confidence in one another’s asylum procedures (Hurwitz 1999: 648; Battjes 2002: 160). As mutual recognition had become an increasingly pervasive concept in the creation of the internal market, its usage had been extended to also apply to the issue of refugee protection, as all Member States were to be considered safe third countries vis-à-vis one another. In essence, it was argued that Member States should be entitled to collectively “pool their responsibility” (Guild 2006: 636) towards asylum seekers, as the decision taken by one Member State with regards to an application for asylum could be considered valid and applicable throughout the Union. The concept of singular responsibility is therefore dependent on both the safe third country and mutual recognition concepts (each of which is discussed later in this section).

The notion of singular responsibility, previously absent in the global asylum regime, evolved out of the desire to prevent situations of ‘asylum shopping’ (the lodging of several simultaneous or sequential applications in different countries) and ‘asylum seekers<sup>94</sup> in orbit’ (where asylum seekers are passed between countries without any single one accepting responsibility for processing their claims) (Uçarer 2001b: 296; Hailbronner and Thiery 1997: 964). While the former was seen as an abuse of the institution of asylum on behalf of asylum seekers, it was Member States who perpetrated the latter. Either way, the introduction of the

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<sup>94</sup> While this is often referred to in the literature as ‘refugees in orbit’, for the sake of terminological clarity, the use of asylum seekers is more appropriate as the individuals referred to herein have not yet been recognised as refugees under the terms of the 1951 Convention.

Dublin Convention sought to limit the occurrence of both phenomena by ensuring that asylum seekers would remain in a single Member State. This is a rather puzzling development, however, as it places “at the heart of the system...a logic which, in fact, is inimical to the internal market”, and as a result, asylum seekers are deliberately made an exception to the principle of free movement of persons (Guild 2006: 637-641). The elaboration of a clear system for handling asylum claims in the EC was also meant to avoid any undue delays in both the initiation of the asylum procedure and the ultimate taking of decisions.<sup>95</sup>

While it is noteworthy that the Dublin system aimed to ameliorate these problems through the notion of singular responsibility, it is a misrepresentation to claim that the terms of the original Dublin Convention provide a *guarantee* that an application for asylum lodged in the Community will be considered *within* its borders. As Bolten (1992: 22) writes:

In press releases after the Dublin ceremony, Commission and government spokesmen jubilantly stressed the novelty of a ‘guarantee’ for asylum seekers to have their asylum request examined in at least one EC country. The preamble of the draft Convention speaks the same language. An unsuspecting, not too demanding, audience would be tempted to assume that the phenomenon of [an asylum seeker] who cannot find one EC State prepared to examine his or her claim to refugee status will be over and done with under this Convention. That audience might even believe that such an examination would inevitably result in the grant of asylum by at least one Member State if the asylum seeker would be found a refugee without a country of asylum. However, there are no guarantees here. It rather looks as if there are some snakes in the grass.

Firstly, the 1990 Convention does not make an explicit reference to the internationally protected and enshrined right to seek asylum. While the preamble pays lip service to Member State obligations under the 1951 Convention and its accompanying 1967 Protocol, the actual right of an asylum seeker to seek refugee status is not mentioned (O’Keeffe 1991:

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<sup>95</sup> As stated in the preamble of the Dublin Convention: “Aware of the need...to take measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum”.

197). As such, “an applicant cannot derive from the Dublin Convention an individual right to a material examination of his or her claim for asylum” (Marx 2001: 9).

Secondly, any ‘guarantee’ that an application for asylum will be considered by a Member State is both undermined and negated by the safe third country provision, which assures every Member State that they “shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State” (Article 3(5) DC). Thus, Dublin not only permits the transfer of responsibility for asylum applicants between Member States within the EC on the basis that they are all to be considered *de facto* safe third countries, but it also allows those Member States to transfer the responsibility for asylum applicants to countries outside of the Union based on the same assumption.

### ***3.1.1 The Safe Third Country Assumption***

The term ‘safe third country’ applies to states that are “determined either as being non-refugee producing or as being countries in which refugees can enjoy asylum without danger” (Kjaergaard 1994: 651). On this basis, the concept of safe third country as it pertains to asylum applications “[denies] an asylum seeker an analysis of the substance of his/her claim on procedural grounds in a particular state, on the basis that s/he already found or could have found protection in another [safe third] country” (UNHCR 1995: 15).

The exercise of the safe third country concept as both the underlying assumption for transfers of applicants for asylum between Member States and as a justification for transfers to non-Member States under the Dublin system has been decidedly controversial. Its usage has been subject to intense criticism on the grounds that it falls considerably “short of the standards of international protection” (Marx 2001: 10) and turns the international asylum regime into a “protection lottery” (Williams 2015: 8) while reducing protection seekers into “passive bodies on whom is visited the will of the Member States” (Guild 2006: 636).

With regards to transfers between Member States, at the time the Dublin Convention was both agreed and later imposed, the consequences of the safe third country premise were

significant. Despite the political homogeneity of the region, recognition rates and practices at the time revealed that the EC was “far from a uniform conception of who should be granted asylum” (Hailbronner 1990: 358) and did not “warrant the assumption that ‘every [asylum seeker] is given a chance’” - nor did it render “streamlined adherence to third country procedures...justifiable” (Bhabha 1994: 112). Between 1985 and 1990, for example, recognition rates in Sweden and Denmark averaged around 65% and 52% respectively (for first instance decisions), while only 14% of the applications lodged in the Netherlands were recognised and a mere 9% were accepted in Germany<sup>96</sup> (UNHCR 2002). In introducing the Dublin Convention when it did, Member States “knowingly and willingly disregarded these divergences” (Noll 2001: 162) by pre-emptively enacting a system based on the supposed similarity of asylum systems before there was actually any “procedural or substantive harmonisation of affirmative norms of refugee law in Europe” (Hathaway 1993: 726). In doing so, this also increased the likelihood that asylum seekers would become concentrated “in the states least likely to grant them recognition” (Neuman 1992: 506) thereby “greatly [diminishing] the chances of [protection]” (Noll 2000: 210). In the lead-up to the negotiations on the Dublin Convention’s replacement, the prospective applicability of the safe third country rule in future accession countries was also particularly concerning in light of their minimally developed asylum systems and considerably lower than European-average recognition rates. In the year after the original Dublin Convention had come into force (1998), Poland and the Czech Republic, for example, measured recognition rates of 1.9% and 2.8% respectively against the European average of 9.7%.<sup>97</sup>

The potential transfer of applicants to safe third countries outside of the EU was even more alarming. Firstly, its application directly contravenes the very intention of the Dublin system to put an end to ‘asylum seekers in orbit’, by permitting successive transfers to safe third countries outside of the EU. Thus, while Dublin may put an “end to ‘[asylum seekers] in orbit’ in the EU, Member States still contribute to this phenomenon in the rest of the world” (Hurwitz 1999: 650). More importantly, however, “the risk of chain *refoulement* is systematically aggravated” (Noll 2000: 210) through this practice. While the *non-refoulement*

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<sup>96</sup> Germany, however, received the highest total rate of applications during the same period.

<sup>97</sup> This only corresponds to those offered protection under the 1951 Convention and does not cover other subsidiary categories of protection.

obligation expressly prohibits contracting states from sending a protection seeker directly back to a country where they may be at risk of persecution, it also requires that contracting states not return a protection seeker back to an additional country, which may in turn send the protection seeker back to a country where they are at risk. States are therefore expected to perform a sort of 'due diligence' with regards to any potential transfers in order to avoid potential indirect breaches of the *non-refoulement* principle – a responsibility upheld in the ECtHR's landmark ruling *T.I. v. UK*.<sup>98</sup> Therefore, "any application of the Dublin Convention which would lead to violating or even to 'avoiding' the obligation of *non-refoulement* constitutes a violation of good faith in the performance of treaty obligations" (Hurwitz 1999: 676). The sanctioning of transfers to safe third countries outside of the EC under the Dublin system consequently exacerbates this risk.

Acknowledging the wide discrepancies in existing safe third country practices and the sheer quantity of potential candidate countries, the EU Ministers responsible for immigration agreed in November 1992 to a 'resolution on a harmonised approach to questions concerning host third countries' (one of the so-called 'London Resolutions'<sup>99</sup>). Intended to complement and clarify the application of the safe third country concept within the framework of the Dublin system, the resolution outlined both the procedural foundations for its use as well as the requirements for designating states as safe third countries. With regards to the former,

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<sup>98</sup> Application No. 43844/98, 7 March 2000. The case dealt with a Sri Lankan national who contested his expulsion from the United Kingdom to Germany under the terms of the Dublin Convention, on the grounds that if he were returned to Germany – where his claim for asylum had already been rejected – he risked being returned to Sri Lanka, which would constitute a violation of the 1951 Convention. While the Court ultimately ruled against the applicant, the Court issued the following assessment: "The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [1951] Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."

<sup>99</sup> Collectively, the London Resolutions sought to achieve a uniform basis for designating asylum applications as 'manifestly unfounded' and other states as either 'safe third countries' or 'safe countries of origin'. Applications could be designated as manifestly unfounded in cases where the application was clearly of little substance or was based on deliberate deception or abuse of asylum procedures, or where the applicant had previously travelled through a safe third country in which they could have lodged an application (Paragraphs 1(a) and (b), Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum). Such a determination could also be reached where the applicant was from a 'safe country of origin' in which 'there is generally no serious risk of persecution'.

the resolution mandated several principles that Member States were to abide by, which are as follows:

- a) The formal identification of a host third country in principle precedes the substantive examination of the application for asylum and its justification;
- b) The principle of the host third country is to be applied to all applicants for asylum, irrespective of whether or not they may be regarded as refugees;
- c) Thus, if there is a host third country, the application for refugee status may not be examined and the asylum applicant may be sent to that country;
- d) If the asylum applicant cannot in practice be sent to a host third country, the provisions of the Dublin Convention will apply;
- e) Any Member State retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country.

While this resolution was ultimately non-binding, it nevertheless sent a very clear message to the Member States: “first and foremost, the asylum seeker should be allocated to a country outside the Union. Only where this is not feasible, allocation under the Dublin Convention is considered” (Noll 2000: 193).<sup>100</sup> Entirely flouting the intention in the preamble that an application for asylum lodged within the Union will be examined by one of the Member States, “expulsion to a third State [was] no longer the exception, but the rule” (Achermann and Gattiker 1995: 23), meaning, in effect, that “there is no procedural guarantee for asylum seekers at all” (Bolten 1992: 23). Despite the degree of controversy surrounding the safe third country notion, however, it has remained an instrumental provision in all three Dublin agreements.<sup>101</sup>

### **3.1.2 (Non-Mutual) Mutual Recognition<sup>102</sup>**

As outlined above and as a direct extension of the concept of singular responsibility, Member States are bound under the Dublin system by the principle of mutual recognition. Much like the use of the concept in the single market, whereby a product produced in one

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<sup>100</sup> Around the same time, several Member States had also begun concluding readmission agreements with states outside of the Schengen and Dublin zone, which required parties to readmit persons (which included both their own nationals and asylum seekers) who have been found to be irregularly present in the territory of one of the other parties (Kjaergaard 1994: 653).

<sup>101</sup> The provision appears identical in all three agreements, though the Dublin II Regulation stipulates that it must be in compliance with the 1951 Convention and the Dublin III Regulation subjects it to the rules and safeguards articulated in Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing protection.

<sup>102</sup> O’Keeffe 1991: 200.

Member State must be automatically recognised as legal in another<sup>103</sup>, the Dublin system is similarly premised on the idea that the outcome of an asylum application in one Member State is automatically legally binding in the others. Mimicking a sort of accordion effect, as the collective responsibility for examining applications for asylum can be reduced to a singular Member State, equally, the decision reached by that singular Member State can be similarly expanded to apply to the collective. What is unique about the Dublin system's usage of the concept, however, is that it only pertains to negative decisions. Thus, while Member States are bound by a "negative mutual recognition duty" (Guild quoted in Costello 2005: 1), the same cannot be said for positive decisions. In cases where a positive asylum decision is issued by the responsible Member State, that decision ultimately remains specific to it. This means that the claimant's right to remain on EU territory applies only to that Member State's territory. As such, the right to freedom of movement is therefore denied not only to individuals who are in the process of seeking asylum but also to individuals who have actually been granted recognised refugee status in line with the 1951 Convention. Arguably undermining the whole premise of mutual recognition, Bolten (1992: 26-28) aptly notes that:

...It is, indeed, significant that [the Dublin Convention does not encompass] a provision which makes it mandatory for the states concerned to abide by a positive determination of refugee status by any one of them. After all, here are states expressing their wish to stand by each other's examinations of applications for asylum and each other's negative decisions...To submit to another state's decision that somebody is not a refugee, and consequently that s/he is safe from persecution, implies trust in that state's decision making. But the reason not to respect another state's recognition of refugee status as *res judicata* can be no other than a lack of confidence in the way the other state reached its decision.

Bolten (Ibid) further argues that the very notion of negative mutual recognition is in itself problematic as it pertains to Member State obligations under the 1951 Convention. While all Contracting States are bound by the universal principle of *non-refoulement*, they maintain the national character of decisions on claims for refugee status; it is therefore not a breach of the 1951 Convention that individual states reach decisions on applications for refugee status according to their national practice. However, this, in principle, inherently negates and invalidates the legitimacy of any attempts to 'internationalise' negative decisions:

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<sup>103</sup> This is based on the famous 1979 CJEU Cassis de Dijon ruling (Case 120/78).

As long as legal differences between national systems of refugee and asylum law account for divergent decisions on claims to refugee status and applications for asylum, the principle of observing in good faith a Contracting State's individual obligations as laid down in the [1951] Convention continues to compel each Contracting State to reach the rejection of an application autonomously. To give another state's negative decision any binding effect under the present circumstances not only restricts the rights of [asylum seekers], but may be considered to be in breach of the principle of good faith owed to some hundred other states parties to the [1951] Convention, which will be surprised to see that twelve treaty partners have issued twelve asylum refusals through one single decision.

Taken together, these issues have been a major source of contention and call into question the very legitimacy of how this overarching principle has been applied, as its execution is seemingly riddled with contradictions. Why introduce a system of singular responsibility that aims to eliminate situations where asylum seekers are passed between countries, and then provide a caveat in the same breath that allows them to do exactly that? How can the establishment of a system designed to facilitate the exercise of free movement be reconciled with the reality that it restricts free movement itself? How can the validity of negative asylum decisions be assumed universally binding, while the same treatment is not afforded to positive ones? Despite these incongruities, these assumptions collectively constitute the overriding feature that governs the whole system, and from which the remaining three features are ultimately derived.

### **3.2 The Authorisation Principle (Permitting Entry by Voluntary or Involuntary Means)**

Branching off from the overarching concept of singular responsibility is the second key feature of the Dublin system, which is the actual principle that guides responsibility allocation - the so-called 'authorisation principle'. This principle embodies the key rationale behind how the responsibility for examining an application for asylum is attributed among the Member States. It dictates that "the more a Member State has consented (explicitly or tacitly) to the penetration of its territory by an asylum seeker, the more it is responsible" (de Lobkowitz quoted in Hurwitz 1999: 648). Thus, regardless of whether or not a Member State has voluntarily permitted the entry of an asylum applicant onto their territory by legal means or has involuntarily permitted entry by virtue of failing to prevent illegal entry, that

Member State is to be held responsible nonetheless. In other words, if you admit an asylum seeker in - knowingly or otherwise - you accept responsibility and are obligated to provide for their well-being.

By virtue of assigning responsibility on the basis of permitting entry, the authorisation principle inherently implies that not preventing entry is a failure that should come with a cost. The use of the authorisation principle as the core determinant of responsibility allocation has therefore been widely criticised for turning responsibility determination into a 'blame game', as being assigned the task of examining an application for asylum is consequently treated as both a "burden and a punishment" (Guild 2006: 637).

If, as the preamble of the Dublin Convention indicates, the "only purposes of the rules were to eliminate multiple asylum applications and to keep [asylum seekers] out of orbit, the parties could have adopted the simpler solution of making the first state in which the [asylum seeker] files an application responsible" (Neuman 1992: 508) – a recommendation which was advanced at various stages by the UNHCR and ECRE (UNHCR 2006; ECRE 2013). This solution was deemed undesirable by several of the Member States, however, as it would likely result in higher rates of applications among those countries with more generous and well-established asylum systems as a result of the lack of harmonisation among European asylum systems at the time. Yet instead of working towards "intensifying the harmonisation of protection systems, whose divergence was the very cause of secondary movements, states stipulated the fictive equality of these systems and allocated protection seekers to them under a mechanical rule...based on the concept of safe third countries" (Noll 2000: 184).

Member States had therefore alternatively given priority to the link forged in the preamble between Dublin and the internal market and favoured security concerns over protection concerns. By allocating responsibility in this way, it would ensure that all Member States 'stayed on their toes', so to speak, with regards to enforcing pre-entry and entry controls in an area without internal frontiers. As such, the use of the authorisation principle as the basis for responsibility allocation arguably reveals a rather sinister intention on behalf of the

Member States, as this principle inherently encourages participating states to adopt increasingly restrictive measures in order to limit access to their territory in an effort to minimise their level of responsibility. Thus, rather than ensuring adequate guarantees for protection seekers within the Union, the Dublin system could instead be seen to function as an “attempt to legitimise [the] restrictive policy changeover” (Vink and Meijerink 2003: 303) that had been sweeping through Europe prior to its introduction.

During the course of formulating the proposal for the Dublin II Regulation, the Commission itself acknowledged that an allocation system based on the first country of application would be the most “credible alternative scenario” (Commission 2001b: 4); however, the concern that on-going divergences among Member State asylum systems continued to create variable incentives for would-be asylum applicants was again cited as the reason for why such a change-over would “not be realistic” (Ibid) at this point in time. Despite the changing circumstances between the proposals for the Dublin II and Dublin III Regulations and the advancements made with regards to the harmonisation of Member States’ asylum systems through the introduction of the minimum standards directives, the authorisation principle was nevertheless maintained as the foundation for responsibility determination under the most recent recast of the system. This is all the more puzzling in light of the geographic vulnerabilities that this principle exaggerates; while those Member States situated along the periphery of the EU already bear a larger responsibility with regards to the physical policing of the external border, the use of this principle punishes their inherent susceptibility to unauthorised entry attempts as a result of this position. It is therefore not clear as to why these Member States would have (repeatedly) agreed to such a system.

### **3.3 The Hierarchy of Criteria for Determining Responsibility**

The third feature of the Dublin system is a set of hierarchical criteria used to determine Member State responsibility. Extending directly from the above, the ordering of the criteria is based on their perceived importance in accordance with the authorisation principle (Hurwitz 1999: 652). The only exception to this is the criterion related to preserving family unity, which takes precedence under all three versions of the agreement.

The original Dublin Convention outlined five criteria (Articles 4-8 DC) for the determination of responsibility. As just noted, the first criterion related to family. If the applicant for asylum had a family member that had been officially recognised as a refugee<sup>104</sup> and was legally resident in a Member State, that Member State was to be held responsible. 'Family' in such cases was limited to the spouse of the applicant, the unmarried minor child of the applicant (under eighteen years of age), or the parent of the applicant where the applicant him/herself is an unmarried minor. Returning to the authorisation principle, the second criterion dealt with residence and entry permits, and extended responsibility to any Member State that had allowed the 'alien'<sup>105</sup> access to Member State territory. In cases where the applicant for asylum possessed a valid residence permit or visa, the Member State that issued that permission to enter EU territory would be responsible. The third criteria assigned responsibility on the basis of irregular<sup>106</sup> entry. If it could be demonstrated that an applicant for asylum irregularly entered a Member State from a non-Member State, responsibility would lie with the irregularly entered Member State unless it could be shown that the applicant for asylum had already been living in the Member State where the application was lodged for at least six months before making their claim. Closely linked to this, the fourth criterion stipulated that responsibility should be "incumbent upon the Member State responsible for controlling the entry of the alien into the territory of the Member States". Finally, but most importantly, in cases where none of the above criteria applied, the fifth criterion assigned responsibility to the Member State in which the application for asylum was first lodged.

Several issues with the criteria are immediately apparent. With regards to the first criterion, the definition of family under the Convention was swiftly criticised for being extremely narrow – indeed, it represented the most restrictive definition of family permitted at the time

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<sup>104</sup> The importance placed on preserving family unity only applied in cases where recipients had been granted status according to the 1951 Convention and did not apply to other subsidiary or humanitarian forms of protection (Battjes 2002: 185).

<sup>105</sup> An alien is defined as "any person other than a national of a Member State" (Article 1, 1(a)).

<sup>106</sup> This study refers to both 'irregular' and 'illegal' entry. This is consistent with its variable usage among EU documents, Member State contributions, etc. However, much like the case with the terminological distinction between responsibility and burden sharing, the author similarly acknowledges that irregular entry for the purpose of claiming asylum cannot, in fact, be deemed illegal due to the internationally protected right to seek asylum. Nevertheless, it is similarly telling that 'illegal' is the term most often employed by many of the Member States.

by the UNHCR (Hurwitz 1999: 653; O’Keeffe 1991: 200). Put into practice, such strict limitations as to who constitutes family necessarily hinders the applicability of this provision as the primary determinant of responsibility. At the same time, the third criterion on illegal entry “reveals all the contradictions and flaws of the Dublin system” (Hurwitz 1999: 657). It goes without saying that “borders cannot be sealed hermetically” (Noll 2000: 319) and that as long as there are people who need or choose to resort to irregular entry for access to territory, irregular entry is inevitable. With regards to the application of this criterion, it therefore proves problematic on a purely functional level; if an asylum seeker has engaged in secondary movements after irregularly entering EU territory, it may be very difficult to prove where irregular entry initially occurred (this is particularly so given that the applicant likely has no interest in being forthright if they are trying to reach a particular destination). This criterion is also highly problematic from a human rights perspective, in that it unapologetically castigates the irregular crossing of external borders by protection seekers. This directly contradicts the provisions of the 1951 Convention that expressly provides that acts of irregular entry for the purpose of seeking asylum shall not be penalised (O’Keeffe 1991: 201). The fourth criterion is also thorny as the vast majority of asylum applicants arriving in the EU do not arrive through regular means and are unable to access centrally located Member States directly via airports (Papadimitriou and Papageorgiou 2005: 303).<sup>107</sup> Thus, regardless of where an asylum seeker intends to travel to, it is almost inevitable that they will be forced to transit through an external border country. As a result, “excluding asylum seekers from access to asylum procedures simply on the basis of transit or the mere possibility of seeking protection in a third state during a stop-over...implies shifting the whole task of providing protection to those countries which just happen to be the first asylum countries” (Marx 2001: 10). Furthermore, “it cannot be presumed that the refugee will be afforded protection by the third state with which he has no links other than mere transit” (Ibid: 11).

Another interesting characteristic of the aforementioned system for determining responsibility is that it pays no heed to the wishes of the protection seeker. Taken together,

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<sup>107</sup> This is due to harmonised visa requirements as well as the widespread introduction of various deterrent measures such as carrier sanctions, which impose financial penalties on transportation companies that are found to have transported passengers without the appropriate legal documentation (Hatton 2005).

the application of this hierarchy of criteria denies the protection seeker the ability to choose the state in which they would like to seek asylum (Hathaway 1993: 725; Hailbronner and Thiery 1997: 967). Yet the elimination of personal choice on behalf of the asylum seeker may seriously contravene the often quite deliberate choice of destination country on the basis of various structural pull factors.<sup>108</sup> Successful integration upon settlement is therefore less likely “to be achieved in countries arbitrarily selected by the [Dublin Convention] criteria with no appropriate links for the claimant” (Blake 2001: 107). Only in cases where none of the first four criteria apply does the state in which the application was lodged have any bearing (assuming that the initial receiving State is where the protection seeker intended to apply as opposed to merely being a country of transit); otherwise the system treats the intentions of the asylum seeker as entirely irrelevant (Hurwitz 1999: 648). It is also worth noting that while the aforementioned tactic of ‘shopping’ for the most generous asylum system has been viewed with considerable disdain, Noll (2000: 182) argues that such behaviour should not be automatically assumed to be based on a “malicious intent to manipulate” but instead, “a rational reaction to the disharmony of European protection systems”.

What is most puzzling, however, is that the elaborated system for responsibility determination is surprisingly unfair as it pertains to the Member States themselves. As alluded to above, the use of the authorisation principle as the basis for responsibility determination could be logically expected to result in a disproportionate amount of responsibility being placed on some Member States over others. This is due to the fact that, in most cases, responsibility ends up lying with the first country of entry. This necessarily shifts responsibility in the direction of those Member States closest to zones of conflict on the external periphery of the Union (Blake 2001: 109) and “whose borders are most exposed to illegal entry attempts” as they will “automatically be subject to larger numbers of asylum applications” (Noll 2000: 139). If we assume, as is often the case, that the majority of flows move from south to north and east to west, then the terms of the Convention are likely to turn the “southerly and easterly members [into] buffer states” that effectively “[block] the access of [asylum seekers] to the other states” (Neuman 1992: 509). Given that many of these Member States already have reception systems much less developed than their neighbours,

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<sup>108</sup> For a review of these influences, see: Thielemann 2004, 2006; Neumayer 2004, 2005.

the redistributive impact of the allocation criteria may actually function as a disincentive for them to improve their asylum systems (contrary to goals of harmonisation), as the “contradictions of the system are so serious that countries with long external borders [may] prefer a dysfunctional system to one which would make them responsible for most of the illegal asylum seekers arriving in Europe” (Hurwitz 1999: 675). The criteria specified therefore risks further entrenching and stabilising existing inequalities in the distribution of asylum applications, ultimately resulting in “burden concentration instead of burden sharing” (Noll 2000: 323).

While those states threatened by the potential implications of the system in its earliest years of operation (due to their being situated as primary points of entry) never fully suffered the consequences on account of its functional shortcomings, the forecast was considerably different by the time Dublin II came into effect. With the introduction of tougher controls and the widespread implementation of the European Automated Fingerprint Recognition System (Eurodac), the system was positioned to become considerably more effective in effectuating transfers. The preservation of the existing system in light of these changes ensured that geography would continue to trump equity as a guiding principle of the system and would allow Germany to “pass its mantle of geographic vulnerability to the newest entrants of the EU” (Byrne 2003: 351) - a position which was now guaranteed to have a far more resounding impact. Thus, it is again surprising that those Member States that stood to be most affected as a result of these changes agreed to their continued applicability. Nevertheless, and notwithstanding the on-going criticisms surrounding the criteria and their increased likelihood for distorting relative responsibilities, bar a few modifications, the hierarchy of criteria has remained more or less the same in all three Dublin agreements.

### *3.3.1 The Sovereignty and Humanitarian Clauses*

The Dublin system does, however, provide two exceptions to the application of the authorisation principle and its corresponding hierarchy of criteria - namely, the sovereignty clause and the humanitarian clause. The former permits Member States to ‘opt out’ of the application of the Dublin system, as they retain their sovereign right to “examine an

application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant agrees thereto" (Article 3(4)). As such, the exercise of the sovereignty clause by one Member State consequently absolves the Member State that would have been determined responsible by the Dublin criteria of their obligation. The latter appears alongside the hierarchy of criteria and allows the criteria to be superseded should any Member State wish to take responsibility for the examination of an application for asylum on the basis of humanitarian grounds, provided that this is in line with the applicant's wishes (Article 9).

Originally intended to allow Member States to override the application of the Convention as a result of considerations that reflect the best interest of the asylum seeker (such as family reunification), its usage in practice has instead been accused of often working to their detriment depending on the context (Noll 2000: 190; Hurwitz 1999: 667). This is due to the fact that the invoking state may actually operate a more restrictive asylum system than the state that would have been allocated responsibility under Dublin. In several cases, these clauses have been deliberately applied by various Member States (including Germany, the Netherlands and Belgium) when it has been known to be easier and quicker to achieve rejections and expulsions at the end of the standard asylum procedure in the original country of application – an outcome that is ultimately preferred to feeding the application into the Dublin system (Hurwitz 1999: 659-660; Noll 2000: 190). While the use of these clauses for this purpose has been condemned by the UNHCR, Member States have justified the practice on the basis that it is in line with the objective of the system to provide for the 'efficient' processing of asylum claims (Hurwitz 1999: 559-660). Though often misused, these clauses have nevertheless "proved relevant where the rigidity of the Convention criteria did not provide acceptable solutions to humanitarian and family related situations"; however, their "very existence...demonstrates the failure of a system in its attempt to organise the sharing of responsibility on the basis of formal criteria" (Ibid: 667).

### **3.4 The Obligation to 'Take Charge' or 'Take Back'**

The fourth key feature of the Dublin system discussed in this chapter is the Member State obligation to 'take charge' of or 'take back' an application for asylum on the basis of the

responsibility determination process outlined above. As the final feature of the system, stemming from the above, this feature provides the actual means for putting the previous ones into effect. If a Member State has received an application for asylum and believes, on the basis of the hierarchical criteria outlined above, that another Member State should be responsible for that application, they can call upon the other Member State to 'take charge' of the applicant. The request must be issued within six months of the date on which the application was lodged (otherwise responsibility will rest with the originally receiving State) and must include the reasons that substantiate the request for transfer. The Member State that receives the 'take charge' request must notify the sending State of its decision within three months. "Failure to act within that period shall be tantamount to accepting the claim" (Article 11(5)). In cases where the 'take charge' request is accepted, transfer of the applicant must take place within one month.

A Member State determined responsible under the terms of the Dublin Convention will also be obliged to 'take back' an asylum seeker who has withdrawn their application and lodged a separate application in another Member State, and who has been found to be irregularly located in another Member State while their application is either still under consideration or has been rejected. In such cases, the Member State that receives the 'take back' request must provide an answer to the requesting State within eight days. Where responsibility is accepted, that Member State must 'take back' the applicant as soon as possible, or at the very latest, within one month. These obligations will cease to apply if the asylum seeker has been outside of the territory of the Member State for at least three months or if the responsible State has taken measures to return the asylum seeker to his country of origin or another country that may be legally entered following the withdrawal or rejection of the application.

One of the major criticisms repeatedly levied against the operation of the Dublin system is that it significantly delays the actual review of an asylum applicant's claim. Contrary to the Dublin Convention's goal of expediting the asylum process (both in terms of examining applications and issuing decisions), the timelines stipulated by it are accused of being "too long for a workable application of the system...to be possible" (Hailbronner and Thiery 1997: 982). In practice, Member States often utilise the whole of the maximum time periods

allotted, or even regularly exceed them (Ibid; Commission 2000: 6). This means that if they follow the Dublin Convention to the letter, in cases of 'take charge requests', the whole Dublin process can take up to 10 months to administer. The situation is even worse in cases of 'take back' requests, as the Dublin Convention does not stipulate a time limit within which the Member State where the application for asylum was originally lodged must issue the request. It is not until after these procedures are carried out – and a physical transfer executed where applicable - that the examination of the application for asylum actually takes place (which is often itself a lengthy procedure). This can hardly be said to work towards “[avoiding] any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications” (Dublin Convention preamble). While the stipulated time limits were modified slightly by the Dublin II and Dublin III Regulations (as will be discussed in the following chapters), the overall time required to complete both the Dublin process and the actual asylum process remains long and protracted.

The actual execution of transfers is a whole other problem. Not only do asylum seekers often have considerable incentives to try to destroy documents or mislead the authorities, the prolonged timelines for both the issuing of requests and the provision of a response provides plenty of time for them to abscond in order to evade transfer (Filzwieser 2006: 6; Hailbronner and Thiery 1997: 982; Hurwitz 1999: 668). While some Member States may utilise detention in order to avoid disappearances, detention practices are in no way uniform nor are they mandated by the Convention or its accompanying decisions. This has been one of the reasons cited for the incredibly low rate of effected transfers in Dublin's early years. In its first full year of operation (1998), for example, the available statistics indicate that less than 2% of all of the asylum applicants who had lodged applications within that year were actually transferred under Dublin (Commission 2000: 12). While the introduction of Eurodac in 2000 has greatly improved the ability to track the movement of asylum seekers – and has therefore, by extension, also made it easier to accurately attribute responsibility in line with the criteria outlined above – actual transfer rates still remain relatively low. Despite the progress made, of the 76,358 outgoing take back or take charge requests issued in 2013, for example, only 15,938 of the 56,466 requests that were accepted were actually transferred – a

mere 28% (Fratzke 2015: 11). In light of the system's on-going ineffectualness, it has been further argued that the allegedly high costs of implementing the system, both in terms of the administrative costs and actual physical transfer costs (though these have been difficult to verify empirically)<sup>109</sup> simply cannot be justified.

Another consideration that elicited particular concern among sceptics was the lack of uniformity or the articulation of any clear rules on appeals<sup>110</sup> and suspensive effect<sup>111</sup>. Indeed, the only mention of both matters appears in the provision that requires Member States to execute 'take charge' transfers within one month of acceptance (Article 11(5)):

Transfer of the applicant for asylum from the Member State where the application was lodged to the Member State responsible must take place not later than one month after acceptance of the request to take charge or one month after the conclusion of any proceedings initiated by the alien challenging the transfer decision if the proceedings are suspensory.

The terms of the initial Dublin Convention did not, therefore, require any degree of harmonisation on this matter, leaving it in the hands of individual Member States. The possibility of removing a failed applicant prior to the full consideration of an appeal was not without consequence as state practices at the time varied widely (Hurwitz 1999: 669)<sup>112</sup>, inherently escalating the risk of either direct or indirect *refoulement*. It was not until the introduction of the Dublin III Regulation that common rules on these issues were officially elaborated.

### 3.5 Conclusion: A 'Bundle of Contradictions'

As a prelude to the empirical chapters that follow, this chapter sought to explain how the Dublin system operates. It therefore described and was structured around the four key organising features of the system, each of which stem from the feature before them: the allocation of responsibility to a single Member State provides the overarching purpose of the system; the authorisation principle provides the central rationale behind responsibility

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<sup>109</sup> The use of detention procedures also considerably impacts the costs involved.

<sup>110</sup> Appeal procedures can also work to significantly extend the length of time that the Dublin process takes.

<sup>111</sup> Suspensive effect prevents the applicant from being transferred to a third state while the appeal is being considered.

<sup>112</sup> While suspensive effect on Dublin decisions was available in Ireland, for example, neither Germany nor France allowed it (Ibid).

allocation; the hierarchy of criteria specifies the exact basis for determining responsibility in line with the authorisation principle; and the obligation to take charge or take back provides the means for the system's execution.

This chapter also elaborated on the puzzle outlined in Chapter One by highlighting the main criticisms and controversies that have surrounded each of these features. With regards to the concept of singular responsibility, this chapter discussed the inherent contradictions emanating from its subsidiary principles relating to safe third countries and mutual recognition, which ultimately serve to undermine the basis for the system's supposed legitimacy and contravene its purpose. The section on the authorisation principle reviewed the claims that Dublin turns the institution of asylum into a blame-game that ends up punishing both asylum seekers and Member States; moreover, it revealed the distinct irony in the reality that any proposed alternatives to this flawed principle have been blocked on account of the on-going diversity of Member State asylum systems despite the fact that the very notion of a system of singular responsibility is justified on the basis of their supposed similarity. Regarding the hierarchy of criteria, this chapter has reviewed the various difficulties associated with their application, as well as their glaring lack of concern for asylum seeker consent and the geographical inequalities produced among the Member States on account of the illegal entry and default first country of entry provisions. Finally, the section on the obligation to take back or take charge discussed the on-going practical problems associated with the implementation of the system, such as time delays, administrative hurdles, high costs and low transfer rates.

In light of these multiple paradoxes and problems, the initial agreement and the subsequent maintenance of each of these core features and their relevant sub-features present various auxiliary puzzles that ultimately support the larger puzzle motivating this study, as reflected in this study's overarching research question (*Why has the Dublin system endured despite its failures?*). In order to address this question, the empirical chapters that follow will examine these puzzles by providing a detailed process tracing of the negotiations for each of the Dublin instruments. The following chapter will, first and foremost, investigate how these problematic features came to be agreed in the first place by analysing the formulation of the

asylum provisions under the SIC and their simultaneous replication via the 1990 Dublin Convention. The subsequent two chapters, which analyse the negotiations on the Dublin II and Dublin III Regulations respectively, will then seek to explain how and why these features have been generally maintained in spite of their difficulties. Employing the RCI framework outlined in Chapter Two, these chapters seek to individually account for how each of these instruments were agreed and collectively explain why the system has been able to persist against the rapidly changing backdrop of EU asylum governance, thereby also addressing this study's secondary research question (*Why has the Dublin system endured despite its failures **and** despite the communitarisation of asylum policy-making?*).

## 4 Uncharted Waters: Intergovernmental Cooperation, Governance ‘Laboratories’ and the Emergence of the 1990 Dublin Convention

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This chapter analyses the emergence of the Dublin system; first through the negotiation of the asylum provisions under the 1990 SIC, and second through their reproduction in the form of the 1990 Dublin Convention. Its purpose is to explain how and why the Dublin system took the (problematic) form that it did. To this end, the first section considers the various circumstances that helped to incentivise asylum cooperation and the intergovernmental form that this cooperation initially took. The second section then details the formation of the SIC’s asylum provisions within the context of these incentives and within the intergovernmental Schengen ‘laboratory’. Following on from this, the third section discusses how the SIC’s asylum provisions were then ‘imported’ by the Schengen states into the EC’s intergovernmental Ad Hoc Group on Immigration thereby replicating them in the form of the Dublin Convention. The fourth section concludes.

### 4.1 The Impetus for Asylum Cooperation and its Intergovernmental Foundations

The necessity of a Community-wide approach for handling the issue of asylum arguably stemmed directly from the 1957 Treaty of Rome. In establishing the European Economic Community and in calling for the creation of an “internal market characterised by the abolition, as between Member States, of obstacles to freedom of movement of persons” (Article 3c), the EC Member States had committed to “[generating] a *de facto* common internal security zone”, which, upon its realisation, would ultimately “[render] borders between the Member States increasingly ineffective both as instruments of control and as obstacles to the free movement of asylum-seekers, illegal immigrants and crime” (Monar 2001: 754). It necessarily followed, then, that the Member States would likely seek to introduce various compensatory measures in order to regain that control and to reinstate certain barriers to free movement elsewhere. This section examines the blend of historical, political and economic factors that helped to foster a climate hospitable to intergovernmental coordination on asylum and which ultimately served to influence both the timing and substance of cooperation.

#### *4.1.1 Changing Geopolitics and New Threats to Internal Security*

Initial efforts at coordination among Member States on matters regarding internal security in the EC had already begun to emerge in the 1970s amidst a growing set of new transnational challenges facing various countries. The growing “spectre of instability created by terrorism”, for example, had helped to “[spur] a greater involvement of European governments, and in particular security agencies, in the surveillance of national and foreign citizens” (Zaiotti 2011: 64). This had in turn led to a “more enhanced cooperation on security matters – something that had always been a jealously kept prerogative of national institutions” (Ibid). Following a series of intergovernmental meetings in the early 1970s that addressed this growing threat, the Council of Ministers held a meeting in Rome in December 1975, which called for the creation of a special working group specifically dedicated to combating terrorism and coordinating policing in the EC (Bunyan 1993: 1). This led to the establishment of the Trevi Group in Luxembourg in June 1976 among the then-12 Member States. The Trevi Group was a purely intergovernmental venture composed of various EC interior ministers and different working groups that expressly excluded the involvement of any EC institutions. Initially limited to combating terrorism, the Trevi Group’s mandate later came to include other transnational issues as well, such as organised crime and drug trafficking.

The face of immigration in Europe had also begun to change during this time. Up until the 1970s, migration had remained a largely regional issue with most individuals moving either within the European continent or outside of it (Zaiotti 2011: 61). Yet, for the first time, a significant number of non-Europeans began arriving on European territory, causing net migration numbers throughout Europe to rise. Despite the termination of various long-standing foreign labour arrangements, guest workers had also started sending for their families instead of returning home, which further contributed to the rising numbers (Uçarer 2002: 19). Illegal immigration was similarly becoming an increasing problem for the Member States. Estimating the number of illegal immigrant workers in the Community in 1976 at some 600,000 (excluding family members), and noting a significant increase in illegal immigration in recent years, the Commission issued a proposal for a Council Directive ‘on the harmonisation of laws in the Member States to combat illegal migration and illegal

employment' (Commission 1976). Arguing that a legal basis for Community action on illegal immigration had been granted by virtue of Article 100 of the Treaty, the Commission sought to push for cooperation in confronting the rise in illegal immigration throughout the Community so as not to jeopardise European goals elsewhere (particularly those pertaining to further economic integration). At this point in time, however, Member State resistance to official community level cooperation in this regard remained high.

As the issue of illegal immigration came to be recognised as increasingly 'European', so too, did the issue of asylum. While post-World War II Europe had been marked by very minimal cooperation on asylum policy, increasing numbers of asylum applications in the 1970s saw asylum once again emerge prominently on the European agenda. Political instability in surrounding regions saw the number of applications rise from approximately 20,000 in 1976 to around 158,000 in 1980 (Uçarer 2002: 20). Inside Europe, but outside of the EC, the Council of Europe began putting forward recommendations on the harmonisation of eligibility practices under the 1951 Geneva Convention and the 1967 Protocol (Council of Europe 1976), while also convening an ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum and Refugees and Stateless Persons (CAHAR) in 1978. These moves were further followed by a recommendation in 1981, which extended the aim of harmonisation to also include national procedures relating to asylum more generally throughout the Council of Europe Member States (though little was actually achieved to these ends at this point in time) (Council of Europe 1981).

As this coincided with a period of financial turmoil in many of the Member States, EC countries had also begun independently pursuing different policy measures to confront these new challenges, as the issue of migration became increasingly politicised "not just for its size, but because it was linked to the widespread economic recession. The result was the drafting by European governments of protectionist policies to restrict the entry of foreigners" (Zaiotti 2011: 61-62). The introduction of a series of deterrent measures, involving amplified border controls, carrier sanctions and increased rates of expulsion and detention began to sweep through Europe – including measures that restricted material assistance for asylum applicants. "Taken as a whole, these policies sought to render Western

European countries not only difficult to reach for the would-be asylum seekers but also undesirable destinations” (Uçarer 2002: 19). Sparking a so-called ‘race to the bottom’ in restrictive policy measures (as Member States competed in an attempt to make themselves less attractive than their neighbours), the swift and unremitting degradation of previously liberal European migration regimes was soon acknowledged as untenable. This consequently led to the widespread recognition that collective action on this issue was the best potential remedy.

Accordingly, the British Presidency of the Council of the EC instigated the formation of the Ad hoc Group on Immigration at a meeting in London in 1986. This new group was to be made up of six distinct policy sub-groups, dealing with admissions/expulsions, visas, false documents, asylum, external borders, as well as one that was specifically dedicated to refugees from the former Yugoslavia. Tasked with better coordinating activities on immigration among the EC countries, the group was composed largely of the Ministers of the Interior and was to have a permanent secretariat based at the Council of Ministers, but would not itself act as a Community structure<sup>113</sup>.

The changing geopolitical and economic landscape in Europe during this time had therefore served to initiate conversations about increased cooperation at the European level – albeit largely intergovernmental - on issues not thought possible previously. At the same time, many of the concerns that had prompted this initial headway in cooperation were being compounded by the simultaneous reignition of momentum on the European project.

#### ***4.1.2 The Reinvigoration of Integration and the Single Market Programme***

The 1960s and 1970s had largely marked a period of stagnation for the European project. The ‘empty chair crisis’ prompted by French President Charles DeGaulle (1965-1966) and a general deadlock on decision-making in the Council had worked to stall the integration process and prompt fears of ‘Eurosclerosis’. While the free movement of workers had been

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<sup>113</sup> While the Commission was granted the ability to participate in meetings as an ‘observer’, it was denied any official recourse for influencing cooperation.

achieved in 1968 through the adoption of Regulation 1612/68<sup>114</sup> and Directive 68/360<sup>115</sup>, disagreements among the Member States on the basis of national sovereignty initially prevented the extension of free movement beyond strictly economic purposes. Acknowledging that the current state of market integration fell far short of Treaty obligations, the Council recommitted itself to realising the internal market goal in a series of meetings in the early 1980s that eventually culminated at Fontainebleau in June 1984, which “became the moment when momentum toward a package deal containing internal market liberalisation and decision-making reform became unmistakable” (Moravcsik 1991: 57). As the 1970s had also generally marked a period of economic stagnation for many of the Member States, renewed vigour in the establishment of the single market was further seen as a way to get the Community out of both its political and economic slump.

Capitalising on the renewed political will of the Member States, the Commission released in quick succession a set of guidelines for a Community policy on migration in March 1985 and its White Paper on the completion of the Single Market in June 1985. Both the guidelines and the White Paper reiterated the Treaty of Rome’s original commitment, urging that “the free movement of persons should gradually become accepted in its widest sense, going beyond the concept of a Community employment market, and opening up to the notion of European citizenship” (Commission 1985a: 6) through the elimination of “internal frontier controls in their entirety” (Commission 1985b: 9). Noting that the “abolition of checks at internal frontiers will make it much easier for nationals of non-Community countries to move from [one] Member State to another”, the Commission highlighted the need for proposed joint measures on the movement of TCNs as well as “the right of asylum and the position of refugees” (Ibid: 15-16) prior to the target completion date of 1992 for the establishment of the single market. It also called for proposals relating to the approximation of arms and drugs legislation and the creation of a common visa policy. The introduction of harmonised compensatory measures was thus seen as necessary to obviate the need for any remaining internal frontier controls by making up for the loss of control over internal security that

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<sup>114</sup> OJ L257/13, 1968.

<sup>115</sup> OJ L257/13, 1968.

would result from the removal of frontier controls between the Member States. Justifying this position, the Commission argued that:

Achieving our objective will require national policies either to be progressively relaxed and ultimately abandoned where they are no longer justified, or replaced by truly common policies applicable to the Community as a whole...It follows that once these barriers have been removed, the reasons for the existence of controls at internal frontiers will have been eliminated" (Ibid: 9-10).

The emphasis placed on collectively confronting the issue of TCNs as a consequence of the impending erosion of internal border controls was then formally echoed in the 1986 SEA, by virtue of a 'political declaration by the Governments of the Member States on the free movement of persons', which read:

In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries.<sup>116</sup>

Though this declaration clearly sought to encourage increasing levels of policy coordination among the Member States, it also contained a built-in guarantee that nothing would affect, on an individual basis, "the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries" (Ibid).

While the "form of such cooperation would continue to be outside the institutional framework of the EC until the Maastricht Treaty" due to Member State resistance, Noll (2000: 123) writes that the above declaration ultimately served to "[flag] that the message of the Commission White Paper had been heard and approved by the Member States: no internal market without measures on the movement of non-communitarians. Or, more succinctly, freedom had to be attained through the means of control". The policy linkage between the erosion of internal borders in the EC for the purpose of achieving economic integration and the subsequent necessity of strengthening the external borders towards the entry of non-Community nationals had therefore been officially articulated and the call for increased cooperation on asylum sounded.

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<sup>116</sup> OJ L169/26, 29 June 1987.

### 4.1.3 *The 1985 Schengen Accord*

The prospect of achieving a EC without internal frontiers was made all the more conceivable – and imminent – with the signing of the intergovernmental 1985 Schengen Accord between Germany, France, Belgium, Luxembourg and the Netherlands. The Schengen Accord was essentially a joining of two existing free movement agreements – one between Germany and France, and one between the Benelux countries. Responding to increasing pressures along their internal border (Cruz 1993: 3) and mutual concerns about each other’s growing protectionism (Moravcsik 1998: 359), France and Germany formalised their commitment to eliminate internal border controls between the two countries by negotiating the Rambouillet Agreement in May 1984, which was soon after followed by the Saarbrücken Accord of July 1984. As larger-scale attempts to abolish internal border controls in the EC had led to political gridlock (Hailbronner 2000: 126), and seeing an opportunity to merge with a long-standing agreement between the Benelux countries that had seen internal frontiers abolished between the three states since 1960, ministers from France, Germany, and the Benelux Union came to a collective arrangement that circumvented the EC in order to achieve the elimination of internal border controls between all five countries. Thus, with the signing of the Schengen Accord on 14 June 1985, “*l’Europe à deux vitesses*” was born (Noll 2001: 123).

The initial accord was divided into two main sections, which confronted measures to be implemented in both the short and long term. The short-term measures dealt predominantly with the actual mechanics of vehicle border crossings and the breaking down of barriers along border control points, while also calling for an approximation of visa policies (Article 7) and – taking cues from Trevi – reinforced cooperation among customs and police authorities (Article 8) for the purpose of combating crime and illicit drug trafficking. The longer-term measures, however, echoed the sentiments in the aforementioned Commission White Paper and signalled the intentions of the participating states as to the introduction of various compensatory actions relating to TCNs so as to ensure internal security. Indeed, with regards to the movement of persons, the Accord directly called upon the Parties to “abolish checks at common borders and transfer them to their external borders” (Article 17), and to take “compensatory measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities”

(Ibid). Article 20 expanded on this by further calling for the “harmonisation of...rules governing certain aspects of the law on aliens in regard to nationals of States that are not members of the European Communities” (though no explicit mention was made of asylum seekers/refugees). As Zaiotti (2011: 2) writes:

Schengen did not imply that borders were to completely disappear or lose importance. In order to compensate for the perceived security deficit stemming from the elimination of controls at common frontiers, the regime envisaged the relocation of controls to the external perimeter of the Schengen area, while other, more diffuse types of controls would be undertaken both within and beyond this area.

The Schengen Accord had therefore simultaneously mandated both the dissolution of internal border controls among the smaller sub-set of participating EC states and the fortification of external ones.

Collectively, these developments marked significant turning points in the development of the EC. Policy areas that had previously been staunchly guarded under the exclusive remit of sovereign nation states were now officially on the European agenda and subject to multi-state cooperation. The intergovernmental foundation for cooperation regarding internal security matters would also continue – with considerable momentum – over the next several years, with some 20 intergovernmental bodies created by the Member States between 1986 and 1991 dealing with issues relating to the management of internal and external border controls, police and customs cooperation, asylum and immigration, as well as drug trafficking and other forms of organised crime (Monar 2001: 754). What is most noteworthy, however, is that the main policy frame for cooperation had been set: Member States needed to work together to overcome new threats facing the EC in order to compensate for the shortfall of internal security control that the single market and the erosion of internal frontiers would entail – and to that end, cooperation was to take on a largely restrictive character. What this meant for the issue of asylum in particular, was that the initial pressure for coordination in this field “was never intended to be a comprehensive solution to the problems of refugee protection” per se, but was rather “conceived as a technical consequence of the abolition of internal borders” (Noll 2000: 123). Thus, in effect, cooperation on asylum was both a rational and a necessary by-product of free movement.

## 4.2 Forging (Independently) Ahead: The Schengen Implementation Convention and its Provisions on Asylum

### 4.2.1 *Schengen as a 'Laboratory' for Cooperation*

Almost immediately after the signing of the 1985 Schengen Accord, the five signatory states (hereafter the Schengen-Five) began the long and arduous process of negotiating a supplementary agreement that would lay out the more specific terms required for successfully executing the removal of internal border controls. Both the short and long-term measures covered in the Accord constituted the basis for the ensuing negotiations, which took five years to complete and which resulted in the signing of the Schengen Implementation Convention (SIC) on 19 June 1990. According to Nanz (1991: 30), “the relatively long time it took before these negotiations could be concluded gives witness to the fact that virtually every area in which measures had to be taken was new territory in terms of international agreements: there were no examples to draw on – neither in the framework of the EC nor in any other treaties or international organisations”. What further complicated the negotiations was the prospective expansion of the Schengen area as several other EC countries began to express interest in joining the border-free arrangement, which promised to not only complicate the negotiation process itself but also the number of potential issues faced for the purpose of implementation. In light of the various hurdles involved and the multitudinous challenges facing successful execution, it was then another five years before the SIC officially entered into force on 26 March 1995 for the Schengen-Five, as well as Italy and Spain.

Although the Schengen and EC initiatives regarding free movement shared the same objectives, i.e. a Europe without internal frontiers, the creation of a Schengen area based on intergovernmental cooperation outside of the EC framework - with flexible membership - “was clearly at odds with the long established practice among European states of working together under a common institutional umbrella” (Zaiotti 2008: 73). This not only led to a reconceptualisation of borders as something external to the Schengen states, but it also established a Europe of “variable geometry” (Ibid) by creating “a new set of borders within the EC, curiously subdividing the EC membership into Schengen and non-Schengen countries” (Uçarer 2002: 23).

Seeking to reconcile this incongruence among parallel goals, the Schengen project came to be referred to as a 'laboratory' for future EC cooperation in this field (Monar 2001: 752; Nanz 1991: 29; Zaiotti 2011: 75). As such, it was seen as an intergovernmental testing ground and a "parallel and significant exercise" in cooperation, which, according to the Commission, could potentially "help to speed up the removal of controls throughout the Community" (Commission 1988). As guardian of the treaties, the Commission's support in rendering the Schengen project as a 'laboratory' was rather controversial as it entailed "embracing an initiative that de facto circumvented these very treaties" (Zaiotti 2011: 77). According to Zaiotti (Ibid), this move was largely pragmatic: "The Commission realised that no matter what its attitude, Schengen would have proceeded anyways; engaging with it was the only feasible way to keep the participants in check and to make sure that the European project remained on track". Moreover, given that the removal of internal border controls throughout the EC was the Commission's ultimate goal, and that this had thus far proven politically impossible among the EU-12, the Commission understandably did not "wish to slow down progress where progress [could] be made" (Commission 1988). It therefore framed its participation in the work of the Schengen Group as "invaluable in formulating its ideas" for application "in the wider Community context" (Ibid). Nevertheless, this stance still drew strong criticism, with the EP going so far as to threaten legal action against the Commission for its complacency and with Commissioner Martin Bangemann (the Commissioner granted 'observer status' within the Schengen Group in later stages of the negotiations) publicly referring to Schengen as a "graveyard" for European cooperation "instead of a laboratory" (quoted in Zaiotti 2011: 77).

The supplementary SIC was to consist of four main categories: 1) measures for the removal of internal border controls and the reinforcement of external border controls; 2) measures for the creation of a common visa policy; 3) measures for the creation of a common policy on refugees and asylum seekers; and 4) measures for the creation of a database system for the purpose of tracking the movement of TCNs (the Schengen Information System or SIS). Unlike categories one, two, and four, the objective of creating a common policy on refugees and asylum seekers had not actually been mentioned anywhere in the original 1985 Accord.

It was instead raised as an important policy priority during the course of negotiations due to the increasing number of asylum applications being lodged in Europe (which had climbed from 70,610 in 1983 to 157,280 in 1985<sup>117</sup>) and because asylum seekers, too, would be able to move freely throughout the Union upon the abolition of internal border controls. This was a matter of particular salience to the Schengen-Five, which, as a group, received over 70% of the applications<sup>118</sup> submitted in the EC-12 the year that the Accord was signed (1985).

Agreement on the substance of the Implementing Convention was to be negotiated by the Schengen Group, which was composed of various sub-groups – each of which was tasked with different responsibilities and areas for coordination. At the top of the chain was the Executive Committee, which was composed of representatives from each Member State government and ultimately responsible for making binding decisions. Directly beneath the Executive Committee was the Central Negotiating Group, which sought to resolve issues arising in the different Working Groups that reported into it. These Working Groups included: Working Group I on policy and security matters (which was further composed of sub-groups relating to internal and external border controls, weapons and telecommunications); Working Group II on the movement of persons (which consisted of sub-groups on Visas, Asylum and Readmission); Working Group III on judicial cooperation; Working Group IV on external relations; as well as a permanent working group on narcotics and a steering committee for the prospective implementation of the SIS. Together, these groups were responsible for identifying the potential problems associated with the implementation of Schengen, proposing potential solutions to those problems and negotiating the terms of the text that would ultimately comprise the final Convention.

It is worth reiterating that all of this occurred entirely outside of the EC framework. Moreover, the negotiations regarding the SIC were entirely confidential – a reality that was decidedly controversial. Speaking specifically to the functioning of the Executive Committee, Noll writes (2001: 124-125):

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<sup>117</sup> UNHCR 1999.

<sup>118</sup> BNL-D-F/pers.-as (86) 4; BNL-D-F/pers.-as (86) 5; BNL-D-F/pers.-as (86) 6; BNL-D-F/pers.-as (86) 7; BNL-D-F/pers.-as (86) 8.

Under its Rules of Procedure, the Executive Committee was presumed to meet under seclusion of the public, and its deliberations and votes were covered by the duty of confidentiality... The opaqueness of procedures and the amount of secrecy engulfing the Committee's work provoked harsh criticism and were brandished as a 'democratic retrogression'.

It is also "noteworthy that the executive powers of the Schengen Committee were not balanced by any judicial review through the CJEU, and that its secretive *modus operandi* largely precluded corrections by domestic or supranational parliaments" (Ibid). Furthermore, the European Commission was only permitted to act as an 'observer' of the Schengen Group's activity<sup>119</sup> – a privilege that wasn't granted until 1988 upon request from the Commission. And although the SIC was to involve provisions directly relating to refugees and asylum seekers, the UNHCR was surprisingly not involved in any way in the meetings of the Schengen Group<sup>120</sup> (Cruz 1990: 4).

The Schengen-Five consequently occupied the policy-making drivers' seat on this matter, with virtually no built-in room for outside influence. This meant that the initial policy choices made regarding the practicalities of achieving an internally border-free area would be made entirely by a small sub-set of Member States operating entirely outside of the Community's political and legal framework. By virtue of expediting cooperation in this way, these Member States had effectively appointed themselves as the agenda setters of asylum cooperation, able to define problems and frame solutions as they saw fit. Further bolstered by the conception of Schengen as a laboratory for cooperation, these Member States were in a prime position to act as 'first movers', thereby enabling them to exert strong influence on the terms of cooperation that would also likely come to apply throughout the EC. Operating on the basis of an implicit unanimity requirement (by virtue of agreeing an international convention), all Member States would have to agree to the terms of cooperation. While this small collective of Member States was fairly homogenous with seemingly similar interests in this regard (and with previous histories of cooperation in the field of border cooperation), the resulting intergovernmental bargain would be expected to nevertheless represent the minimum – or most restrictive – point at which collective agreement was possible.

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<sup>119</sup> Represented by Mr. Martin Bangemann, the Vice President and Commissioner for the Internal Market and Industrial Affairs (DGIII).

<sup>120</sup> Unlike the Commission, however, UNHCR never issued a formal request to participate (Cruz 1990: 4).

Ultimately, the participating Member States were united in their common goal of achieving free movement amongst themselves as swiftly as possible and thus had an incentive to compromise; at the same time, however, they were more or less institutionally unfettered in pursuing an agreement that achieved this goal but which most closely aligned with their individual preferences.

#### *4.2.2 The Schengen-Five as the Self-Appointed Agenda Setters for Asylum Cooperation*

In line with the goals mandated by the 1985 Accord, the Working Group on the free movement of persons (WGII) swiftly launched discussions regarding the approximation of national policies regarding visas and TCNs and prospective measures for preventing illegal immigration<sup>121</sup>. As mentioned previously, and despite the original Accord's silence on the issue of asylum, the group acknowledged in a meeting of the WGII in November 1985 the need to also consider the potential consequences of the abolition of border checks as it pertained to asylum seekers as part of its preparations regarding the long term measures stipulated in articles 17-20 of the SA (BNL-D-F/pers. (85) 25). As a result, the contracting states agreed to establish a separate sub-group dedicated exclusively to the issue of asylum. Much like the Schengen project as a whole, early cooperation on asylum within the WGII's asylum sub-group was similarly presented as a promising 'laboratory' for future EC-level harmonisation, with the contracting states positioned as credible agenda setters on this issue given that they were among the main countries affected by the growing rate of asylum applications in Western Europe (and therefore possessed more expertise on the matter), and because all were bound by the same human rights obligations emanating from the 1951 Geneva Convention and its accompanying 1967 Protocol (BNL-D-F/pers.as (86) 10 Révisé).

The early meetings of the asylum sub-group in late 1986 resulted in agreement between the Schengen-Five as to the various features that needed to be incorporated into a prospective international agreement on free movement with regards to asylum seekers. The first of these

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<sup>121</sup> Prior to the actual signing of the Schengen Accord in June 1985, the participating states had agreed to produce individual lists regarding existing visa requirements and exemptions in their respective territories, in order to determine which nationals face different visa regimes (BNL-D-F/pers. (85) 15). On the basis of these lists, France and Germany issued a proposal as to the staged harmonisation of visas across the five countries, including which Member States should introduce visas for which countries and by when (BNL-D-F/pers. (86) 4).

features was a principle for determining the exclusive jurisdiction or responsibility of a single Member State for the examination of a claim for asylum. This was seen to respond to several issues confronting the contracting states, as it would help to reduce situations of asylum seekers in orbit, while also discouraging asylum shopping and the submission of multiple applications due to irregular secondary movements<sup>122</sup>. The allocation of singular responsibility in turn necessitated the second feature, which was a set of criteria by which the responsible Member State was to be determined. As a direct corollary, provisions for the return or taking back of a claimant by the state determined responsible (the third feature), were deemed an automatic necessity. At the same time, the states also agreed that it was important to establish, as a fourth feature, how the movement of asylum seekers throughout the Schengen area was to be handled once an application had been lodged within a Member State and once a provisional stay had been granted for the duration of the asylum procedure (SCH/II (87) 2 Annex 1; SCH/II-as (87) 2 Def.)<sup>123</sup>. Agreeing on the specific terms of cooperation pertaining to these features was consequently the main task of the ensuing negotiations.

### *Dictating the Terms of Cooperation: Negotiating the Core Features of a Responsibility Determination System*

*A Principle for Allocating Singular Responsibility.* With regards to the first feature, a meeting in December 1986 had resulted in initial agreement among the contracting states that the primary determinant for allocating responsibility should logically be where the application for asylum was first lodged (following a presentation by the German delegation to that effect) (SCH/II (87) PV 1 Révisé). However, by February 1987, this approach had undergone a marked transformation. In a meeting that month, the contracting states instead agreed that the responsible state should actually be the first country of entry, regardless of whether or not that was the country in which the application was first lodged (SCH/II-as (87) PVI). The former option had come to be deemed undesirable on account of the fact that

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<sup>122</sup> As discussed in Section 3.1

<sup>123</sup> The contracting states also agreed on the possibility for exchanging information on individual asylum seekers (feature five) as well as more general information on asylum flows and states of origin (feature six). While the former was seen as a way to more easily determine responsibility and to help prevent abusive claims, the latter was meant to help achieve a free flow of material on origin and first asylum states in order to help approximate national recognition practices (SCH/II-as (87) 2 Def.). This section only focuses on the first four, however, in keeping with the key features outlined in the previous chapter.

it gave merit to the idea that an asylum seeker should have a right to choose their country of asylum, and would therefore fail to discourage asylum shopping<sup>124</sup> (which was one of the main objectives of the asylum provisions in the first place<sup>125</sup>) (SCH/II-as (87) 2 Def.). Stressing the aforementioned linkage between the erosion of internal borders and the fortification of external ones, and conscious of the prospective applicability of a free movement area throughout the entire EC<sup>126</sup>, the latter option had alternatively gained favour, as it was seen to place an imperative requirement on states to better control movement across their borders (SCH/II-as (87) PV1). While the contracting states openly acknowledged that this principle would likely pose problems with regards to proving transit and potentially overloading external border countries<sup>127</sup> (SCH/II-as (87) 2 Def.), it was nevertheless preferred on the basis that it emphasised the need for control and stressed a sense of individual accountability to that end.

By May of the same year, the approach to responsibility allocation had been modified further still, continuing in the same control-oriented direction. In light of on-going discussions pertaining to the harmonisation of visa requirements and the establishment of a prospective 'Schengen visa', the contracting states further agreed that any state that actively permitted entry into the Schengen zone, and which subsequently resulted in an application for asylum, should ultimately be the one held responsible regardless of which state was first entered<sup>128</sup>. This was seen to similarly incentivise tougher migration controls, whilst increasing state accountability (SCH/II-as (87) PV 1). Employing crucially different terminology to earlier conversations, the contracting states were therefore now leaning

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<sup>124</sup> Which was (negatively) framed as an abuse of the protection regime by the asylum seeker (assumed to be law consumers 'shopping' for the best 'deal').

<sup>125</sup> In that they sought to curb any potential abuses (as per above) that may result from the removal of internal frontiers.

<sup>126</sup> As per the aforementioned 1992 deadline for the completion of the single market.

<sup>127</sup> The issue of potential unfairness towards external border states had also been acknowledged in an early meeting outside of the asylum sub-group. Prompted by Germany's concerns over its particularly high proportion of asylum applications (BNL-D-F/pers.-as (86) 4), the possibility of a distribution key had been put forward, which would help to achieve effective burden sharing (which was in keeping with Germany's domestic approach at the time to the distribution of asylum seekers among the Länder (Thielemann 2004: 6)). However, this proposal does not seem to have been seriously considered in subsequent discussions (BNL-D-F/pers.-as (86) 10 Révisé) (though Germany proposed the use of an EC-wide distribution key once again in 1992 on account of on-going collective action problems in this regard).

<sup>128</sup> The Belgian delegation noted, however, that this might cause problems with regards to the entry of foreigners with visa exemptions, and for foreign holders of Benelux visas in particular (SCH/II-as (87) PV 1).

towards a restriction-oriented system that would base responsibility determination on a state's *'failure'* to control entry/access (SCH/II-as (87) PV 2 Z).

On the basis of these discussions, the Schengen-Five consequently agreed that responsibility should ultimately lie with the state that implicitly or explicitly *authorised* the entry of the applicant for asylum into the Schengen territory through either a positive act (the granting of permission for entry) or a negative act (the failure to prevent entry) (SCH/II-as (88) 5 Z). As such, the responsibility for examining a claim for asylum was no longer framed as a matter of circumstance resulting from international humanitarian obligations triggered by either the deliberate or non-deliberate actions of the asylum seeker, but was rather a direct repercussion and an unwanted consequence of either the deliberate or non-deliberate actions of the relevant state, stemming from a failure to uphold their border control responsibilities in an area of free movement. Thus, in effect, 'responsible' now meant 'at fault'.

It is interesting to note that against this backdrop of agreeing a largely 'fault-oriented' principle for responsibility, the notion of solidarity among the contracting states featured prominently in the negotiations. In an explanatory memorandum originally drafted by the French delegation in June 1988 (SCH/II-as (88) 5 Z), and later formalised by all of the states, solidarity was attributed as one of the main philosophies behind the agreed provisions and a key foundation for a workable system on asylum. According to the memorandum, the removal of internal frontiers and the achievement of the free movement of persons necessarily implies that the participating states are working in a spirit of solidarity, since each of them, in granting access to their territory, will also, by extension, be granting access to the territory of its partners – and vice versa when it comes to denying access. It therefore asserted that the authorisation principle effectively affirmed solidarity as a core objective of cooperation by making all of the contracting states responsible vis-à-vis one another, by encouraging everyone to pull their own weight<sup>129</sup>.

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<sup>129</sup> In keeping with this spirit of solidarity, some initial proposals had also been advanced regarding the possibility for financial burden sharing, specific to the issue of illegal immigration. Acknowledging that certain states were more likely to be affected by illegal immigration than others, the Benelux delegation had advanced the idea of creating a common fund to assist with the removal of individuals found to be irregularly present on

Several other issues had also come to light during the discussions on singular responsibility. The first related to the mutual recognition of decisions. Early on in the negotiations, the Dutch delegation had argued that it should flow from the foundation of singular responsibility that asylum decisions – both positive and negative – be automatically recognised by other states, as a failure to do so might risk the possibility for either direct or indirect refoulement. Moreover, they argued that this would be consistent with the premise that all states are understood to uniformly apply the 1951 Convention criteria (SCH/II-as (87) 2 Def.). However, as this would inherently grant accepted individuals with the right to reside and work in other states in an area of free movement, the French delegation argued that the potential extra-territorial effect of asylum decisions would constitute a violation of the State's sovereign right to determine admission onto its territory and would therefore run into constitutional difficulties during the process of ratification (Ibid). In the end, the more restrictive position won, as positive decisions did not qualify for mutual recognition under the terms of the SIC.

The second issue related to the scope of application. Once again, it was the Dutch delegation that inquired as to whether the definition of asylum seeker should also include applications seeking other forms of protection (i.e. subsidiary protection) in addition to those seeking refugee status under the 1951 Convention (as this was a recognised concept under Dutch national legislation) (SCH/II-as (87)). Other delegations, however, (namely France and Belgium) quickly resisted this suggestion on the grounds of universality. They conversely argued that the terms of the SIC should only apply to individuals seeking protection under the 1951 Convention, as this had binding effect for all contracting states. As the same could not be said for the national practices of individual states as it pertains to alternative protection statuses, these statuses are consequently unenforceable in other states and therefore shouldn't be included in the terms of the Convention (SCH/II-as (88) PV 1 Z; SCH/II-as (88) PV 2 Z). Similar to the case above, the minimum point of agreement

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Schengen territory. Though this proposal received reservations from the German and French delegations (and therefore did not immediately come to fruition), Germany did express its willingness to consider a more general system of compensation for financial imbalances between contracting states going forward (SCH/C (87) 7).

ultimately prevailed, with the SIC only applying to those seeking refugee protection under the 1951 Convention.

The third – and most problematic – issue of course related to the highly divergent state of national asylum legislation amongst the contracting states. In a memorandum issued in May 1989, the French delegation lamented that however useful and necessary the agreed provisions on asylum might be, problems would continue to arise without adequate efforts to harmonise national legislation (SCH/II (89) 16), as asylum applicants would continue to have an obvious incentive to engage in irregular secondary movements from more permeable states towards more liberal asylum regimes (and to destroy any and all evidence pertaining to their path of transit) – a reality that was in direct conflict with the objectives of the proposed provisions (SCH/II-as (88) PV 4 Z; SCH/II (89) 16; BNL-D-F/pers.-as (87) 10 Révisé)<sup>130</sup>.

Echoing the argument for the necessity of harmonisation, the Dutch State Secretary informed the Schengen Ministers and State Secretaries at a meeting in July 1989 of a motion that was going through the Dutch parliament, which called for harmonised criteria regarding asylum policies as a necessary accompaniment for the procedural arrangements contained in the draft SIC (SCH/M (89) PV 1 Z). In November of the same year, the Dutch delegation further informed the group that the motion had been approved by the Dutch national parliament and therefore requested that the contracting states conduct, in accordance with national constitutional law, an exchange of views on the procedures and standards applied in the granting of asylum and recognition of refugee status, which should then be subject to consultations within the Executive Committee.

Despite having issued the initial memorandum on this matter, the French delegation ultimately argued against the Dutch delegation and insisted that while a suggestion as to the necessity of harmonisation could and should be included in the minutes of the negotiations, such a requirement could not appear in the actual text of the SIC, as the Schengen Accord

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<sup>130</sup> In order to assess the state of affairs, the French delegation also requested in the memorandum that the contracting states organise, potentially through a separate ad hoc group, a comparison of their existing national legislation and practices (SG/Pers. (89) 33 Traduction non-révisé).

had not granted any mandate for the harmonisation of national asylum laws. Once again citing domestic level institutional constraints, the French delegation also advised that the inclusion of any such requirement would cause serious problems in the French parliament during the SIC's ratification process (SCH/M (89) PV 2). Ignoring the French protest as to lack of mandate, the Dutch delegation nevertheless insisted that such a provision be inserted in a later section of the long-term measures, stressing that the *non-inclusion* of such a requirement would equally cause problems in their national parliament during the course of ratification (Ibid). Curiously, the Dutch later capitulated on this point, and in the end, it appears that both delegations deemed it preferable – or indeed necessary – for the sake of achieving agreement - to abandon their opposition, as the resulting convention neither called for nor mentioned the harmonisation of national asylum procedures (SCH/II (88) PV 4 Z; SCH/II (88) PV 4 Annex 4).

*The Criteria for Determining Responsibility.* With regards to this second feature, the contracting states agreed (in May 1987) that on the basis of previous efforts at cooperation within CAHAR, the variety of situations facing asylum seekers and the variable geopolitical conditions among the states concerned, a single general rule for determining responsibility was neither desirable nor feasible. It was therefore agreed that a combination of criteria was the best approach. On the basis of this reasoning, the Member States developed an initial list of six criteria for determining responsibility derived from both positive and negative acts of authorisation (SCH/II-as (87) PV 2 Z):

1. Where the person is in possession of a visa, the issuing state is responsible;
2. Where the person has a visa issued by a state on the authorisation of another state, the authorising state is responsible;
3. Where the person is exempt from a visa requirement, the state with external borders through which they entered is responsible;
4. Where the person entered the territory unlawfully, the state with external borders through which they entered is responsible;
5. Where the person possesses a residence permit, the issuing state is responsible (where multiple permits apply, the one that is valid the longest stands);
6. Where the above five criteria do not apply, the responsible state is the one in which the application was first submitted<sup>131</sup>.

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<sup>131</sup> At the next meeting of the sub-group, the Member States inserted three further points in this regard (SCH/II-as (87) 13). The first point clarified that a temporary residence permit issued in connection with the examination of an asylum application does not constitute grounds for responsibility. The second point stated that as long as an alien had not left the territory of the contracting states, any state that had previously issued a residence permit

With regards to the fourth criterion, while the German delegation stressed the various difficulties that would likely accompany the need to prove irregular entry (SCH/II-as (87) PV 1 Revisé), it was nevertheless maintained for its symbolic importance because it enshrined the importance of strong external border controls in lieu of internal ones (and thus received strong support from the French, Dutch and German delegations) (particularly in light of its prospective applicability throughout the EC) (SCH/II-as (87) PV 1 Revisé; SCH/II-as (89) 2). Relatedly, the French delegation expressed its concern over the inclusion of the default provision, arguing that the destruction of documents and dishonesty on behalf of asylum seekers as to their actual paths of entry would make it difficult for authorities to establish responsibility and would therefore lead to an extremely frequent application of this criterion (SCH/II-as (89) PV 1 Z). Its inclusion was deemed necessary, however, in order to ensure the allocation of singular responsibility and to guard against situations of ‘asylum seekers in orbit’ – one of the main motivations behind the system in the first place.

Alongside the above authorisation-related criteria, the contracting states also agreed that exceptions should be made in cases where applicants have family members already present (as recognised refugees) in the Schengen area. In such cases, responsibility ought to be transferred to the state in which the existing family member was already present. Family was stipulated to include the spouse or unmarried child (under 18) of the applicant, or if the applicant is an unmarried child himself (under 18), his mother or father. While the Belgian delegation initially argued for the inclusion of the term ‘dependent’ with reference to children, so as to capture the complications associated with financial dependency, the Dutch delegation countered this suggestion with concerns that this may lead the article to contain too broad a concept of family reunification (SCH/II-as (88) PV 4 Z). Due to this concern, the SIC ultimately preserved the more basic (and restrictive) definition.

Despite fairly easy agreement on the above criteria, several concerns regarding the successful harmonisation of visa requirements remained. At a meeting in June 1988, the

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remains responsible even where it has expired. The third point specified that where an alien has left the Schengen territory and then returned, any previously issued allowance to stay will provide the basis for responsibility, provided that its validity has not expired.

contracting states agreed on a clarification of the third criterion due to requests issued by the German and French delegations, which sought to stipulate that in cases where visa policy harmonisation has not been fully achieved, and where an asylum seeker is exempted from a visa requirement in only some of the contracting states, then the contracting state through which the applicant has entered the territory and from whom the applicant benefited from a visa exemption, is responsible (SCH/II-as (88) PV 1 Z). While the Benelux delegations initially objected to this request, on the grounds that harmonisation implies that such cases won't occur, the German and French delegations insisted that it is more pragmatic to take account of the current situation and that while such situations should be marginalised by visa harmonisation, harmonisation does not always mean total uniformity (Ibid). The Dutch and French delegations had also issued reservations on this criterion, regarding whether or not this would additionally be extended to include transit visas (SCH/II-as (88) PV 4 Z). The French delegation in fact submitted a separate note specific to the issue of transit visas, in cases where the harmonisation of visa policies had not been fully realised. Seeking to clarify the terms, the French delegation proposed that in cases where the destination country is a contracting state and where the alien should have a visa for that country, if they do not, the contracting state that issued a transit visa without ensuring that the alien had an appropriate visa for the destination state should be held responsible on account of this neglect. The French delegation argued that such a stipulation would help to bolster trust amongst the contracting states and create a sense of solidarity (SCH/II-as (89) 1). At the same time, this would have the added benefit of holding traditional transit countries accountable for permitting onward movement to traditional destination countries (such as France). As both of these requests for clarification/specificity further supported the overall policy frame of accountability/culpability-based responsibility (in keeping with the authorisation principle), both were ultimately included in the final SIC text.

*Provisions for Transferring Applicants.* The matter of including a return obligation was generally met with no opposition, as the failure to include such an obligation would render a system of singular responsibility meaningless. Thus, it was readily agreed by all parties that where one of the contracting states is convinced that another contracting state should be responsible under the above-listed terms, then the person concerned should be sent to the

responsible state to undergo an asylum procedure there (SCH/II-as (87) PV 2 Z). Should it later turn out that the state initially deemed responsible was not in fact responsible, the applicant in question would be subsequently returned to the first state for processing (Ibid).

While the initial discussions on this requirement assumed the 'automatic' nature of a return obligation (SCH/II-as (87) PV 2 Z), this was later amended in favour of a request-based system, whereby the "Contracting Parties shall endeavour to determine as quickly as possible which Party is responsible for processing an application for asylum" (Article 31, SIC). To this end, the Member States agreed that the contracting state in which the application was originally lodged must request the contracting state that it deems to be responsible to take charge of the applicant within six months (originally stipulated at twelve months). Failure to submit a request within this time would result in responsibility defaulting back to the contracting state in which the application was first lodged. Though the Dutch delegation argued that six months was too long (SCH/II-as (89) PV 1 Z), disagreement among the other participating states saw the six-month time limit upheld in the final version of the text.

*The Question of Free Movement.* The issue as to whether or not applicants for asylum who are in the process of having their claim processed in one contracting state should be allowed to transit freely within the Schengen area constituted one of the more divisive points of discussion during the course of the negotiations. While it was initially agreed that this issue should be considered in conjunction with circulation provisions applicable to other categories of foreigners (SCH/II-as (87) PV 2 Z), the German delegation issued a note in August 1987, which conversely argued that asylum seekers subject to national determination procedures should instead be treated as a special category of foreigners and should justify special consideration with regards to provisions on free movement irrespective of those that would ultimately be applicable to other types of aliens. To this end, the German delegation further advanced its position (which was consistent with its national practice<sup>132</sup>) that for the duration of the asylum procedure, asylum seekers should not be granted the legal right to

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<sup>132</sup> Whereby asylum applicants are designated to specific Länder and subject to free movement restrictions (see: Thielemann 2004).

move between contracting states, as they ought only to enjoy the right to temporarily remain in the state where their application is being examined for the exclusive purpose of its processing (SCH/II-as (87) 10)<sup>133</sup>.

The French delegation, however, favoured a more liberal approach (also in line with its national practice). They therefore floated the idea of permitting temporary travel during the asylum procedure, but only in cases where the asylum seeker is in possession of the necessary authorisation from the relevant contracting states (SCH/II-as (87) 20; SCH/II-as (87) PV 3 Z). This option actually coincided with a recommendation that had been issued by the Commission (in its role as observer and following consultations with relevant experts), which similarly advocated the possibility for free movement, but subject to the explicit authorisation of the states involved (CDM (88) 640 final). This option was subsequently proposed formally at an asylum sub-group meeting in December 1988 (SCH/II-as (88) PV 6 Z; SCH/II-as (89) 9). Compared to a total ban, this option was presented as a way to achieve some semblance of balance between the logic of free movement within the Schengen area and the need to control the movement of certain categories of persons (SCH/II-as (88) PV 4 Z). As its main proponent, the French delegation argued that the free movement of asylum seekers ought to be a logical consequence of the introduction of the principle of free movement more generally and that the issuing of a document that authorises their stay for the duration of the examination of their application should necessarily also extend the right to move freely within the entire territory of the contracting states (SCH/II (88) 13, 6<sup>th</sup> revision). They further argued that the often-lengthy duration of asylum procedures made confining individuals to one state unfair (SCH/II-as (89) PV 2 Z).

At a sub-group meeting in Luxembourg on 7-8 March 1989, however, the German, Belgian, Dutch, and Luxembourgish delegations all voted against France's proposal for the limited free movement of asylum seekers during the processing of their claims. Arguing that the inclusion of such a provision presented multiple disadvantages, they expressed particular concern that free movement might actually encourage the submission of multiple or successive applications for asylum in multiple contracting states, thereby counteracting the

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<sup>133</sup> Further German resistance to the free movement of asylum seekers can be found in SCH/II-as (89) 9.

original intentions of the agreement. They also argued that it could cause additional problems and delays in terms of the execution of asylum procedures – which was also contrary to the aims of the agreement - as applicants may not be available or at the disposal of the authorities in the contracting state within which the application is being processed (SCH/C (89) PV 2 Z; SCH/II-as (89) PV 2 Z). While the French delegation maintained its position throughout the course of the negotiations, it was ultimately overruled by the resistance of the other states in favour of the more restrictive option, which was to disallow the movement of asylum seekers – limited or otherwise – during the course of an asylum procedure.

### *Dictating the Terms of Participation: Addressing the Potential Expansion of the Schengen Area*

Of course, one of the other key issues that the contracting states had to consider was the potential expansion of the Schengen area prior to the introduction of full Community measures on free movement. This was initially prompted by Austria's strong expression of interest in joining the Schengen project midway through the SIC negotiations in 1987. Austria made the case that its participation in Schengen would be beneficial for all parties involved on account of its important role as a transit country for the original contracting states, while also stressing that its pre-existing cooperative arrangements with the Trevi group and the twelve members of the European Political Cooperation (EPC) made it well suited for collaboration. Though there was considerable interest in Austria's proposal at the time, France, Belgium, and the Netherlands collectively expressed their initial reluctance on account of the fact that Austria was not yet a Member State of the EC (SCH/C (87) 6; SCH/M (87) PV 2 révisé le 11.5.1988).

Shortly thereafter, Italy also began to court the Schengen-Five in the interest of gaining access, as it stood to gain significant economic benefits from partnership in a free movement zone (Baldwin-Edwards 1997). Unlike Austria, Italy was already a Member State of the EC, and therefore did not face the same barrier to entry in this regard; however, its heavy reliance on cheap North African labour, high levels of uncontrolled migration, and lengthy unguarded coastline (which made it inherently susceptible to high rates of clandestine

entry) (Whitaker 1992: 197) meant that Italy's membership request, too, faced considerable initial opposition from the existing Schengen countries. Yet, the fact that Italy was indeed an existing EC Member State meant that its eventual inclusion in Community-wide free movement provisions would be inevitable (and therefore, so too, was the eventual exposure of the Schengen-Five to Italy's porous borders). As a result, the contracting states agreed to engage in preliminary discussions, as this would allow them to dictate the terms of Italy's participation outside of the EC framework.

As a condition of potential entry, Italy was immediately required to accept all existing terms of the Schengen negotiations (including future objectives at both higher levels and within the working groups), while also agreeing to adapt its relevant national laws and regulations in order to comply with any and all decisions taken within the framework of Schengen (SCH/C (87) PV 2). Unreservedly agreeing to these terms (due to the economic and political benefits membership would reap), the Italian delegation submitted a letter to the Schengen group, which stressed that it was prepared to do whatever was necessary to dispel any doubts as to its capacity to participate (SCH/C (87) PV 2 Z). Italy also announced that it was in the process of drafting new legislation regarding immigration and asylum matters (SCH/II-as (88) PV 6 Z). Despite these assurances, Italy's initial request for observer status was nevertheless rejected on account of fears that it would set a precedent for expansion, while also threatening to slow down existing progress in the negotiations by virtue of inviting new participants to the table (SCH/M (87) PV 2 révisé le 11.5.1988). It was, however, granted at a later date, at which point consultations were held to agree on the necessary requirements that Italy would have to meet prior to officially joining the Schengen area (SCH/C (89) 11; SG/COORD (89) 100). These conditions included harmonising entry requirements and visa lists with existing members, enhancing external border controls, modifying national laws on asylum, and establishing a program that would link Italy's police records with those included in the SIS, among others. Eager to comply, the Italian delegation provided on-going updates as to improvements in the patrolling of its borders and the performance of its police services. In the first nine months of 1990, the rate of expulsions from Italy was up by 6,000 from the previous year, with more than 52,000 people denied admission to the country (compared to 3,000 refusals the previous year) (Whitaker

1992: 198). In the same year, Italy also introduced the Martelli law (which dealt with immigration and asylum) and re-imposed visa requirements on the Maghreb countries, as well as Turkey and Senegal (Foot 1995: 140). As a result of these efforts, Italy was permitted to sign both the SA and the SIC on 27 November 1990, not long after the signing of the SIC by the original contracting parties on 19 June 1990<sup>134</sup>.

The handling of Italy's accession into the Schengen area ultimately set the precedent for how future accessions would proceed, with Spain, Portugal and Greece following in Italy's footsteps shortly thereafter<sup>135</sup>. Prospective states would therefore be required to agree up front to all existing terms of cooperation (with no potential input prior to the finalisation of the SIC), regardless of how they might potentially intersect – or conflict – with an increasingly diverse set of national interests. Moreover, their request for inclusion would start from a defensive position, in that they would be required to prove their security-enforcing competency (through the introduction of various specified control measures) in order to secure the trust of the other participating states<sup>136</sup>. Thus, in effect, (and referring back to theoretical concepts outlined in Chapter Two), those Member States that wanted to join the existing Schengen states (the 'first movers') in an area of free movement must be willing to pay the requisite 'tolls' (responsibility for asylum applications) in order to gain access to the exclusive Schengen 'club' (good), to which the Schengen-Five held the keys.

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<sup>134</sup> Signing had been originally scheduled for 15 December 1989; however, it was called off the day before on account of unresolved reservations (Cruz 1990: 6).

<sup>135</sup> Despite being the first state to request inclusion, Austria didn't sign the SIC until 28 April 1995 following its accession into the EU on 1 January 1995.

<sup>136</sup> This 'burden of proof' regarding border control capabilities was effectively described by Italy's Foreign Minister, Lamberto Dini, following Schengen's entry into force in 1997: "Convincing our partners that Italy is capable of patrolling its borders and that we are not, and we won't be tomorrow, the weak link, has required a long and patient work of persuasion [sic], based on immediate visible and tangible proofs, rather than on future commitments" (quoted in Zaiotti 2011: 91).

Table 4.1: The Expansion of the Schengen Regime

Country	1985 Schengen Accord	1990 SIC	Schengen's Entry Into Force
France	14 June 1985	19 June 1990	26 March 1995
Germany	14 June 1985	19 June 1990	26 March 1995
Benelux	14 June 1985	19 June 1990	26 March 1995
Italy	27 Nov. 1990	27 Nov. 1990	1 July 1997
Spain	25 June 1991	25 June 1991	26 March 1995
Portugal	25 June 1991	25 June 1991	26 March 1995
Greece	6 Nov. 1992	6 Nov. 1992	8 Dec. 1997
Austria	28 April 1995	28 April 1995	1 July 1997
Sweden	19 Dec. 1996	19 Dec. 1996	19 Dec. 1996
Norway	19 Dec. 1996	19 Dec. 1996	19 Dec. 1996
Iceland	19 Dec. 1996	19 Dec. 1996	19 Dec. 1996
Denmark	19 Dec. 1996	19 Dec. 1996	19 Dec. 1996

Source: Zaiotti 2011: 100

As stated at the beginning of this section, the negotiations on the SIC took a full five years to complete<sup>137</sup>. The long and protracted nature of the negotiations ultimately spoke not only to the contentious nature of the subject matter involved and its close association with fundamental issues of national sovereignty, but also to the difficulties involved with intergovernmental negotiations. As illustrated in the discussion above, several of the issues that were subject to negotiations entailed some degree of push/pull between the contracting states. In almost every case (and consistent with theoretical expectations<sup>138</sup>), the decision ultimately reached reflected the most elemental (and restrictive) point of agreement, with any proposed enhancements to these baseline terms effectively overruled by the objections of other states, in the interests of minimising potential costs and/or burdens. In the end, the intention to simply clarify how singular responsibility for asylum applications should be determined in a free movement area had resulted in the elaboration of a control-oriented system of 'blame' attribution, designed with a view towards safeguarding the interests of its designers in an enlarged free movement area. Despite not making any strides in terms of the harmonisation of asylum legislation among the contracting states (and regardless of its acknowledged necessity), the initial terms of cooperation agreed by the Schengen-Five *may*

<sup>137</sup> The final text included eleven articles on asylum (Articles 28-38), which constituted the seventh chapter of the Convention.

<sup>138</sup> As detailed in Chapters One and Two.

have proved workable in the context of this small sub-set of states; however, before they could be tested, their applicability had expanded to a larger and far more heterogeneous set of states (as intended by the Schengen-Five) in the form of an EC-level agreement applicable throughout the then-twelve Member States. Nevertheless, the steps taken by these ‘first movers’ of asylum cooperation and the provisions ultimately agreed (both on asylum and in terms of the SIC as a whole) marked the “first crucial step in the efforts to develop a comprehensive regional migration regime” and allowed the participating states to agree “a package that would [have been] politically impossible for *all* EU Member States to accept at the time” (Uçarer 2002: 23).

### **4.3 Following (Collectively) Along: The Concurrent Completion of the 1990 Dublin Convention**

#### **4.3.1 *Expanding Cooperation on Asylum to the EC-12: Intergovernmental Coordination in the Ad Hoc Group on Immigration***

It wasn’t long after the negotiations began on the SIC’s asylum provisions that parallel negotiations began among the then-twelve Member States of the EC<sup>139</sup> on a similar agreement within the Ad Hoc Group on Immigration. These negotiations began in June 1987 and were concluded in June 1990. As outlined previously, this intergovernmental group (housed within the Council of Ministers) was composed of the ministers responsible for immigration within each of the Member States (often the Minister of Interior) and six constituent sub-groups<sup>140</sup> tasked with collectively developing the different measures necessary to “compensate” for the removal of internal border controls (Bunyan 1992: 8). Like the Schengen group, the Ad Hoc Group on Immigration was highly cognisant of the 1992 deadline for the completion of the single market and was similarly concerned as to the potential implications that the free movement of TCNs – including asylum seekers – might entail for internal security. While coordination in the Schengen group had – consistent with its ‘laboratory’ function – begun to experiment with how to best address these issues (as per above), the inescapable reality was that these issues would soon confront all twelve Member

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<sup>139</sup> Belgium, France, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the UK.

<sup>140</sup> 1) Admissions/expulsions; 2) visas; 3) false documents; 4) asylum; 5) external borders; 6) refugees from the former Yugoslavia.

States. It was therefore recognised that a parallel EC-wide system for allocating asylum responsibility would also be necessary. The task of agreeing such a system necessarily fell to the asylum sub-group.

Like those on the SIC, the negotiations on the Dublin Convention also took place behind closed doors with next to no institutional interference. Bar the Commission's limited role as 'observer' (a role that it also occupied in the Schengen group), the Member States were similarly left to their own devices. Given that the need for cooperation in this regard was a direct "response to a Community imperative" (O'Keeffe 1995: 266), this choice of a secretive intergovernmental venue for pursuing a Community-wide international convention that was not itself Community law was "indeed curious" as the Convention was ultimately "drafted by reference to the [EC] treaties but distinct from Community structures" (Guild 1996: 115). The resulting Convention of course also required the unanimous agreement of all twelve Member States<sup>141</sup>, several of whom were among the states that had initially blocked progress with regards to the achievement of free movement and who had consequently instigated the creation of the Schengen group in the first place by those Member States that wanted to spur cooperation forwards. Nevertheless, all twelve states were back at the negotiation table (an incidentally more private table than that used for the initial discussions), and they were talking about asylum responsibility.

#### ***4.3.2 Replicating the SIC Asylum Provisions: 'Imported' Preferences and Policy Frames***

Inevitably, the discussions on a Community-wide mechanism for asylum responsibility centred on the same concerns that had motivated the inclusion of asylum provisions in the SIC in the first place, i.e. "freedom of movement would be accompanied by an increased abuse of domestic asylum procedures through the simultaneous or repetitive allocation of asylum claims in several Member States" (Lavenex 1999: 34) – a reality which the asylum sub-group had been specifically tasked with circumventing.

These concerns had taken on an altogether different complexion, however, in the context of an agreement between the EC-12, which - as a group of states - included a considerably

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<sup>141</sup> As well as national parliamentary ratification.

more diverse collection of immigration histories and border control capabilities. As highlighted in the previous sub-section with respect to Italy's initial bid to join the Schengen area, the original Schengen states (several of which were among the higher receiving states in Europe and for whom the asylum issue was therefore particularly salient) were quite concerned as to the potential implications of extending free movement to their more southern neighbours<sup>142</sup>; indeed, they were worried that they "would lose all means of controlling illegal immigration or the entry of asylum seekers [onto] their territory" in light of the "relative laxity of immigration controls in [the] southern Member States" (Ibid) – a view that was shared by some of their fellow 'northern' neighbours, such as Denmark and the UK<sup>143</sup>.

Quite unlike most northern European countries, whose immigration and asylum systems had undergone considerable developments over the last several decades<sup>144</sup>, the systems and procedures in place in the southern European countries – i.e. Italy, Greece, Spain and Portugal – generally pre-dated World War Two (Baldwin-Edwards 1997: 506)<sup>145</sup>. In reality, most of these Mediterranean countries were "developing economies with histories of emigration<sup>146</sup> and poor immigration infrastructure" that had minimal "provision for immigrants" and which "frequently [exhibited] outright discrimination against non-nationals". In fact, the only "saving grace [was that their] bureaucratic procedures [were] generally ineffective, if not corrupt" (Baldwin-Edwards 1991: 203). Furthermore, not only had these states been historically disinterested in preventing illegal immigration, they were, to the contrary, *extremely reliant* on it for their overall productivity<sup>147</sup>. The extent of this reliance is made evident by the reality that, at the time, both Italy and Greece were in the habit of boosting their official GDP figures by around 15-30% in order to account for activities in the underground economy (Baldwin-Edwards 1997: 508). As for any sort of

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<sup>142</sup> Between 1980 and 1985, for example, Germany and France received a total of 323,480 and 135,270 asylum applications respectively, compared to Italy and Greece's 21,930 and 7,830 (UNHCR 1999).

<sup>143</sup> Denmark and the UK, in particular, placed a very high degree of emphasis on the security concerns stemming from free movement, arguing that the abolition of internal border controls did not include TCNs (Niessen 1996: 40).

<sup>144</sup> Largely because of their status as traditionally high receiving countries. These countries therefore had considerably more experience (expertise) in dealing with the issue of asylum than their southern neighbours.

<sup>145</sup> For a discussion on the typical characterisation of the 'North/South' divide within the immigration literature, see Finotelli 2009.

<sup>146</sup> Italy, for example, produced over 25 million expatriates between 1876 and 1976 (Pastore 2002: 1).

<sup>147</sup> Portugal to a lesser degree.

comprehensive system for handling asylum seekers and processing asylum applications, such procedures were virtually non-existent on account of the fact that these states had typically acted as purely transit countries for those seeking to make their way to more established and more generous asylum systems such as those further north. Thus, quite understandably, the states that were traditionally on the receiving end of this equation were quite apprehensive about the prospect of opening their doors to all types of migratory traffic between the south and the north.

Fortunately for the Schengen states, however, they were in a rather privileged position as the ‘scientists’ of the so-called Schengen laboratory to try and import their preferences and preferred policy frames into the EC-wide forum. By the time the first discussions began in the Ad Hoc Group on Immigration in mid-1987<sup>148</sup>, the Schengen group had already decided on not only the different elements necessary for an asylum responsibility allocation system, but also the core principles and criteria on which they wanted asylum responsibility to be based. They were therefore able to use their first mover advantage to set the policy agenda by advancing their proposed policy solutions as the most suitable options (on the basis that they had already considered and eliminated potential alternatives)<sup>149</sup>. This was aided by the fact that it was actually the same people engaging in both forums, as the Member State representatives that were party to the Schengen group were the same Member State representatives that were party to the Ad Hoc Group on Immigration (Lavenex 1999: 37). Moreover, in sanctioning – and even endorsing - the laboratory function of the Schengen group, and in articulating the explicit intention that the foundations for cooperation reached within that group would later provide the foundations for EC-level cooperation (as per above), the Commission had effectively validated the agenda-setting role that the Schengen-Five had fashioned for themselves by virtue of initiating cooperation first. Thus, despite the fact that Dublin was technically a stand-alone agreement that required the approval of all participating states (unlike Schengen, where the acceptance of the asylum provisions was a package deal for prospective new members, embodying a sort of carrot-and-stick approach

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<sup>148</sup> A preliminary discussion was held within the asylum sub-group on 12 June 1987, towards the end of the Belgian presidency (SN 1830/87 WGI 89).

<sup>149</sup> This assertion is based on the author’s review of the meeting minutes for the Dublin negotiations, based within the Council Archives.

to free movement access), the Schengen-Five were nevertheless able to successfully import their preferred framing principle of responsibility-by-authorisation (i.e. blame-based responsibility) into the EC-framework (despite the fact that this was not in the interest of the southern Member States) as a result of their ability to maintain its intrinsic policy linkage to the Schengen free movement area (to which they still held the keys) throughout the course of the negotiations<sup>150</sup>.

Like the case with the Schengen membership conditions outlined above, this was an effective strategy as the southern Member States had a similar incentive to agree to their terms, even if it was technically outside the Schengen cooperation. Though they would have to pay some of the highest 'tolls' of participation, and face some of the highest adjustment costs associated with effectively restricting immigration (and asylum) access, they stood to benefit hugely from single market completion and access to a free movement area. Moreover, they were among the principal beneficiaries of the structural funds, to which several of the other states were net contributors (Baldwin-Edwards 1997: 506). At the same time, most of these states had no real basis for proposing alternative policy suggestions due to their complete lack of experience and expertise in this field. Indeed, Spain was the only southern Member State to even have an asylum law on the books at the time<sup>151</sup>. As a result, the southern states were therefore quite amenable to the terms set by their northern counterparts. And while it might be expected that these states would be inclined to avoid the high adaptation costs that they faced as a result of these exogenous pressures for the modernisation of their immigration/asylum/border control systems, it is worth noting that, at the time, some of these states – particularly Italy and Greece - were also beginning to face more endogenous pressures for change, as asylum was becoming a more salient issue for them domestically, and one which they could no longer ignore. Indeed, both countries had started receiving higher rates of applications from people who were actually claiming

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<sup>150</sup> Denmark, Ireland and the UK – the other three Member States participating in the negotiations – were unopposed to the transfer of this principle due to their more insulated geography as fellow 'northern' states. As Denmark and the UK were also asylum-receiving states with generous social systems (and therefore attractive destination countries), the opportunity to be able to return applicants to initial points of entry would indeed work in their favour (whereas Ireland was at this point still a primarily emigrant-producing nation as a result of its political and economic problems).

<sup>151</sup> A law that was actually deemed to be quite liberal and which was introduced in conjunction with an immigration and regularisation law aimed at modernisation (Baldwin-Edwards 1997: 507-508).

asylum on their territory and not just passing through. With events going on in the eastern bloc at the time, this promised to get even worse – especially for Greece in terms of the incoming rates of Albanians (Ibid: 507-508). While Italy had seen an increase from 5,400 applications in 1985 to 11,000 in 1987 when it applied for entry into Schengen, Greece had seen a similar rise from 1,400 applications in 1985 to 7,000 in 1987 when the negotiations on Dublin started (Eurostat). These countries therefore needed to adapt, not just because of the conditions attached to their entry into Schengen, but also because circumstances in their own countries were changing. With little expertise in the area, their best option was to therefore replicate the more effective regulatory practices of their northern neighbours<sup>152</sup>. As Schengen had essentially mandated this anyways, Schengen – and Dublin with it – consequently compelled the modernisation of southern immigration and asylum systems in line with the - at the time - restriction-oriented northern model<sup>153</sup>.

The southern countries also knew that while the proposed Dublin agreement may have been disadvantageous to them in principle, it was unlikely to significantly affect them in practice due to the problematic nature of the provisions. Indeed, as outlined above, the designers themselves (i.e. the Schengen-Five) had openly acknowledged the difficulties that would likely accompany implementation, as they knew full well that the most symbolically important provisions relating to responsibility in cases of illegal entry or stay – and the ones most pertinent to the southern states - would be almost impossible to apply and similarly impossible to prove (SCH/II-as (87) 2 Def.; SCH/II-as (87) PV 1 Revisé; SCH/II-as (89) PV 1 Z). They also knew that the lack of policy harmonisation between the south and the north would continue to funnel secondary movements in their direction (SCH/II (89) 16; SCH/II-as (88) PV 4Z; BNL-D-F/pers.-as (87) 10 Revisé). Thus, while applications for asylum may have been on the rise in some of the southern Member States regardless, these states ultimately knew that their northern neighbours were unlikely to be able to actually effect very many transfers back to their territory on the basis of Dublin because of the openly anticipated

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<sup>152</sup> See: Vink 2005; Baldwin-Edwards and Schain 1994.

<sup>153</sup> Unfortunately, (though perhaps inevitably) this presented future problems; while the development of fairly robust human rights regimes had generally accompanied the concurrent development of immigration and asylum regimes in the more developed states of the north, in the case of the south, the cart (i.e. immigration and asylum controls) arguably came before (or indeed, without) the horse (i.e. rights protections) (Baldwin-Edwards 1997: 513). This incongruent development has, in turn, presented substantial problems for the fair application of the Dublin rules.

implementation problems. Moreover, in light of provisions that allocated responsibility by default in cases of exceeded timelines, they also knew that they could “deliberately elude responsibility...so that it would revert back to the requesting state”– this was going to be “the game” (Interview, ECRE). They were therefore willing to agree on the basis that it was unlikely to really affect them<sup>154</sup>.

For their part, the northern Member States knew this but pursued these principles regardless (as demonstrated in section 4.2), because they wanted to set the tone for cooperation, and that tone was accountability (particularly for the control of the external frontiers) in exchange for free movement access. The imposition of the policy frame of blame-based asylum responsibility was therefore more important than its prospective functionality (SCH/II-as (87) 16). As relayed by an official from the Permanent Representation of France in an interview with the author (Interview, Perm Rep FR):

“We knew, we perfectly knew, that when the Schengen agreement has been adopted, that it will be very difficult for Italy, but specifically for Greece, to control the frontier. But it was ultimately a *political* decision.”

In sum, due to this overlap between intergovernmental fora, the slight time lag between the initiation of both sets of negotiations, the strong agenda-setting role played by the Schengen-Five and their incentive to ‘lock-in’/‘import’ their preferences among a more diverse group of EC states, as well as the unique mix of policy packaging, policy linkages and indirect side payments that secured the otherwise-unlikely support of the southern Member States, the terms of cooperation ultimately agreed in the Ad Hoc Group on Immigration’s asylum sub-group effectively mirrored those that had been agreed in the Schengen group. The system for determining asylum responsibility elaborated in both the 1990 SIC and the 1990 Dublin Convention were therefore more or less identical, save for a few points of distinction. As the negotiations on these terms of cooperation were consequently also very similar, the remainder of this sub-section will focus on highlighting some of these distinctions in order to avoid unnecessary repetition between this section and the last.

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<sup>154</sup> This is consistent with theoretical expectations relating to strategies of calculated evasion, as introduced in Chapter Two.

### *Main Differences*

On a fundamental level, the core notions of responsibility and accountability for controlling entry and access had, for the reasons outlined above, taken on even more importance under Dublin in light of the concerns surrounding the disparate asylum systems of the participating states. Thus, while the SIC had elaborated the different criteria that should be used to determine responsibility, the Dublin Convention employed the same criteria but emphasised that they should be applied in a strictly hierarchical fashion on the basis of which criterion was deemed to make you more or less responsible in accordance with the authorisation principle.

For the same reasons, the notion of solidarity had also gained further importance in the negotiations, but had taken on a dual meaning/application. On the one hand, solidarity continued (as per the SIC negotiations) to be stressed in terms of Member States collective responsibility for 'pulling their own weight' with regards to controlling entry in order to prevent the unfair targeting of more liberal asylum regimes by asylum shoppers (which was again used as a rationale for justifying the lack of choice given to asylum seekers with regards to their selection of destination country) (SN 3954/88 WGI 334 AS 35; SN 1535/89 WGI 397). Despite being one of the designers of the system, Germany was particularly nervous in this regard on account of the right to asylum that was guaranteed under its constitutional Basic Law (a reality which it felt would make it particularly susceptible to asylum shopping and secondary movements from the south). Germany therefore suggested that it could provisionally agree to the draft terms of the Convention, but that it would need to undertake a constitutional amendment to rid itself of this guarantee<sup>155</sup>; in the meantime, however, Germany argued that it should be granted the ability to terminate the application of Dublin should a seriously uneven burden distribution materialise prior to their national law being changed (SN 3954/88 WGI 334 AS 35)<sup>156</sup>.

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<sup>155</sup> Something that it later achieved in 1993 (Hailbronner 1994), prior to the SIC's and Dublin's entry into force.

<sup>156</sup> It is interesting to note that, in keeping with the uploading predictions of the misfit theory (as outlined in section 2.2.2), Germany had actually helped to instigate discussions on a potential draft convention on a Community-wide right to asylum, which was consistent with its national legislation, as outlined above (SN 3150/88 WGI 298; SN 2495 WGI 440 AS 45). As this never came to fruition, however, Germany instead pursued the aforementioned 'suspension' option in order to avoid an unfair distribution of costs directed towards it.

On the other hand, solidarity also came to be stressed – by the new southern participants - as something that would also be needed to help confront a potentially similarly unfair distribution of burdens, but one which would target an entirely different group of states on the basis of their geographic position and their consequent exposure to higher rates of transit and/or irregular entry. Thus, while unwilling to actually block agreement for the reasons outlined above, these states were nevertheless prepared to voice their concerns as partners at the negotiating table. In light of this concern, while the failure to prevent irregular entry remained one of the core criteria for responsibility determination, an additional stipulation was added, which sought to make everyone more accountable for tolerating the illegal entry/presence of TCNs. Thus, in cases where responsibility could be allocated to a particular Member State under Dublin on the basis of irregular entry, that responsibility would cease to apply if the applicant had been present in the Member State within which it lodges its application for at least 6 months prior, at which point responsibility would automatically transfer to the state that had been hosting the illegally present applicant. The matter of transit visas had also proven a controversial issue in this regard. While some of the more insulated Member States, such as Denmark, had argued that transit countries should be held responsible in certain cases in order to prevent the free choice of destination countries, (which would unfairly disadvantage those states with more liberal asylum systems) (SN 1535/89 WGI 397), the Spanish delegation conversely argued that because not all Member States are confronted with the same geographic realities, responsibility cannot and should not be automatically allocated to a country simply on the basis of an applicant's path of transit (SN 1833/90 WGI 582 AS 78). This was actually an important sticking point for the Spanish delegation, which insisted that Spain could not agree to any terms of cooperation regarding transit visas that suggested otherwise (Ibid). In the end, Spain did manage to achieve the inclusion of a compromise provision in this regard, which stipulated that, pending the entry into force of an agreement between the Member States regarding the crossing of the external borders – which was being simultaneously negotiated in the Ad Hoc Group on Immigration - any Member State that authorises transit without a visa through the transit zone of an airport will not be regarded as responsible for failing to control entry in cases where travellers do not leave the transit zone (Article 7(2)). Arguably, the main reason why Spain – a country with otherwise

relatively low positionality in this area – was able to secure its preferences in this regard is because it was one of the Member States actually blocking cooperation on the external borders convention (which was also set to be signed in 1990 but which had to be postponed), due to on-going disputes between Spain and the UK over the status of Gibraltar (Lavenex 1999: 68).

As a result of these dually oriented concerns as to solidarity and the potentially inequitable distribution of burdens that may arise from the authorisation principle, the Dublin Convention actually included a designated suspension provision (as initially advocated by the German delegation – though originally intended to be specific to Germany). Under this provision (Article 17), any Member State “[experiencing] major difficulties as a result of a substantial change in circumstances” can bring the matter before the newly created Article 18 Committee (consistent of a representative from each Member State and intended to resolve any issues/disputes regarding the interpretation/implementation of the Convention on the basis of unanimous decisions), so that the Committee can endeavour to address the situation. In cases where these major difficulties persist for a period exceeding six months, the Committee may then authorise a temporary suspension of the application of the provisions of the Dublin Convention in order to alleviate the situation. While it is indeed significant that a safety clause had been included in order to accommodate the concerns of the various parties involved (particularly Germany) and in order to circumvent the potential redistributive consequences of the system, the triggering of such a clause would still require the unanimous approval of all participating states; as such, it would be unlikely to gain that approval should the Member States feel that the requesting state had not been holding up their obligations vis-à-vis their partners.

With regards to the more technical requirements associated with the take charge/take back obligation, the Dublin Convention had also introduced some additional timelines in order to ensure the system’s effective, and timely, application due – once again - to the wider range of actors involved with highly variable administrative and bureaucratic capabilities. This was primarily a result of insistence on behalf of the French delegation, which wanted to avoid undue delays in the processing and execution of transfer requests and to ensure that it could still enact transfers should another Member State fail to respond to its requests

(SN4404/88 WGI 349; SN 1829/90 WGI 578 AS 78). Thus, while the SIC already stipulated that Member States must submit their request that another Member State take charge of an application within six months of having received it (a requirement which was replicated in the Dublin Convention), the Dublin Convention additionally required that Member States must respond to take charge requests within three months (Article 5) and take back requests within 8 days (Article 7)<sup>157</sup>, or accept responsibility automatically by failing to do so. Similarly intended to ensure efficient application, the Dublin Convention also required that transfers must then take place within one month (or within one month of the conclusion of any proceedings initiated by the applicant to challenge the transfer in cases where national legislation provides suspensive effect<sup>158</sup>). The introduction of such a time window was also advantageous for a country like France, which received a high rate of incoming requests on the basis of previously issued visas/residence documents, as responsibility would default to the requesting state should its weak control capacities/administrative capabilities prevent it from executing transfers on time. As a result of further concerns as to the potential difficulties that differently able administrations might encounter in the processing of requests, Member States were also required under the Dublin Convention to explicitly include in their requests any indications that would help enable the authorities of the Member State receiving the request to quickly and successfully ascertain whether it is in fact responsible (Articles 4 and 7).

#### ***4.3.3 Replacing the SIC Asylum Provisions: The Dublin Convention as the Sole Instrument for Allocating Asylum Responsibility***

At a meeting of the Ad Hoc Group on Immigration on 15 June 1990, eleven of the twelve EC immigration ministers (with the exception of Denmark<sup>159</sup>) signed the Dublin Convention. This was despite the fact that earlier on in the negotiations, Germany, the UK, Ireland and Denmark had all indicated their preference that Dublin take the form of a 'gentleman's agreement' or a 'code of conduct'. Eager to ensure the swift application of the Dublin rules (so that they could begin initiating transfers away from their territory), these states had

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<sup>157</sup> Though there was still no specific time requirement for the issuing of take back requests.

<sup>158</sup> This additional specification was included to accommodate divergent national legislation and to avoid situations where responsibility would automatically default (thereby imposing costs) to those states that offer suspensive effect (as they would likely regularly exceed the one-month limit in cases where appeals were made).

<sup>159</sup> Denmark signed the Convention a year later.

advocated this possibility in the hopes of avoiding the costs and delays that would inevitably accompany the national ratification process of twelve sovereign states (SN 3955/88 WGI 335 AS 36; SN 870/89 WGI 376). Citing the same reasons, and sensing an opportunity in these concerns, Mr Bangemann (the Commission observer) had tried to use his informal role in the negotiations to draw the ministers' attention to the potential benefits of agreeing Community legislation instead, as this would be immediately applicable throughout the Member States due to the legal principle of direct effect<sup>160</sup> (SN 1819/89 WGI 412). However, as the Ministers were keen to maintain exclusively national jurisdiction in this area, this suggestion gained little traction (Ibid). In the end, and notwithstanding the aforementioned concerns about national ratification delays, the ministers ultimately agreed that an international convention was the most suitable option (SN 879/89 WGI 385).

As a result, and despite initial hopes that Dublin would become operational by the end of 1992 (to coincide with the completion of the single market) (SN 879/89 WGI 385), the ratification process among the EC-12 took over seven years, with the protracted delays largely credited to national parliamentary concerns as to the compatibility of the Dublin provisions with state obligations under the Geneva Convention and other international law (Bhabha 1994: 107-108). The Convention consequently didn't enter into force until 1 September 1997, at which point, it also entered into force in Austria and Sweden.

Prior to this point, the Schengen Executive Committee had also agreed the so-called 'Bonn Protocol' on 26 April 1994. In keeping with the evolutionary clause included under Article 142 of the SIC (and clearly indicative of the Schengen group's 'laboratory' function)<sup>161</sup>, the Bonn Protocol specified that the Dublin Convention's entry into force would effectively

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<sup>160</sup> See footnote 53.

<sup>161</sup> As cooperation within the Schengen group had been directly intended to provide a foundation for future EC cooperation, the contracting states had recognised the need to consider how the terms agreed under the SIC should intersect with Community law and had therefore set up a separate ad hoc sub-group to deal with this issue (SCH/II (88) PV 3 Z). This was one of the few areas that, despite its limited role as observer, the Commission was actually able to exert influence over. Upon its instigation, the contracting parties had agreed to include a clause in the SIC that would safeguard future Community law – the so-called evolutionary clause. The text proposed by the Commission was based on the premise that the provisions of the Schengen agreements would only apply until Community acts concerning the same matters came to be implemented (SG/COORD (88) 91).

nullify the asylum provisions included in the SIC, thereby making it the sole instrument for allocating asylum responsibility among the Member States.

*Table 4.2: Signature and Ratification of the 1990 Dublin Convention*

Country	Date of Signature	Date of Ratification	Entry Into Force
France	15 June 1990	10 May 1994	1 Sep. 1997
Germany	15 June 1990	21 Dec. 1994	1 Sep. 1997
Belgium	15 June 1990	10 Aug. 1995	1 Sep. 1997
Luxembourg	15 June 1990	22 July 1993	1 Sep. 1997
Netherlands	15 June 1990	13 June 1997	1 Sep. 1997
Italy	15 June 1990	26 Feb. 1993	1 Sep. 1997
Spain	15 June 1990	10 April 1995	1 Sep. 1997
Portugal	15 June 1990	19 Feb. 1993	1 Sep. 1997
Greece	15 June 1990	3 Dec. 1992	1 Sep. 1997
Ireland	15 June 1990	13 June 1997	1 Sep. 1997
United Kingdom	15 June 1990	1 July 1992	1 Sep. 1997
Denmark	13 June 1991	13 June 1991	1 Sep. 1997
Austria	28 April 1995	Not available	1 Oct. 1997
Sweden	13 June 1991	13 June 1991	1 Oct. 1997
Finland	Not available	Not available	1 Jan. 1998

Source: Adapted from Guild 1996: 111; European Council [online].

#### **4.4 Conclusion: The Emergence of Dublin – A Case of First Mover Advantage**

This chapter has analysed the emergence of the Dublin system, first through the negotiation of the asylum provisions under the 1990 SIC, and second through their simultaneous reproduction in the form of the 1990 Dublin Convention. By examining the main incentives for cooperation in this area, and in analysing the formation of both of these documents, its purpose was to explain how and why the Dublin system initially took the troubled shape that it did. To this end, three main conclusions deserve highlighting.

First, the Schengen-Five developed a system for allocating asylum responsibility because it was in their interest to do so. The form that cooperation ultimately took also reflected those interests. The Member States involved were at once interested in reaping the economic benefits of a free movement area, ensuring internal security in that free movement area (in a world of changing geopolitical threats), whilst also reducing the number of asylum seekers

on their respective territories. They therefore wanted to ensure that while the doors to free movement were to open for their own nationals, they were to remain closed (or at least provide an incentive for Member States to keep them closed) to those intending to claim asylum. This was particularly true in light of the prospective expansion of free movement to the southern Member States, whose external borders (located closest to key asylum producing regions) were particularly porous and who lacked effective or established measures for properly controlling asylum traffic. As such, they wanted to create a system that: would clearly allocate responsibility for asylum applicants to a singular Member State; that would seek to prevent a free flow of that traffic from the south to the north; that stressed a sense of responsibility and accountability for managing one's borders in an area of free movement; that allowed for the redirection or redistribution of asylum seekers back from north to south on the basis of that accountability; and which encouraged the fortification of the EU's external borders in lieu of internal ones. The "necessity of Dublin [therefore] appeared with Schengen" (Interview, Perm Rep FR), and its design reflected that necessity. Given that the actors involved were all attempting to "seize upon the new opportunities offered by the regionalisation of the border control domain in order to pursue their self-interest", but within a limited time frame, they consequently followed an ultimately "bounded rationality logic ('do only what suffices to solve a given problem'). Schengen was not, therefore, necessarily an optimal outcome" (Zaiotti 2011: 8-9). And by extension, neither was Dublin. Nonetheless, it was deliberate.

Second, the Schengen-Five were in a strong position to impose ('import') their interests in the context of a larger agreement between the EC-12, which is why the Dublin Convention was essentially a replica of the SIC's asylum provisions. Having successfully exercised first mover advantage with regards to the establishment of Schengen and its accompanying provisions on asylum, and having had its agenda setting function in this regard legitimised by the Commission by virtue of its laboratory function, the Schengen-Five were able to effectively transfer their preferences from the intergovernmental Schengen venue to the intergovernmental EC venue. They were incentivised in this regard for the reasons cited above; they therefore wanted to transfer their preferred policy frames to the EC level in order to reduce the potential adaptation costs of an expanded free movement area so as to

minimise their individual asylum costs and relative asylum burdens. They were enabled in this regard by the higher credibility of their position; not only were they the temporary gatekeepers to Schengen, but they were also among the Member States for whom the issue of asylum was particularly salient (on account of being some of the primary asylum receiving states<sup>162</sup>) and who (for the same reason) had more experience and a greater degree of expertise when it came to handling matters relating to asylum. At the same time, for those Member States that Dublin would likely disadvantage, and for whom its implementation would present considerable adaptation costs (i.e. Italy, Greece, Spain and Portugal), it was in their interest to accept the terms of cooperation advanced by the Schengen-Five regardless, as they were presented to them as the toll for gaining access to Schengen – something that they earnestly wanted on account of the economic benefits that membership would entail. Moreover, countries like Italy and Greece had a growing domestic-level interest in undertaking adaptation regardless. While immigration and asylum had not previously been particularly salient issue areas for these countries, they were becoming more important. As such, and with no real experience in regulating or controlling the movement/entry/stay of TCNs, it was in their interest to try to emulate the more effective regulatory practices of their more experienced partner states.

Third, the intergovernmental setting for cooperation on both of these agreements had an important impact on the overall content of cooperation (i.e. policy output). As the Member States were both agenda setters and decision makers, they were alone responsible for dictating the terms of agreement. Given the circumstances at the time, (as elaborated throughout this chapter), the overall mind-set of the Member States at the time was one of restriction. This mind-set was then reflected in the elaboration of a system that presented the responsibility for asylum applicants as a burden, and which allocated that burden on the basis of a failure to prevent access. With regards to the agreement of the system's more specific provisions, the default unanimity requirement based on the negotiation of an

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<sup>162</sup> Which is why, for example, Germany was able to secure a provision on the potential suspension of transfers. As the largest asylum applicant receiving state by far, Germany could argue its interests on the basis that it was the most greatly affected. In this case, it argued for the inclusion of an option that transfers could be suspended in cases of extreme inflows, which it feared it would be subjected to on account of its constitutionally enshrined right to seek asylum (under its Basic Law).

international convention meant that at every turn, the more restrictive position prevailed<sup>163</sup>. While some states did cite domestic level institutional constraints (i.e. national courts) as reasons for why they could not accept, or why it would be difficult for them to accept, some of the more restriction-oriented provisions (and therefore argued for more liberal ones on the basis of their existing national practice), they were nevertheless overruled<sup>164</sup>. The intergovernmental setting for cooperation was therefore, indeed, consequential. Highlighting these implications, Hathaway (1993: 179) writes:

EC governments have seized upon the impending termination of immigration controls at intra-Community borders to demand enhanced security at the Community's internal frontiers. Fearful that a continuing commitment to refugee protection threatens the viability of a union premised on external closure, states have taken the facile approach of elaborating a policy of generalised deterrence...Equally ominous [however] is the decision-making process from which this common policy of deterrence has emerged, for it breaks with the tradition of elaborating norms of refugee law in an open and politically accountable context. Collaborating within a covert network of intergovernmental decision-making bodies spawned by the economic integration process itself, governments have dedicated themselves to the avoidance of national, international, and supranational scrutiny grounded in the human rights standards inherent in refugee law.

In the end, asylum seekers have had to "bear the brunt" of economic integration (Bolten 1992: 10), as they have been among the primary casualties of the securitisation of the EC's external borders. What ultimately "began as a logical development of the internal market" and which "might have been a solution providing some security to asylum applicants in an integrated Europe is now being used to move asylum seekers out of the Union altogether" (Guild 1996: 120). Nevertheless, the foundation for EC-level cooperation on asylum had been set, and as the subsequent chapters will show, the Member States have either deliberately sought to maintain that foundation or have reservedly, but still deliberately, accepted its continuation over the course of two attempts at reform, despite the manifold problems associated with its implementation.

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<sup>163</sup> In addition to the previously cited examples with regards to the SIC negotiations, the Dutch also argued against the inclusion of the provision permitting transfers to STCs external to the EC on the basis that this would result in a Community-wide failure to examine an application for asylum as per the Convention's stated objective (SN 1543/90 WGI 563 AS 72). Much like its other points of protest, this one, too was ultimately ineffectual when it came to the final agreement.

<sup>164</sup> It would seem that restriction oriented threats of veto were ultimately more credible than liberally oriented ones.

## **5 Institutionalising Dysfunction: Adopting EU Asylum Legislation under the Consultation Procedure - The Negotiation of the 2003 Dublin II Regulation**

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This chapter analyses the adoption of the 2003 Dublin II Regulation, which replaced the 1990 Dublin Convention. Its purpose is to explain why, despite the early failures of the Dublin system and the problems associated with its core features, this first attempt at reform ultimately produced marginal results, with the resulting regulation effectively replicating the content of its predecessor - the terms of which were now entrenched in the EU asylum acquis as binding legislation. The chapter therefore begins with a brief discussion as to why the Dublin Convention was deemed a failure in its early months of operation, thereby instigating the need for its reform. The second section then establishes the institutional context for reform as well as the anticipated positionality of the actors involved. On this basis, the third section analyses the negotiation of the Dublin II Regulation in order to address the puzzle outlined above, by tracing the agenda-setting and decision-making process that resulted in its agreement. The fourth section concludes with a discussion on how the particular intersection of preferences, positions and institutions in this case ultimately helped to ensure the stability of the Dublin system through this first attempt at reform.

### **5.1 The Need for Reform: Early Problems with the Dublin System**

It was not long after the Dublin Convention's entry into force in September 1997 that discussions began on the need to replace it with a more effective instrument. Stated simply, "the basic problem with the Dublin Convention of 1990 [was] that it [did] not really work" (Blake 2001: 95). As its early months of operation had quickly revealed some of the system's intrinsic inadequacies, the Council had requested that the Commission initiate a formal evaluation of the Convention's implementation (based on information provided directly by the Member States) in order to identify its major shortcomings, with a view towards swift

reform<sup>165</sup>. This led to the release of a Commission working paper in March 2000 (Commission 2000) – which officially launched the debate on the establishment of a replacement mechanism<sup>166</sup> – and a further performance review on its early years of operation in June 2001 (Commission 2001a).

Perhaps the most glaringly obvious indicator of the system’s dysfunctionality was that it had barely been used (Table 5.1). Of the total number of asylum applications lodged within the EU during its first two years of operation, only 6% had been subject to a request for transfer of responsibility (Commission 2001a: 2). While almost 70% of those requests were subsequently accepted, this again only represented 4.2% of the total number of asylum applications lodged, meaning that in over 95% of cases, responsibility had simply remained with the Member State in which the application was first lodged. The number of transfer requests actually executed was even less impressive, as only 40% of that 4.2% were ever subject to transfer, which meant that only 1.7% of the total number of persons who lodged applications for asylum in EU Member States had been effectively transferred to a Member State deemed alternatively responsible under the terms of the Convention (Ibid)<sup>167</sup>.

Table 5.1: Performance of the Dublin Convention, 1998-1999 (EU Aggregate)

**Total Number of Asylum Applications Lodged in EU Member States: 655, 204								
No. of TC/TB requests submitted to other MS	% of total no. of asylum apps.	No. of TC/TB requests accepted	Accepted requests as a % of TC/TB requests submitted	Accepted requests as a % of total no. of asylum apps.	No. of asylum seekers actually transferred	Transfers as a % of accepted TC/TB requests	Transfers as a % of submitted TC/TB requests	Transfers as a % of total no. of asylum apps.
39,521	6.00	27,588	69.80	4.20	10,998	39.90	27.80	1.70

Source: Commission 2001a: 2.

Note: TC = take charge; TB = take back.

<sup>165</sup> This request was included in the ‘Vienna Action Plan’ (or the Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice), which was adopted by the Justice and Home Affairs Council of 3 December 1998.

<sup>166</sup> Though the official mandate for a replacement *Community* mechanism had been issued in the Treaty of Amsterdam, which required that the Dublin Convention’s successor be introduced in EU law by 1 May 2004 (Commission 2000: 3).

<sup>167</sup> While the illustrative capacity of these early statistics is somewhat undermined by the lack of comparable statistics on rates of secondary movements (as EU-wide data collection on asylum was still in its infancy at this stage), these particularly low values are nevertheless indicative of the system’s minimal functionality in its first two years of operation.

The main reasons for this particularly low rate of effective implementation can be related back to the four organising features of Dublin outlined in Chapter Three. With regards to singular responsibility, the lack of policy harmonisation among supposedly similar countries and the denial of mutual recognition in the case of positive decisions had resulted in the “desire of many asylum seekers to evade the application of the Convention by any means” (Ibid: 18). The earliest attempts at policy coordination in this area (such as the aforementioned 1992 London Resolutions) were largely restrictive soft laws and did little in the way of actually harmonising Member State policies<sup>168</sup>. Indeed, the only real step towards harmonisation taken during this time had been the adoption of the 1995 resolution on minimum guarantees for asylum procedures<sup>169</sup>; however, as it was agreed on an intergovernmental basis, its provisions were ultimately subject to multiple caveats, derogations and exceptions, which collectively threatened the likelihood that its objectives would be met (especially since its terms were non-binding). In the end, this was exactly what happened (Peers 1998: 9). As such, this minimal stride towards harmonisation prior to Dublin’s entry into force was simply not adequate to compensate for the system’s inherent assumption that all Member States could be considered ‘equal’<sup>170</sup> – nor its subsequent denial of free movement following a successful application. As a result, many asylum seekers sought to avoid being subject to the Convention’s provisions either before it could be applied (by destroying any relevant documentation<sup>171</sup>) or just prior to its completion (by

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<sup>168</sup> In fact, when combined with the Dublin Convention in practice, these resolutions generally only served to provide Member States with additional grounds for restriction and expulsion. The exercise of the manifestly unfounded concept in particular basically provided the Member States with an effective tool to avoid responsibility altogether (thereby reducing the number of applications even subject to Dublin). Of the 42,691 applications lodged in Belgium in 2000, for example, 38,366 of them were subject to expedited procedures on this basis, while the Netherlands similarly dismissed 35,384 of the 43,895 applications received in the same year (Gallagher 2002: 388).

<sup>169</sup> Which sought to establish a common set of procedural guarantees for both standard procedures and expedited removals in cases of manifestly unfounded applications. As the enforcement of such guarantees could ultimately be thwarted by a failure to agree on who actually constitutes a ‘refugee’, the Immigration Ministers also subsequently agreed a Joint Position on the Definition of a Refugee in 1996 to ensure a more uniform basis for recognition.

<sup>170</sup> This is problematic because the very legitimacy of the concept of singular responsibility (and by extension, the entire system) rests on the assumption that all Member States can be considered “equal”, in that they are all safe third countries vis-à-vis one another providing equivalent standards of protection, and because asylum applicants should ultimately face a similar likelihood of acceptance regardless of where their application is processed (as outlined in Chapter Three).

<sup>171</sup> Which can effectively “deprive the Member State to which he is applying of any means of action under the Dublin Convention” (Ibid: 6).

absconding following notification of a transfer decision<sup>172</sup>). As the Convention only applied to those applying for protection under the 1951 Geneva Convention, other asylum seekers even sought to suspend its applicability during the procedure (and use the lack of policy harmonisation to their advantage) by withdrawing requests for refugee status in favour of requesting protection on other grounds (i.e. subsidiary protection) in those Member States that provided it (Ibid: 12).

With regards to the authorisation principle and the hierarchy of criteria, problems relating to the individual criteria and their evidentiary requirements had worked to limit the applicability of some of them, which had in turn affected their overall rate of application<sup>173</sup>. Despite its priority status, the criterion relating to family reunification had been barely invoked (accounting for only 16 out of 961 cases in Belgium and 64 out of 1,464 in the Netherlands), which was likely due - at least in part - to the stringency of the definition of family and the standard of proof required (Ibid: 5). Unsurprisingly, the criterion relating to unlawful entry had proven almost impossible to apply, as clandestine entries, by definition, leave no official trace, which made it extremely difficult for Member States to submit a substantiated request on this basis. This type of request consequently accounted for a relatively low proportion of the overall requests received by Member States (just 10% in France and the Netherlands) and enjoyed a similarly low rate of acceptance (just 33% in Germany compared to an overall acceptance rate of around 70%) (Ibid: 4-6). The criterion on lawful entry also experienced very limited use due to similar evidence problems as those pertaining to proving unlawful entry<sup>174</sup>. As a result of these difficulties, a relatively large

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<sup>172</sup> As many applicants would prefer to be in an unlawful situation in their preferred destination country as opposed to in a lawful situation in a country that is not their preferred destination (Ibid: 18). This arguably explains why “a certain ‘evaporation’ [of applicants] occurs” between the requesting and transfer stages (Ibid: 3).

<sup>173</sup> Some of the problems relating to the lack of clarity regarding the implementation of certain provisions of the Convention had also highlighted the ineffectualness of the Article 18 Committee. Composed of a representative from each Member State, and tasked with resolving any questions relating to interpretation, any and all decisions made by the Committee had to be unanimous. As a result, its overall output was rather limited. Given that no jurisdiction had been granted to the CJEU, the inherently flawed nature of a dispute resolution mechanism requiring unanimity ultimately meant that there was no effective way to resolve potential discord among the Member States.

<sup>174</sup> Though the Member States had previously acknowledged the potential difficulties associated with evidentiary requirements involving travel and identity documents (given the ease with which they can be disposed of or destroyed), such documents were nevertheless required by the Dublin Convention to prove responsibility. While this realisation had prompted a study on the feasibility of a Community-wide fingerprint system as early as 1991, such a system had not yet been made operational at the time Dublin came into force.

proportion of requests<sup>175</sup> were ultimately based on the default criterion, which allocates responsibility to the Member State that received the application in the first instance. Accounting for almost half of the requests sent to Belgium and about one-third of those sent to the Netherlands, the use of this criterion actually increased year on year as asylum seekers engaged in quick secondary movements following the submission of their applications, giving rise to an increased number of potential take back requests (Ibid: 4).

The initial statistics on Dublin's application had also confirmed, to some extent, the 'geographic determinism' that had been feared would result from the hierarchy of criteria<sup>176</sup>. As Table 5.2 demonstrates, those Member States that had external facing borders at the time generally faced a more unfavourable balance between incoming and outgoing transfer requests (i.e. Germany, Austria, Italy, France, Spain, Greece and Portugal) than those that were more internally protected (i.e. Denmark, the Netherlands, Sweden and the UK). As the data on the Convention's implementation was generally "consistent with a continuous migratory flow affecting the Member States of the EU in a line running broadly from south-east to north-west", the balance between individual Member States consequently favoured those situated upstream compared with those situated downstream (as illustrated by the case of Germany, which registered a positive balance of transfers vis-à-vis Italy and Austria but a negative one vis-à-vis the Netherlands, Denmark and Sweden) (Ibid: 17). The terms of the Convention had therefore dictated that while some states would be inherently situated as 'net importers' of asylum applicants, others would act primarily as 'exporters'.

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<sup>175</sup> Unsurprisingly, however, the largest number of requests and the largest number of successful requests were based on the previous issuance of a valid or expired visa, as this was the easiest criterion to apply due to the often-indisputable nature of the evidence.

<sup>176</sup> While the low rate of effected transfers arguably minimised the impact of this determinism, the pattern could nevertheless still be clearly observed.

Table 5.2: Performance of the Dublin Convention, 1998-1999 (By EU Member State)

Member State	Total Asylum Apps.	Submitted Requests	Submitted Requests Accepted	Outgoing Transfers	Received Requests	Received Requests Accepted	Incoming Transfers
Austria	33,889	5,536	988	85	3,523	2,005	1,295
Belgium	57,738	3,252	2,131	100	1,972	2,032	750
Denmark	18,230	3,791	3,309	1,316	786	514	-
France	53,207	1,530	1,010	495	5,122	3,320	-
Germany	193,757	9,169	4,501	2,529	20,257	16,915	6,457
Greece	4,481	31	19	17	1,085	468	110
Ireland	12,350	322	190	31	125	98	68
Italy	31,000	424	89	19	5,429	1,572	872
Luxembourg	4,630	294	176	115	-	-	-
Netherlands	84,516	9,476	8,044	2,787	2,094	1,225	800
Portugal	609	107	46	17	305	235	84
Spain	15,169	331	258	76	923	681	357
Sweden	24,075	4,259	3,102	1,609	419	272	-
UK	117,175	4,690	3,616	1,759	309	177	103

Source: Commission 2001a: 26-27.

Note: '-' indicates unavailable data. For LU, data only available for 1999. For FI, data excluded due to incompleteness.

With regards to Member State obligations to take charge or take back, problems regarding time limits had led to considerable disagreement among the Member States, with some arguing that the stipulated requirements were too generous (and therefore incompatible with the objective of speed of processing) and others arguing that they weren't generous enough (due to the administrative and bureaucratic hurdles involved). Regardless, the time limits specified in the Convention were being regularly exceeded (Ibid: 11). With a maximum procedure length of 9 months in the case of take charge requests, Member States were finding it difficult to meet both the initial six-month notification requirement and the three-month response requirement (Commission 2000: 6; Commission 2001a: 9). In the case of take back requests, the eight-day response requirement had proved similarly challenging. With regards to both types of requests, Member States had also found the one-month transfer requirement difficult to uphold. Regardless, Member States reported that transfers had ultimately been less likely to take place the longer the procedure took to administer (Commission 2001a: 10).

The aforementioned lack of policy harmonisation was therefore also problematic in this regard, as divergent national legislation provided one of the key potential sources for delay.

As the Dublin Convention contained no common provision regarding appeals, and as common rules on this issue had not yet been stipulated elsewhere, those Member States that provided for suspensive effect in the case of appeals ultimately experienced much higher rates of appeals than those that did not<sup>177</sup>. This had not only caused substantial delays in the time taken to carry out the Dublin procedure, but the resulting national litigation had also produced several legal decisions that “were likely to impose further constraints on the manner in which those States may apply the Convention” (Ibid: 14). Similarly, the lack of common provisions on detention also meant that Member States were bound by their variable national legislation, which in some cases meant a time limit for the duration of detention that was shorter than the timelines provided for in the Convention. This had also resulted in substantial delays (or in Member States being unable to continue the procedure), due to the fact that those asylum seekers not held in detention were likely to abscond in order to evade transfer (Ibid: 10, 17)<sup>178</sup>. It was therefore clear “on the basis of over two years’ experience” that the Dublin system had “not [functioned] as well as had been hoped” (Commission 2000: 1) and was consequently in need of reform.

## **5.2 The Context for Reform: A Partially Communitarised Setting for Asylum Policy-Making Among the EU-15**

Although the Dublin Convention had been considered as one of the few successful policy outputs of the Ad Hoc Immigration Group, intergovernmental cooperation had, by and large, “failed to produce any meaningful results – particularly with regards to issues involving [TCNs]” (Commission 1991: 80). As a result, the institutional arrangements pertaining to JHA and asylum policy-making had undergone a substantial transformation since the signing of the Dublin Convention by virtue of changes made in the Treaties of Maastricht (1993) and Amsterdam (1997) – the latter of which had explicitly called for the

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<sup>177</sup> The rate of appeals in reporting states also increased between the first and second year of Dublin’s operation (1998 and 1999), climbing from 6 to 358 in Austria, 83 to 200 in Germany, 132 to 208 in Denmark and 376 to 484 in the UK. Moreover, in the Netherlands, approximately 80% of all negative asylum decisions were being referred to the courts in order to obtain permission to remain in the country pending appeal (Ibid: 14).

<sup>178</sup> Member State practice also varied considerably with regards to escorted vs. un-escorted transfers, with the latter also leading to high rates of absconding asylum seekers.

adoption of a replacement “mechanism for determining Member State responsibility for asylum applications” within a period of five years<sup>179</sup>.

While these changes had importantly resulted in the incorporation of asylum policy-making under the first pillar of Community law<sup>180</sup>, they had – as outlined in Chapter Two – been made quite reluctantly by the Member States, with a “corset of intergovernmental elements” kept deliberately in place (Noll 2001: 136). Indeed, asylum policy-making had effectively been placed in a holding pattern, with Article 67 of the Amsterdam Treaty stipulating that the rules of decision-making as they pertain to asylum policies would remain the same as those under Maastricht for a five-year period following Amsterdam’s entry into force. This meant that: the Commission’s formal agenda setting powers would still be constrained by unanimity voting in the (now four-layered<sup>181</sup>) Council; the EP would still only be able to issue non-binding amendments via the consultation procedure; and the CJEU would still lack full jurisdiction and enforcement capacities in this policy area.<sup>182</sup> In formulating the Amsterdam Treaty this way, the Member States had “resorted to piecemeal engineering” (Noll 2001: 140), and complicated the path towards the full communitarisation of asylum policy by first stopping at the point of partial communitarisation. More importantly, they had ensured that they would maintain veto power with regards to the negotiations of the obligatory legislative measures on asylum mandated by Article 63, of which Dublin was one. In so doing, “the Member States [had] secured for themselves a strong position for determining the content of the first cohort of Community acts” on asylum (Ibid) without any significant risk of agency loss in their formulation, despite the technical delegation of legislative initiative to its agent, the Commission. As a result, the role of the Council presidency was therefore likely to be particularly important in the negotiation of Dublin II,

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<sup>179</sup> Alongside the introduction of measures regulating minimum standards with regards to the reception of asylum seekers, the qualification of TCNs as refugees, and the procedure for granting or withdrawing refugee status (Article 63, Amsterdam Treaty).

<sup>180</sup> As Title IV in the Amsterdam Treaty on ‘Visas, Asylum, Immigration and other Policies Related to the Free Movement of Persons’.

<sup>181</sup> Consisting of: the JHA Council; COREPER; SCIFA; and the working groups.

<sup>182</sup> Though, as outlined in Chapter Two, the CJEU had, for the first time, been granted *some* jurisdiction over asylum policy; however, it was strictly limited and only permitted the court to issue advisory rulings on questions of interpretation brought to it by Member States where judicial remedies didn’t exist under national law (Article 68).

as its occupiers would face the difficult challenge of trying to reach unanimous agreement on a contentious dossier within this still relatively new EU policy area.

There were also now 15 Member States at the negotiating table, as Austria, Sweden and Finland now sat alongside the other 12 Member States that had previously agreed the Dublin Convention. In keeping with the theoretical framework developed in Chapter Two, we can anticipate a considerable level of diversity with regards to the strength of actor positions (positionality) when it comes to the negotiations on Dublin II due to their varying degrees of credibility and intensity.

With regards to credibility, and employing the previously outlined measures for expertise and effectiveness (i.e. generation of immigration and world of compliance), we can arrive at the following categorisation between high and low credibility states, as shown in Table 5.3. While the southern Member States (which all fall under the low credibility column) had begun the process of modernising their immigration and asylum systems between the signing of the Dublin Convention in 1990 and its entry into force in 1997<sup>183</sup>, they were nevertheless still regarded with considerable scepticism as to their ability to effectively manage migration and asylum flows and can therefore be expected to occupy a relatively weak negotiating position when it comes to Dublin II.

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<sup>183</sup> Spain, having introduced its first round of immigration, regularisation and asylum laws between 1984-1986, adopted newer regularisation and asylum laws as of 1991 and 1994 respectively. In 1990, Italy had introduced the aforementioned Martelli law, which dealt with immigration, regularisation and asylum. Greece then introduced its first immigration law in 1991 and its first asylum law in 1993, while Portugal introduced its first joint immigration and asylum law in 1993 (Baldwin-Edwards 1997: 507).

Table 5.3: High and Low Credibility Member States in the EU-15 (Expertise + Effectiveness)

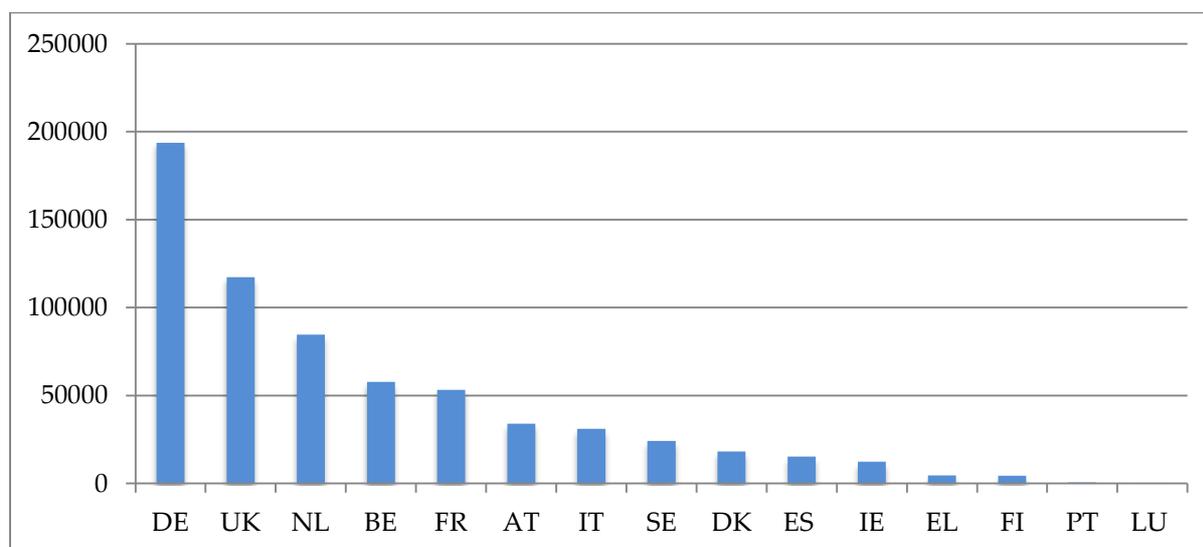
<b>High Credibility</b> (First Generation/Law Observance + Domestic Politics)	<b>Low Credibility</b> (Second Generation/Dead Letters + Transposition Neglect)
Austria Belgium Denmark Finland France* Germany Luxembourg* Netherlands Sweden UK	Greece Ireland** Italy Spain Portugal

Source: Author's Depiction.

Note: \*While both France and Belgium fall under the category of first generation immigration countries, they are, according to Falkner and Treib (2008), also countries situated within the world of transposition neglect. They have nevertheless been placed within the 'high credibility' group of states with regards to the Dublin II Regulation, as they are likely to possess a sort of 'default credibility' in this area on account of having been original Members of Schengen and the original designers of Dublin. \*\*Despite being geographically situated among the Northern countries, Ireland is categorised as low credibility, due to it being a second-generation country (having not traditionally received many immigrants due to its political and economic problems) and belonging to the world of dead letters.

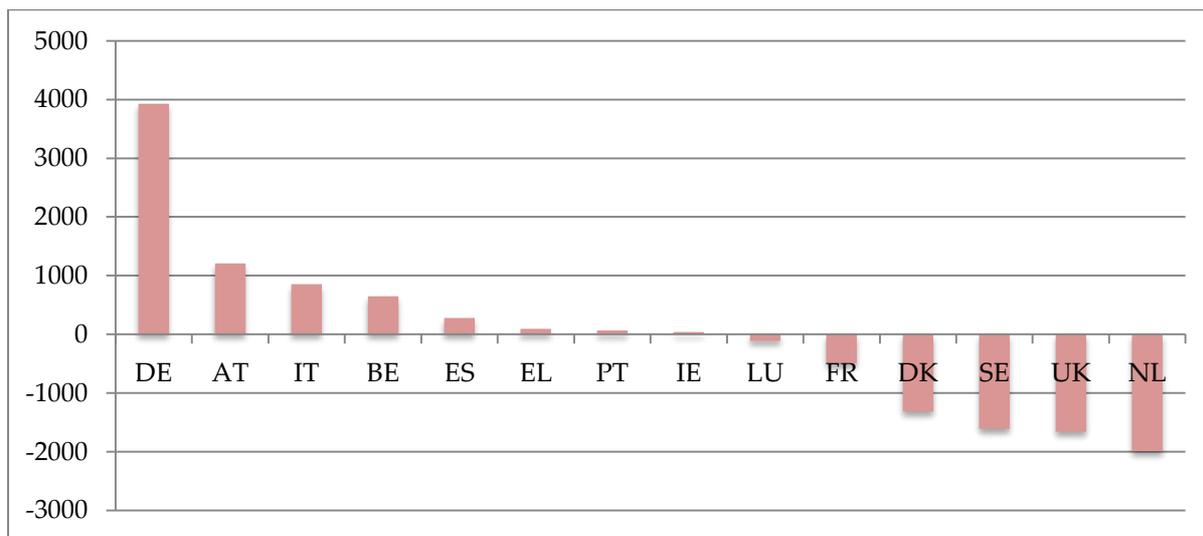
In the years immediately following the Dublin Convention's entry into force, Member States had also diverged considerably in terms of their exposure to both asylum inflows and Dublin transfers, as demonstrated in Figures 5.1 and 5.2.

Figure 5.1: Number of Asylum Applications per Member State, 1998-1999



Source: Commission 2001a: 26-27.

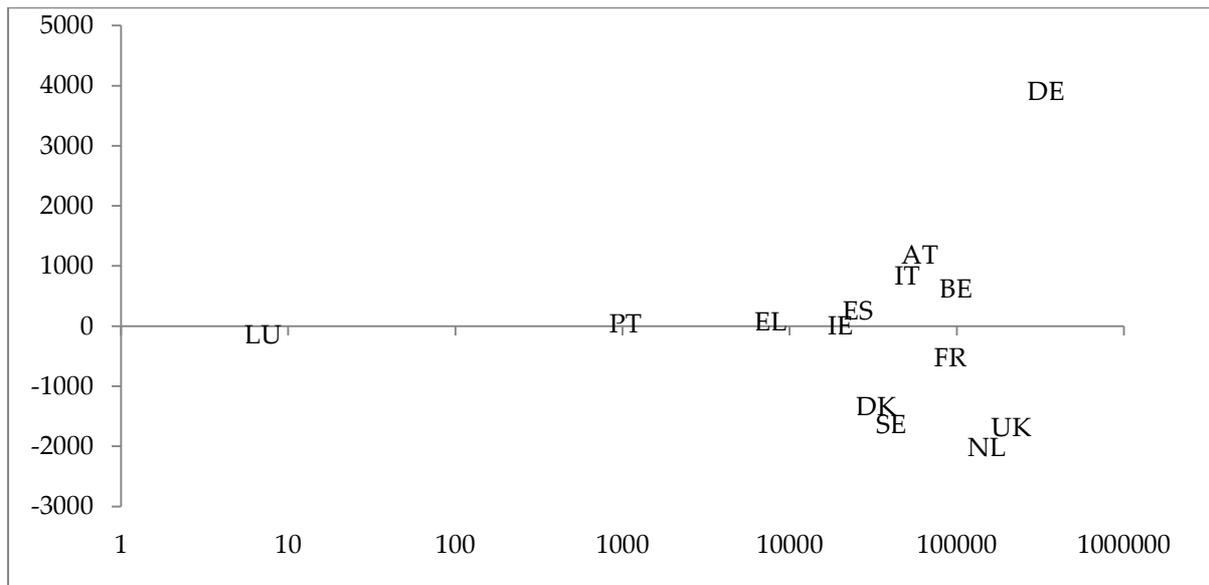
Figure 5.2: Net Dublin Transfers (Incoming-Outgoing), 1998-1999



Source: Commission 2001a: 26-27.

Combining these two measures, Figure 5.3 accordingly shows the anticipated salience attributed to asylum policy, and the Dublin system in particular, by each Member State. Salience is expected to be higher among those Member States that receive the highest rate of overall asylum applications and those who register either the highest rates of net incoming Dublin transfers (leading to an increase in net asylum costs) or the highest rates of net outgoing transfers (leading to a reduction in net asylum costs). So while Germany, the UK and the Netherlands were the highest receiving states in terms of total asylum applications, they were also among those most affected by the implementation of the Dublin system, but in an opposite way; whereas Germany 'imported' more asylum seekers than it 'exported' as a result of Dublin transfers (a positive net rate), the UK and the Netherlands 'exported' more asylum seekers than they 'imported' as a result of Dublin transfers (a negative net rate). The issue salience of Dublin was therefore still the highest among these states regardless of this distinction, as they all had a high stake in the outcome of the negotiations given that they were the most affected either way.

Figure 5.3: Asylum Salience by Member State, 1998-1999

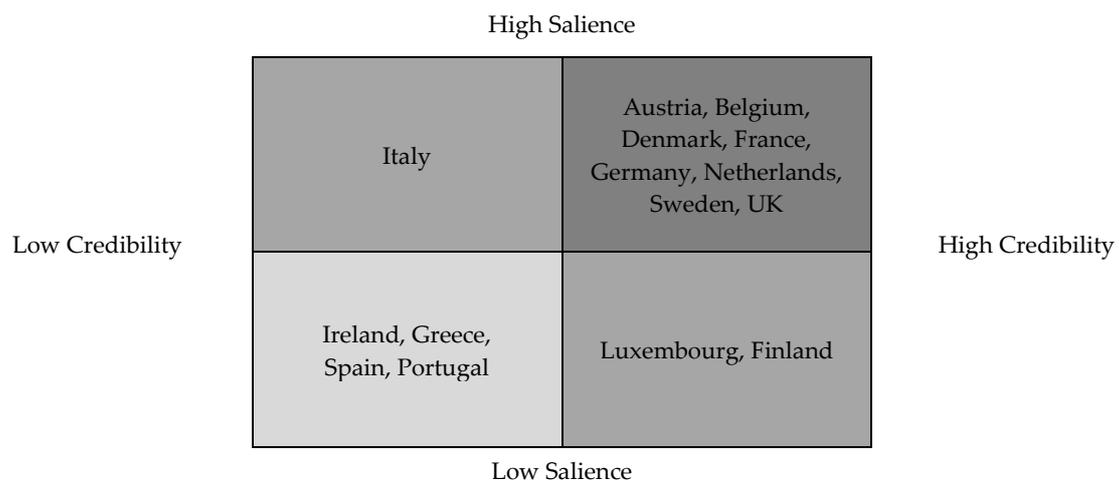


Source: Author's depiction.

Note: Y-axis = Net Dublin Transfers; X-axis = Number of Asylum Applications.

On the basis of both of these considerations (the anticipated credibility of the relevant Member State positions and their anticipated intensity), we can thus arrive at the following depiction of the anticipated strength of Member State positions as it pertains to the Dublin II negotiations (Figure 5.4). The most strongly positioned states can be found in the top right quadrant, while the medium positioned states can be found in the top left and bottom right quadrants, and the weakest positioned states in the bottom left quadrant. As per the theoretical framework outlined in Chapter Two, and reminiscent of the Dublin Convention negotiations examined in Chapter Four, we can therefore expect that the outcome of the Dublin II negotiations will better reflect the preferences of the Northern Member States over those of the South.

Figure 5.4: Strength of Asylum Positions in the EU-15 (Pre-Dublin II)



Source: Author's Depiction.

Another point that needs to be raised with regards to the overall context for reform relates to the impending accession of the CEECs. Similarly reminiscent of the Dublin Convention negotiations and the Schengen-Five's concerns as to the pending inclusion of the southern Member States in the Schengen area, were the new anxieties pertaining to the prospective further expansion of Schengen to a group of states with even more disparate polities and economies. Indeed, the prospect of an enlargement was becoming increasingly real, which meant that the composition of the EU was preparing to undergo a fundamental metamorphosis. Between 1987 and 1996, thirteen countries had submitted applications to join the EU, which included: Cyprus, Estonia, Hungary, Poland, the Czech Republic, Slovenia, Bulgaria, Latvia, Lithuania, Malta, Romania, Slovakia and Turkey. In order to prepare for potential accession, all candidate countries had been required to sign a Europe or Association Agreement and adopt a pre-accession strategy. On this basis, the European Council had officially launched the enlargement process in December 1997, with formal accession negotiations initiated as of March 1998.

Not only would this change entail the addition of some 75 million people to the existing EU population, but it would also lead to a fundamental redesign of the external border while shifting the ramparts of EU border control eastwards. As the bulk of these countries had been part of the former Communist bloc and had therefore been largely immigrant producing and were not considered attractive destination countries for would-be asylum

seekers, most of them had minimally developed immigration/asylum and border policing systems. For this reason, the European Council had explicitly included JHA, and border control measures in particular, in the pre-accession strategy. While this was seen as necessary in order to ensure that these countries would not act as 'weak links' in the buttressing of the EU's external border (Reflection Group 1999: 56), the problem was, however, that the JHA 'acquis' was far from being a clear-cut collection of policies and was instead a diverse patchwork of intergovernmental resolutions, conventions, conclusions and commitments that were not officially binding on the existing Member States within the context of the EU's legal framework.

And while the candidate countries had been technically required to accept all of the obligations associated with the Schengen and Dublin systems as a condition of their accession<sup>184</sup>, only the terms of the former would be binding following the incorporation of the Schengen acquis into the EU acquis, as mandated by the Treaty of Amsterdam<sup>185</sup>. This meant that while the candidate countries would be obligated to ensure the full implementation of the Schengen conditions prior to joining (Jileva 2002: 78), there was no real way to ensure the proper implementation of Dublin (which, as an international convention, would also require national ratification by each of the CEECs). Thus, not only did the Member States have an incentive to replace the Dublin Convention with a more effective instrument in light of its failings (as established in section 5.1), they also had an incentive to replace it (quickly) with what would be an immediately binding EU legal instrument for the CEECs prior to their accession. The Member States ultimately knew that this was the last call for the negotiation of a EU-level replacement among a community of 15 Member States as opposed to one of 25 (Interview, Civil Servant DK). While swift agreement would still likely prove difficult on account of on-going unanimity voting requirements, the clock was also ticking on the five-year deadline that had been issued by the Treaty of Amsterdam for the adoption of the Dublin Convention's replacement.

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<sup>184</sup> This did not mean, however, that accession countries were granted automatic membership or access to the Schengen area.

<sup>185</sup> Set for the year 2000.

### **5.3 The Negotiations: Cautious Cooperation, Interest Preservation and Institutional Adaptation**

The negotiations on the Dublin II Regulation were actually concluded quite quickly. Having received the Commission's proposal on 26 July 2001, the Member States agreed on the final version of the text in less than two years, resulting in the regulation's formal adoption on 18 February 2003. Notwithstanding the aforementioned considerations, this is still impressively quickly given that every Member State held individual veto power due to the continued applicability of unanimity voting (as outlined above).<sup>186</sup>

This section traces the negotiation process that resulted in the agreement of the Dublin II Regulation. It therefore begins with an examination of the Commission's proposal, proceeds with an examination of the actual negotiations within the Council (including its consultation with the EP), and concludes with an examination of the final text in the context of an attempted reform. In keeping with the theoretical framework presented in Chapter Two, its analytical focus throughout will rest on the behaviour of the actors involved, how that behaviour reflected their preferences, and how that behaviour was affected as a result of the either constraining or empowering effect of institutional and/or positional considerations, with a view towards explaining the output of negotiations, which in this case was a Dublin II Regulation that very closely resembled the preceding Dublin Convention, effectively preserving the (failed) status quo.

#### ***5.3.1 The Commission's Proposal: An Exercise in Pragmatic Agenda-Setting***

As mentioned at the beginning of this Chapter, the Commission had released a working paper on the Dublin Convention (2000) that was intended to initiate the conversation on reform and to provoke a discussion as to what a replacement Community instrument should look like. This was subsequently followed up by the release of a performance evaluation (2001a) as per the European Council's request. Both of these documents served as the foundation for the Commission's proposal and were based on extensive consultations with

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<sup>186</sup> As this is typically expected to result in prolonged negotiations, as discussed in Chapters One and Two.

the Member States, as well as discussions with relevant stakeholders, including the UNHCR<sup>187</sup> and ECRE<sup>188</sup>.

### *Early Optimism, Forced Pragmatism: Revisiting the Authorisation Principle*

As a result of the difficulties that had arisen during the Dublin Convention's initial operation period, one of the main issues that the Commission wanted to address during the pre-consultations was, of course, the authorisation principle. Enthusiastic about its new mandate on asylum matters, and reflecting early optimism as to the potential for improvements under the first pillar, the Commission had urged the Member States to "use the opportunity provided by the transition to new treaty arrangements to consider whether a fundamentally different approach [to the question of asylum responsibility allocation] is required" (Commission 2000: 7). To this end, the Commission working paper discussed four potential alternative approaches that had been identified and which deviated from the authorisation-based model (Commission 2000: 17-19).

The first option involved attributing responsibility to the last known transit country within the EU. While this option would arguably help overcome evidentiary problems regarding point of entry (as the last country of transit would be much easier to prove), it was highly problematic given that it would effectively penalise the removal of internal border controls. Given that Dublin had originated as "the compensatory measure on the basis of which we could abolish the internal borders" (Interview, Perm Rep NL), this option made little sense. The second option involved the consideration of relevant elements of an applicant's immigration history in the allocation of responsibility; however, as there was no obvious element to employ in this regard that would avoid arbitrariness, and because procurement

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<sup>187</sup> The UNHCR had, at this point, been granted an official role in the formulation of EU asylum policy by virtue of a special declaration that had accompanied the Amsterdam Treaty (Declaration 17), and which specified that the UNHCR must be consulted on all matters pertaining to asylum.

<sup>188</sup> Both the UNHCR and ECRE had been quite vocal as to their concerns regarding the Dublin Convention. Critical of time delays, the narrow definition of family, the lack of harmonisation and the flimsy criteria for determining responsibility, UNHCR expressed its on-going concern in the wake of the Commission's white paper regarding the ability of Member States to shift responsibility for the processing of asylum claims to other states outside the Union, which effectively "[breaks] the chain of commitments and mutually agreed safeguards that UNHCR can reasonably expect within the European space" (UNHCR 2001: 1-5). ECRE had further argued that should the authorisation principle be maintained, any new proposal would be as "ineffective and unworkable as its predecessor" (ECRE 2001: 10) and would continue to shift responsibility to those states with "extended land and sea borders in the south and east – the principal migration entry points to the EU" (Ibid: 12).

of evidence would still remain a crucial impediment to the system's efficiency, this option also held little appeal. The third and arguably most radical option related responsibility allocation to the applicant's country of origin, in that all applicants from one country of origin would be allocated to a corresponding Member State. Unsurprisingly, this option faced outright opposition on account of the potential demographic consequences and because it would be highly detrimental towards efforts aimed at improved burden sharing, as crises in particular countries of origin would impact Member States in a highly disproportionate way (Ibid).

While the first three options were therefore dismissed on the basis that they did not present a justifiable or desirable alternative (policy frame) to the current principle, the fourth option was identified as the most obvious possibility. Previously considered as a potential responsibility allocation principle (as outlined in Chapter Four), and advocated by several of the Member States as well as the Commission, the EP, UNHCR, and ECRE, this option envisaged a system of responsibility allocation based on where the application for asylum was first lodged. Not only would this approach help to circumvent the geographic implications of the current system (as outlined above), proponents of this model argued that it would also help to minimise the complexity of the system (by overcoming problems regarding evidence requirements) and bureaucratic muddiness (as responsibility allocation would be a much more straight-forward and less cumbersome process). At the same time, it would likely produce the added benefit of better achieving one of the core objectives of the system, as the usage of this principle would likely reduce rates of secondary movements and the submission of multiple applications by virtue of affording asylum seekers a degree of choice regarding their destination country. While this was therefore a quite promising option on the one hand, it was, however, framed as equally – if not more – problematic on the other, as choice was precisely something that the Member States wanted to actively discourage<sup>189</sup> (Commission 2000: 18). As an interior ministry official put it in an interview with the author:

“If you come from a crap country and you've had a really crap life, why shouldn't you choose where you live, and there's a sort of social justice in that...but that sort of rubs against the right of the state to control its own

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<sup>189</sup> In order to prevent instances of asylum shopping (Commission 2000: 18).

borders and [against] democracy, because that's not what people who vote for governments generally want" (Interview, Interior Ministry Anon).

The Member States therefore "wanted to make it clear that it wasn't for asylum seekers to decide where they [end up]. Dublin was an arrangement between states and it was for states to decide amongst themselves" (Interview, UNHCR). And yet, even more importantly, the majority of the Member States also argued that this approach did not sufficiently establish a "link between responsibility for controlling the external frontier and responsibility for dealing with any subsequent asylum applications" (Commission 2000: 18).

While the explanatory memorandum that preceded the Commission's proposal (2001b) again identified this latter option as the most "credible alternative scenario", the Commission had nevertheless been able to accurately gauge Member State sentiment over the course of the aforementioned pre-consultations and therefore knew that a proposal based on this scenario would be immediately vetoed (Interview, Perm Rep FR; Interview, Perm Rep NL; Interview, Interior Ministry Anon; Interview, ECRE). Several of the core Member States (including the 'first movers' of the Dublin Convention) had used the opportunity for informal agenda setting which the pre-consultations presented to clearly convey to the Commission their unflinching insistence that the existing policy frame be maintained; that is, Dublin could not be disassociated from Schengen (Interview, Perm Rep FR) as it, and the authorisation principle, were effectively a "precondition for Schengen" (Interview, Interior Ministry Anon). These states were insistent that responsibility continue to be attributed to the state 'most responsible' for allowing entry, as a system based on first country of application would inevitably see the vast majority of asylum applicants engaging in secondary transitory movements through the southern (and soon central and eastern) Member States in their direction, which would further increase the already massive share of the EU's collective asylum burdens for which they were responsible. As such, a system based on *accountability* in an area absent internal border controls could not be changed. Articulated by an official from the Commission (Interview, Commission 1):

The North wanted to ensure that they had legislation in place that would allow them to return people to the first country of entry, i.e. Greece and Italy...They wanted to safeguard that because they knew that people coming in at the first country of entry didn't want to stick around in those countries and make an application.

Thus, faced with the opposition of the EU's main asylum receiving northern bloc, and aware that there was therefore "no appetite in the Council to revisit the fundamentals" (Interview, ECRE), the Commission was consequently forced to adopt a more pragmatic approach, conceding that a fundamental departure from the terms of the existing Convention would not be appropriate at this stage in the development of the CEAS given on-going divergences in asylum practices. Such a change could therefore only be realistically conceived at a later date (Commission 2001: 4). As a result, the Commission's proposal for a Dublin Regulation was ultimately based on the same foundation as the Dublin Convention. In maintaining this foundation and in transferring it into the EU acquis, the Commission had inadvertently served to legitimise the authorisation principle and its underlying rationale by entrenching it in EU legislation as the continued basis for responsibility allocation. Effectively codifying this policy frame of blame-based responsibility, the Commission wrote in its explanatory memorandum (Ibid: 5, italics added):

...In an area within which free movement of persons is guaranteed by the Treaty, each Member State is *answerable* to all the others for its actions concerning the entry and residence of third-country nationals and must *bear the consequences* thereof in a spirit of solidarity and fair cooperation. The main criteria for allocating responsibility, and the hierarchical order in which they are presented, reflect this general approach by placing the *burden of responsibility* on the Member State which, by issuing him with a visa or residence document, being *negligent* in border control or admitting him without a visa, played the greatest part in the applicant's entry into or residence on the territories of the Member States.

Interestingly, however, though the new proposal was clearly still based on the underlying assumption that Member States could be considered STCs vis-à-vis one another (despite the fact that their differences had simultaneously been employed as the main excuse for why the authorisation principle couldn't be changed), the Commission had quite subtly excluded the previously included right of Member States to send applicants to STCs outside of the EU, thereby seeking to ensure that asylum applicants would, in fact, be guaranteed that their application for asylum would be examined by at least one, but only one, EU Member State.

### *Tit-for-Tat: Addressing Problems with the Hierarchy of Criteria and Taking Charge/Taking Back*

As a result of the maintenance of the authorisation principle, the hierarchy of criteria, as it appeared in the original Convention, was consequently also maintained. The Commission did, however, propose a few slight changes. While the previous agreement had already included a provision providing for family reunification in cases where the applicant had a family member already resident as a refugee in one of the Member States, the Commission sought to increase family reunification possibilities under the new proposal in four key ways. First, it expanded the definition of ‘family members’ to include an asylum seeker’s “unmarried partner in a stable relationship, if the legislation of the Member State responsible treats unmarried couples in the same way as married couples, provided that the couple was formed in the country of origin” as well as, “where appropriate, other persons to whom the applicant is related and who used to live in the same home in the country of origin, if one of the persons concerned is dependent on the other” (Article 2(i))<sup>190</sup>. Second, it introduced an entirely new criterion, which it placed at the very top of the hierarchy, which stipulated that unaccompanied minors, in particular, must be reunified with family members (who they are to be deemed “indissociable” from), provided that this is in the best interests of the child (Article 6). Third, the Commission extended the applicability of family reunification to cover family members who were in the *process* of having their application for asylum examined in one of the Member States, as opposed to just those who had already been accepted (Article 8). Fourth and finally, the Commission stipulated that where several members of a family submit applications in the same Member State (either simultaneously or on dates close together) and where the application of the Dublin rules would see them separated, they shall remain in the same state with responsibility going to whichever state is responsible for the highest number of applications or to that which is responsible for the eldest applicant (Article 15).

With regards to the criterion on irregular presence, while the Dublin Convention had already stipulated that responsibility would be allocated to any Member State where an

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<sup>190</sup> Whereas the Dublin Convention restricted family to “the spouse of the applicant for asylum or his unmarried child who is a minor of under eighteen years, or his or her father or mother where the applicant for asylum is himself or herself an unmarried child who is a minor of under eighteen years (Article 4).

applicant had been able to reside irregularly for more than 6 months (on the basis that they had failed to uphold their responsibility vis-à-vis their partners to take effective action against the irregular presence of TCNs), the new proposal included an accompanying provision that allocated responsibility to any Member State that had “knowingly tolerated” the irregular presence of a TCN for more than two months. Arguably seeking to appease those Member States concerned with external border ‘free-riders’<sup>191</sup>, the Commission justified the inclusion of this new provision on the grounds that it was intended to discourage Member States from implicitly encouraging secondary movements; where Member States are indeed aware of the unlawful presence of a TCN and fail to remove that person, the State “which has tolerated such a situation has, through its inertia, encouraged the plans of the [TCN]...to travel unlawfully to another Member State in order there to declare his intention of requesting recognition of refugee status, whereas the threat of removal would have led the person concerned...to lodge an asylum application” in the Member State where they were at that point present (Ibid: 14-15). On a related note, seeking to further appease these Member States, and in response to the virtual inapplicability of the illegal entry criterion under the terms of the Dublin Convention, the Commission had also recommended relaxing the related evidentiary requirements; thus, according to the proposal, Member States should be required to ‘show’ rather than ‘prove’ illegal entry or stay. Moreover, in cases where formal sources of proof are unavailable, “the requested Member State should recognise responsibility once a body of corroborating evidence makes it possible to establish responsibility with a reasonable degree of probability” (Commission 2001b: 18).

The other key change made to the hierarchy of criteria (which was quite surprising given that it would work to the detriment of asylum seekers), was that the Commission had removed the requirement of consent with regards to the application of the sovereignty and humanitarian clauses on the basis that the applicant had implicitly consented to the

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<sup>191</sup> This is a reference to the discussion in section 2.2.2, whereby certain states are expected to try to free ride in the overall provision of a public good, while still reaping the benefits of its provision. As applied here, external border states with weak asylum systems/border control (e.g. Greece and Italy) have an interest in allowing/implicitly encouraging illegal secondary movements to other member states (e.g. Germany, Denmark, the UK, etc.) in order to avoid the cost of processing the application on their own territory, thereby freeriding on the contributions of others to the protection regime. In so doing, they are also cheating their ‘toll’ for access to the Schengen club good.

processing of their application by the relevant Member State by virtue of submitting it there (despite the fact that Member States were deliberately invoking these clauses to subject applications to accelerated procedures in order to avoid subjecting them to Dublin).

With regards to the timelines pertaining to Member States' take charge/take back obligations, the Commission had introduced some similarly seemingly contrary changes. While on the one hand, the Commission reduced the deadlines for submitting and responding to take charge requests (from 6 months to 65 working days and 3 months to 1 month, respectively) and introduced the possibility of requesting an urgent reply, it simultaneously extended the timeline for the execution of transfers from one to six months on the other hand, thereby prolonging the potential overall length of the procedure instead of shortening it. Correspondingly, while the proposal at once introduced an obligation for Member States to communicate to an asylum seeker a reasoned decision on which they might base an appeal, it concurrently denied the right to suspensive effect on the grounds that this would help ensure the efficiency of the system by preventing the lodging of appeals as a stall tactic. Thus, arguably in response to the tone of Member State contributions in the pre-consultation process and keen to be seen as a responsible 'agent' in this area, the Commission appeared to have adopted a sort of tit-for-tat approach to several of its proposed changes, careful not to deviate too far in any one way from the majority interest in the Council. Thus, in exchange for a standard-enhancing amendment in one area (e.g. expanding the right to family reunification and an informed right to appeal), the Commission had aligned itself more closely with (some) Member State interests in other areas (e.g. increasing accountability for permitting/tolerating illegal entry/stay and removing the possibility for suspensive effect). Interestingly, the previously stipulated possibility for requesting a suspension of transfers in situations of 'major difficulties due to a 'substantial change in circumstances' was also not included in the Commission's proposal<sup>192</sup>.

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<sup>192</sup> As provided for in Article 17 of the Dublin Convention.

### *Power on Paper, but not in Practice: A Constrained Commission 'Playing it Safe'*

Taken as a whole, the draft regulation ultimately proposed by the Commission did not depart significantly from its predecessor. Indeed, for all intents and purposes, it was effectively a EU-level replica of the Dublin Convention, bar a few minor modifications. This is arguably not surprising given that “where unanimity applies, the resulting text is never very ambitious and is almost always disappointing” (Interview, Council Secretariat). As the Member States had deliberately maintained unanimity voting on asylum matters, the Commission knew that any proposal it put forward would have to receive the unanimous approval of at least twelve, if not fourteen, Member State governments<sup>193</sup>. This inherently limited the Commission’s newly obtained formal agenda setting powers, thereby also limiting its ability to propose policy provisions that deviated from the preferences of the Member State most resistant to change. As a result, and mindful of Member State interests (of which it was acutely aware on account of the pre-consultations<sup>194</sup>), the Commission rationally embarked upon the path of least resistance and the one most likely to successfully obtain unanimous agreement – that is, the maintenance of the status quo.

This overall strategy of playing it safe – while largely intended to ensure the approval of its proposal (thereby avoiding the embarrassment of a rejected one) – can also be understood as a tactic of institutional self-interest. The Commission was arguably highly aware of the general sense of reluctance on behalf of the Member States to fully commit to delegation in this policy area (Interview, MEP), as evidenced by the staged and highly controlled approach to its partial communitarisation to date. As the Commission had only just been granted drafting privileges in this area (which it held jointly with the Council), it was undoubtedly concerned with effectively gaining the confidence of the Member States and demonstrating that it could be trusted with the *sole* right to legislative initiative. In putting forward passable legislation that did not really ruffle the feathers of key Member States, the Commission stood to not only consolidate and legitimise its involvement in JHA and asylum policy-making, thereby ensuring its continuation, but also to potentially encourage a

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<sup>193</sup> The EU-15 minus Denmark, but potentially inclusive of Ireland and the UK.

<sup>194</sup> The Commission was also mindful of the fact that previous JHA discussions on options for physical burden sharing had not produced any results (Commission 2000: 12).

further expansion of its powers in this field. This was especially true given that the aforementioned 5-year transitional period post-Amsterdam was specifically intended to function as a trial period for the Commission, which, if passed, would result in the delegation of the exclusive right to legislative initiative alongside the transition to QMV – a shift which would invariably increase the Commission’s manoeuvrability in proposing future legislation<sup>195</sup>. This was contingent, however, upon the Council’s successful adoption of the first stage of Community legislation on asylum as outlined by the Tampere programme, thereby giving the Commission considerable incentive to advance relatively docile proposals in order to ensure that they would be agreed on time (as members of the Council are typically more willing to hold up negotiations until their preferred policy options are accommodated, which is why negotiations based on unanimity voting are expected to take so long). Thus, despite its initial optimism that the new institutional arrangements for asylum policy-making (brought about by treaty changes) would work to provide an important opportunity for a fundamental reconsideration of the Dublin Convention’s approach to asylum responsibility, that very same structure had ultimately compelled it to preserve the flawed foundations of the existing system in its proposal for the sake of reaching agreement – a decision that was both inherently strategic and deliberately restrained.

### ***5.3.2 Decision-Making in a Divided Council: ‘Silencing’ the Opposition***

Following the submission of the Commission’s proposal, negotiations in the Council began under the Belgian presidency, proceeded under the Spanish presidency (which also covered consultation with the EP), and concluded in December 2002 under the Danish presidency, following its invocation of the *silent procedure*. Within the Council, the main points of disagreement over the Commission’s proposal related to the scope of its application, possibilities for family reunification, the right to return applicants to non-EU STCs, the continued use of the authorisation principle, the criterion relating to illegal entry and/or stay and the evidence requirements pertaining to its application, as well as the various timelines specified for executing take charge and take back requests.

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<sup>195</sup> See footnote 28.

*Initial Disagreement under the Belgian Presidency: Southern Resistance, Northern Insistence*

The first reading of the Commission's draft regulation took place in the Council's Asylum Working Party (AWP) on 2 October 2001. Despite the Commission's conservatism in the drafting of the proposal, much of the early discussion on its provisions centred around many of the same issues that had proven problematic or contentious in the negotiations on both the SIC and the Dublin Convention.

One of the immediate points of disagreement consequently related to the scope of the regulation. On the one hand, the Netherlands, Finland and Sweden all insisted that the proposed regulation "must apply to all forms of international protection, [and] not just asylum" (Council 2001/12501/01: 2, footnote 1). As each of these three states recognised and offered some form of subsidiary protection status in their national legislation (ECRE 2004), they consequently also wanted this recognition reflected – and harmonised – at the EU level in order to avoid any potential costs that may emanate from people withdrawing asylum applications on their territory in favour of lodging applications for other forms of protection in order to avoid being subject to Dublin<sup>196</sup> (thereby allowing them to remain). On the other hand, other Member States, including Germany, Greece, Spain, France, Austria and the UK all submitted scrutiny reservations to this effect, arguing that the regulation's applicability must be strictly limited to those applying for protection under the Geneva Convention, precisely due to the *lack* of harmonisation in this regard, which they feared might risk the possibility of delays and avoided transfers (thereby potentially increasing their own individual costs) (Council 2001/12501/01: 3, footnote 1; *Ibid*: 8, footnote 3).

Several of the Member States were also resistant to the Commission's changes with regards to family reunification (as more possibilities for family reunification would result in more possibilities for returns to their territories on that basis). Germany, Spain, France, Ireland, Italy, Austria and the UK all registered scrutiny reservations on the Commission's expanded definition of family members, arguing that the "extension of the Dublin Convention

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<sup>196</sup> Or, indeed, to be incentivised to engage in secondary movements to their territory in the first place in order to lodge applications for subsidiary forms of protection for this same reason. This is consistent with classic misfit theory, as outlined in Chapter Two.

definition...could result in problems of proof and could affect the duration of procedures” (Ibid: 5, footnote 1). Germany, France, Ireland, Austria and the UK also registered scrutiny reservations regarding the *automatic* granting of family reunification on the basis of family members who are in the *process* of having their claims examined (Ibid: 11, footnote 1).

At the same time, Austria insisted that the Commission re-include the previously provided for right of Member States to return applicants to a STC outside of the EU, pursuant to their national laws (Ibid: 8, footnote 1). As Austria had recently concluded readmission agreements with several of the CEECs, including Hungary, Slovenia, Slovakia, the Czech Republic and Romania (Lavenex 1999: 85; Baldwin-Edwards 1997: 516)<sup>197</sup>, it had a discernible interest in retaining this right in order to transfer asylum applicants (and the costs associated with them) away from their territory on the basis of these agreements (and indeed, away from the EU altogether).

As their participation in Schengen was no longer conditional on their acceptance of the Dublin rules, and eager to express their discontent at this early stage in the negotiations, both Italy and Greece entered formal reservations on the continued use of the authorisation principle. As their geography made them particularly vulnerable to responsibility that was allocated on this basis, they therefore had an obvious interest in the use of an alternative principle (in order to minimise their relative burden), and – emboldened by the requirement of unanimity - were clearly demonstrating their willingness to act as potential veto players in this regard. To this end, Italy specifically argued that, “the Member State responsible for examining an asylum application must be the Member State with which the application was actually lodged” (Ibid 8, footnote 1). For the same reasons, both countries also registered formal reservations on the illegal entry criterion in particular, with Italy specifically highlighting the fact that a “Member States’ duty to guard their borders should not be confused with determining the Member State responsible for examining an asylum application” (Ibid: 13, footnote 2).

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<sup>197</sup> Austria also benefited from the Schengen-wide readmission agreement with Poland.

In a similar vein, both Spain and Greece (as external border states highly susceptible to returns on this basis) registered formal reservations on the relaxation of the evidence requirements for demonstrating illegal entry and/or stay (Ibid: 13, footnote 2). The Commission's new criterion relating to the 'knowing toleration' of illegal presence also received resistance, garnering formal reservations from both Greece and Italy (states with high rates of illegal entry), with France, Ireland, Luxembourg, Italy and the Netherlands requesting a definition for 'knowingly tolerated' (Ibid: 14, footnote 3). Ireland also expressed its concern as to the potential difficulties that would likely arise in the application of this criterion (Ibid). With regards to the criterion on family reunification, and wanting to avoid the potential allocation of additional responsibility on this basis (and therefore additional costs), Germany, France, Austria and the UK (as high receiving states with well established asylum systems and strong administrative capacities) all lodged scrutiny reservations on the proposed expansion of this provision to also include family members who were in the process of having their claims examined (Ibid: 11, footnote 1).

Several of the Member States further resisted the changes that the Commission had made to the timelines pertaining to both take charge and take back requests. Those Member States with lower administrative capacities and less established asylum systems, namely Greece, Italy and Spain, protested the new one-month timeline for replying to take charge requests, with Greece asserting that this was "unrealistic because in practice a large number of checks need to be made. Provision [sic] must be made for exceptions, particularly in light of the international situation" (Ibid: 20, footnote 3)<sup>198</sup>. Meanwhile, several Member States with higher administrative capacities and more established asylum systems (France, Netherlands, Finland and Sweden), insisted on setting a specific time limit with regards to the newly introduced possibility of requesting an urgent reply (Ibid: 19, footnote 1). As they were likely to be able to comply with whatever deadline was set, they therefore had an interest in ensuring that their less effective partners had a specific window to adhere to. Germany, Spain, Austria, the UK and Sweden also opposed the new 6-month window for executing transfers, on the basis that this would open the procedure up to abuse as asylum applicants

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<sup>198</sup> Greece also issued a reservation against the maintenance of the 8-day reply requirement in the case of take back requests, asserting that this was also "too short and unrealistic" (Ibid: 22, footnote 2/3).

would be much more likely to abscond in that time, thereby preventing successful transfers and leading to a default assumption of costs (Ibid: 21, footnote 3)<sup>199</sup>.

The initial negotiation setting within the Council therefore more or less resembled what the situation had been like outside of it: individual Member States pursuing the attainment/protection of their national interests in an essentially intergovernmental forum. Unfortunately, beyond this initial discussion, further progress on the Dublin dossier had not proved possible under the Belgian presidency, as it had been unable to devote the necessary time and effort to these issues during the course of its tenure, as much, if not most, of its energy had been quickly subsumed by the need to coordinate the EU's collective response to the terrorist attacks that had occurred in New York City on September 11<sup>th</sup> (Aus 2006: 20)<sup>200</sup>.

*On-going Disagreement under the Spanish Presidency: Dishonest Brokering, Discussions in SCIFA and Strategic Issue Linkage in the JHA Council*

In advance of the AWP's next meeting on Dublin, scheduled for 19 February, the incoming Spanish presidency (January-June 2002) advanced its first compromise proposal. In it, and in response to the reservations issued during the Belgian presidency, the Spanish presidency amended the definition of family members to still include unmarried partners (consistent with national law) but removed the inclusion of 'other relatives' (Council 2002/5623/02: 4). Seemingly accepting this compromise, the relevant delegations rescinded their reservations (Council 2002/6344/02: 4). In a more pointed departure from the Commission's text, the presidency had also amended the ordering of the hierarchy of criteria by downgrading the criterion that allocates responsibility in situations of illegal entry (Council 2002/5623/02: 12-13). As this proposed re-ordering would quite clearly work in favour of Spain, due to its position as an external border country vulnerable to high rates of illegal entry, the presidency had arguably infringed upon the 'honest broker' norm that applies to the office of the Council presidency. Unsurprisingly, the Spanish proposal received enthusiastic support from fellow external border countries Italy and Greece, who also stood to benefit

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<sup>199</sup> Moreover, most Member States would be unable to detain an applicant for that long within the confines of national practice/legislation.

<sup>200</sup> The Belgian presidency did, however, secure the participation of both Ireland and the UK by finalising their 'opt-ins' (Council 2001/13428/01; Council 2001/13427/01).

from the demotion of the illegal entry criterion. Equally unsurprisingly, however, the presidency's proposal provoked strong rebuke from the more strongly positioned high receiving internal countries (and some of the criteria's original designers) who favoured a strong emphasis on the effective guarding of the external frontier, with Germany, the Netherlands, Sweden and the UK all calling on the presidency to "put the criteria back in the order...proposed by the Commission" (Council 2002/6344/02: 12, footnote 1).

Meetings continued within the AWP between March and May<sup>201</sup>, with minimal progress achieved, as the majority of the reservations and scrutiny reservations that had been originally registered by the delegations remained on the table. Alongside those pertaining to scope, family reunification<sup>202</sup>, and non-EU STCs<sup>203</sup>, Greece and Italy maintained their formal reservations on the authorisation principle and the hierarchy of criteria (Council 2002/6485/02: 9, footnote 1; Council 2002/8207/02: 9, footnote 1; Council 2002/8752/02: 9, footnote 1), while Germany, the Netherlands, Sweden and the UK continued to insist that the ordering of the criteria be returned to their normal format in order to properly convey the importance of the illegal entry criterion, in keeping with the authorisation principle (Council 2002/6485/02: 12, footnote 1; Council 2002/8207/02: 15, footnote 1; Council 2002/8752/02: 13, footnote 1). Despite the earlier inclusion of a reference to Eurodac (which would make the execution of take back requests considerably easier on account of easily confirmable proof in the form of fingerprints) (Council 2002/6344/02: 12), disputes also continued in relation to the evidentiary requirements pertaining to illegal entry/stay. As Greece had an obvious interest in sustaining the current requirements (and the resulting low rate of (successful) requests), the Greek delegation insisted that "verifiable evidence must be produced to prove that the applicant entered the country via the border of a particular

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<sup>201</sup> Meetings were held on 20/21 March (Council 2002/6485/02), 16 April (Council 2002/8207/02), 7/8/17 May (Council 2002/8752/02).

<sup>202</sup> While several of the other states had withdrawn their scrutiny reservation pertaining to family reunification in cases where an applicant's family member was in the process of having a claim examined, the UK maintained its reservation (Council 2002/6344/02: 10, footnote 1).

<sup>203</sup> This was despite the fact that the Commission had reassured Austria that "nothing prevented a Member State from using the safe-third-country clause". The Commission therefore argue that such an addition was unnecessary, and that, regardless, this matter should be left to the proposed directive on asylum procedures (Council 2002/6485/02: 7, footnote 1).

Member State” (Council 2002/6485/02: 12, footnote 2)<sup>204</sup>. As the more insulated British and Irish delegations would conversely benefit from loosened requirements of proof, they conversely lobbied in support of the Commission’s proposed changes (Ibid). Several of the delegations also remained unconvinced as to the inclusion of the Commission’s new criterion on ‘knowingly tolerated’ unlawful presence due to anticipated practical problems in its application, and consequently requested that it be deleted (Ibid: 13, footnote 1). With regards to time limits, while the Spanish presidency had proposed a further extension of the time allowance for executing transfers from 6 months to one year (despite earlier resistance to the Commission’s already extended deadline of six months compared to one month under the Dublin Convention), the Member States did manage to resolve a compromise text, which maintained the Commission’s suggestion of 6 months, but which allowed for an extension of up to one year if the transfer could not be carried out due to serious illness or detention. Several reservations still remained on this provision, however, with Denmark, the Netherlands and Sweden requesting that this extension also cover cases of disappearing applicants<sup>205</sup> (Council 2002/8752/02: 24).

Frustrated with the lack of progress that had been achieved up to this point by the negotiations within the AWP, the Spanish presidency decided to elevate the conversation to a higher institutional level in the hope of reaching some sort of compromise. The proposal was consequently discussed within SCIFA on 23/24 May. At this point, SCIFA immediately made several changes to the proposed text in an effort to ameliorate the state of dissatisfaction with the current proposal. One such move, intended to appease the Austrian delegation, was the re-introduction of the STC provision as it pertained to non-EU states (which arguably also worked to the benefit of everyone, as it would allow Member States to continue to ‘export’ the costs for processing asylum applications to their neighbours in keeping with pre-existing readmission agreements) (Council 2002/9305/02: 6). Given that the Spanish presidency’s compromise text had actually exacerbated some of the crucial conflict

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<sup>204</sup> Similarly, both Greece and Italy argued that transfer requests “must include evidence, proof and the asylum applicant’s fingerprints in order to enable the authorities of the requested State to establish whether it is responsible for examining the asylum application and checking the applicants’ exact identity” (Ibid: 18, footnote 1).

<sup>205</sup> Considered among the more liberal destination countries, it was feared that applicants would be more likely to disappear or abscond in order to evade transfer (possibly to a less liberal state).

lines within the AWP (particularly among the northern Member States), SCIFA also reverted the hierarchy of criteria back to the original order put forward by the Commission, once again placing greater importance on irregular entry in the determination of responsibility (Ibid: 13-14) – a move which was unsurprisingly opposed by Greece and Italy, who reiterated that the ordering of the criteria should “avoid penalising Member States due to their geographical situation”.

At the beginning of June, and coming up to the end of its term, the Spanish presidency reported to COREPER that despite intensive negotiations, agreement on the proposed text had thus far proven impossible, due to on-going discord between the Member States (Council 2002/9563/02). At this point, the presidency drew up the following list of questions directed towards the Member States, which centred on the most crucial points of outstanding disagreement (Council 2002/9563/1/02: 3):

1. Should irregular border crossing and unlawful presence in the territory be maintained as criteria for defining the Member State responsible for examining the asylum application?
2. Should the reference to knowing toleration of the unlawful presence of [TCNs] be maintained?
3. Should the aforementioned criteria appear in the order of precedence given in the Commission proposal?
4. Is it possible to maintain the provisions of the original Commission proposal to the effect that responsibility for examining the asylum application should revert to the Member State where the application was lodged if, 6 months after the transfer decision, the transfer of the asylum seeker has not been carried out?
5. Regarding the previous question, should there be exceptions to take account of, for example, the lodging of an appeal, disappearance of the asylum applicant, serious illness, or detention of the applicant, etc.?
6. Are the time limits set for deciding on requests for ‘taking charge’ and ‘taking’ back considered appropriate?

To this end, the delegations were all invited to answer the above questions in order to gain a clearer view of the ‘state of play’ in the negotiations and to facilitate consensus on these crucial issues (Council 2002/9563/02; Council 2002/9563/1/02)<sup>206</sup>. The strongest, and in fact, the only formally submitted response came from the Italian delegation. With regards to irregular/unlawful entry/presence (questions 1-3), Italy insisted that the criterion established

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<sup>206</sup> This was a tactic that was also employed by the Spanish presidency in order to reach agreement on the reception conditions directive.

in the Dublin Convention was no longer appropriate in light of the “radically [changing]” asylum phenomenon; as such, they argued that the maintenance of the current approach was “plainly at odds with the principle of shared management of external borders” and that “the responsibility criterion relating to unlawful border crossing should [therefore] not be included among the criteria or, failing that, should be of an entirely residual nature, insofar as there has been a clear failure to comply with the common provisions”. For the sake of the rapid completion of asylum procedures, the Italian delegation accepted the principle that responsibility should default in cases where Member States have failed to execute a transfer in a timely manner; however, they did specify that exceptions should not be made in this regard that extend beyond circumstances that are “independent of the asylum seeker’s will” (i.e. only in situations of serious illness, and not in cases of disappearances or deliberate absconding). They also insisted that time limits must be appropriately proportional to the required standard of proof (Council 2002/10102/02).

The Presidency had presented these same issues to the JHA Council, which were subsequently discussed at its meeting on 13 June. In a move clearly designed to place increased political pressure on the Member States, the JHA Council Ministers emphasised in their discussions the “close link between this question and the issue of combating illegal immigration” and “underlined the importance of reaching agreement on this subject in the near future” (Council 2002/9620/02 Presse 175). As the fight against illegal immigration (and the various other criminal activities often associated with it) had been articulated at Tampere as one of the core objectives of the AFSJ alongside the creation of the CEAS, the JHA Ministers knew that this strategic act of issue linkage would make it increasingly costly, in political terms, for Member States to be seen to be impeding agreement on Dublin, as this would now also be interpreted as an act of interference in the collective effort to combat illegal immigration – an objective which everyone *could* actually agree on. The JHA Ministers also noted that the European Council would discuss both of these issues at their next meeting in Seville on 21/22 June. As promised, and with the link between these two issues forged, the European Council at Seville urged the Council in its Presidency Conclusions to adopt the Dublin II Regulation by December 2002 “in parallel with closer cooperation in combating illegal immigration” (European Council 2002: 9).

### *Consultation with the EP: Ignored at the Side-lines*

During the course of the Spanish presidency, the EP had issued its opinion on the draft regulation, as per the requirements of the consultation procedure. Within the EP, the Committee on Citizens' Freedoms and Rights (JHA) had considered the proposal over the course of three meetings, held on 15 October 2001, 20 February 2002 and 19 March 2002, and had ultimately approved its list of amendments (and the proposed legislation) at the last of these meetings by a vote of 34 to 9, with 1 abstention (EP 2002/A5-0081).

With regards to the system as a whole, and having (like the Commission) accepted the lack of collective will for more fundamental reform, the EP conceded, "not least because of the absence of viable alternatives, [that] the right approach seems to be to continue the tried and tested system of the Dublin Convention" (EP 2002/A5-0081). Nevertheless, it did recommend several adjustments to the text that sought to enhance protections for asylum applicants, focusing specifically on the rights of minors and family reunification. With regards to the Commission's new provision on family reunification in the case of unaccompanied minors, the EP proposed that 'family' ought to also include 'other relative(s)', as "the group of people who can take charge of the child should not be restricted unnecessarily" (Ibid: Amendment 3). They also extended this recommendation (in terms of the inclusion of other relatives) to the general provision on family reunification: "The definition of family member seems to be too narrow...as it concerns cases in which the needs of family members are taken into account, for instance on health grounds. It would [therefore] be appropriate to widen the family circle" (Ibid: Amendment 6). On a related point, the EP further endorsed the idea that Member States be required to "inform the asylum applicant of the possibility of seeking family reunification or transfer on the basis of cultural or other humanitarian needs...in order to enable the asylum seeker to present relevant information" (Ibid: Amendment 7). Returning to the issue of unaccompanied minors, the EP additionally advised that the proposed 65-working day time limit for submitting/issuing take charge requests was "too short" for a full consideration of family reunification possibilities and that in these cases the "period in which the suitability of the family member is being examined...should not count as part of the time limit, which should only start to run afterwards" (Ibid: Amendment 8).

Aware of its weak position in the negotiations as consultant, the EP had clearly sought to align its recommendations with some of those made by the Commission (by focusing on family reunification and unaccompanied minors) in order to give additional weight to its proposed amendments. However, the EP's recommendations also went further than those made by the Commission, as the EP knew that - given the non-binding status of its amendments - it would have to speak louder in order to be heard. This was made easier by the fact that "if you know you are just being consulted, you can be much more ambitious than if you're actually involved in the legislation<sup>207</sup>" (Interview, MEP). Nevertheless, and as could arguably be expected, the EP's amendments were effectively ignored when it came to the final text of the draft regulation. This is consistent with expectations, as the Member States have generally displayed a "relative neglect of the Parliament as an actor" under consultation (Kaunert 2010: 142-143). Indeed, they treated the process of getting the EP's opinion as "a five minute thing...okay, this is the position of the parliament, thank you very much, [now we can] move on because we'd consulted them" and that was all that was required (Interview, NL Perm. Rep): "we didn't care whatever the Parliament would say...we do it our way" (Interview, Council Secretariat). This neglect was arguably further augmented by the fact that the EP's position carried very little perceived credibility, as the Member States generally held the view that the "EP wasn't anything more than a talking shell"; while their inclusion in the negotiations was "all very nice", the EP was seen to be "not living in the real world" when it came to asylum issues (Interview, MEP). Thus, while the Council had done its duty in consulting the EP, the fact remained that it was under no obligation to take its amendments on board. As a result, the EP's participation in the negotiation process on Dublin II had been essentially relegated to that of merely background noise<sup>208</sup>.

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<sup>207</sup> Because "the pressures on you as members aren't so great - your parties aren't sort of pressing down on you" (Interview, MEP).

<sup>208</sup> The European Economic and Social Committee (EESC) had also been consulted alongside the EP, consistent with consultation procedure. As it was only charged with issuing an (unbinding) opinion as opposed to actual amendments, the EESC was much bolder in its assertions. In its adopted opinion of 20 March 2002, the EESC asserted that the proposed regulation threatened to "[bring] into Community law the main features of a substantially flawed Dublin Convention" and that "even after the improvements proposed by the Commission, we will not have a Regulation that is clear, workable, effective, fair and humane" (EESC 2002/C 125/08). Moreover, they argued that the "harmonisation of asylum procedures, reception conditions, interpretation of the definition of refugee and other complementary forms of protection, should take place *before* formulating a system

### *Under Pressure: Denmark's Controversial yet Decisive Presidency*

As a result of the aforementioned Seville presidency conclusions, the incoming Danish presidency had therefore been tasked with the substantial challenge of reaching agreement on Dublin II by the end of the year. It is worth noting that the timing of this particular Danish presidency was not uncontroversial. Indeed, this particular session of the rotating presidency had actually been originally intended for the Greeks. However, as the office of the presidency is a highly demanding and resource intensive post, an agreement had been reached within the Council whereby Denmark (which was next in line for the position) would take Greece's place as chair, due to Greece's limited administrative and bureaucratic capacities. Greece would still have the ability to preside, however, over certain policy areas for which Denmark – a notoriously Eurosceptic country<sup>209</sup> – was deemed unsuitable (such as the ESDP). While JHA might have also been an obvious area for exclusion given Denmark's opt-out in this field, the sheer volume of the workload earmarked for JHA by the Seville presidency conclusions saw a resource-weary Greece elect to also delegate the responsibility for these matters – and the conclusion of the Dublin Regulation with it – to the Danes (Aus 2006: 24). This decision was arguably not without consequence; given Greece's stance in the negotiations to date, it seems reasonable to assume that the potential outcome of a Greek presidency at this stage might have differed considerably from that which transpired under the 'stand-in' Danish presidency.

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for allocating responsibility" (Ibid). Like the EP, the EESC also specifically recommended that the proposed regulation make explicit references to Member State obligations via international human rights conventions, while also advocating better protections for unaccompanied minors and a broader definition of family. In addition, it further recommended the inclusion of suspensive effect on appeals. Effectively conveying its discontent with the proposal, the EESC's conclusion read as follows: "The right to seek asylum is contained in the Universal Declaration on Human Rights is undermined [sic] by a system which links allocation of responsibility for asylum applications to responsibility for entry controls. Such a system encourages States to prevent asylum applicants from ever reaching their territory through an ever-increasing variety of control measures. Far from contributing to safeguarding of rights at national level, this proposed regulation undermines those rights. It encourages Member States to externalise their borders and to take repressive measures against those seeking entry into their territory with the result that asylum seekers are forced into the hand of organised criminals involved in human trafficking".

<sup>209</sup> A previous referendum in Denmark had rejected the Maastricht Treaty, which had resulted in the negotiation of several opt-out clauses, one of which applied to its participation in the field of JHA. A subsequent referendum had also rejected the euro; meanwhile immigration had become one of the central issues in the 2001 Danish election, which resulted in victory for the centre-right on the basis of electoral promises of restrictive reform (Laursen and Laursen 2002: 6).

Mindful of its December mandate, and eager to reach swift agreement for national reasons as well<sup>210</sup>, the Danish presidency immediately went about putting forward a compromise proposal for discussion at the SCIFA meeting of 23 July. In order to appease the up-to-now obstinate Italian and Greek delegations, the Danish presidency introduced the possibility of including a safety clause, similar to that which had existed under the Dublin Convention but which had not been included in the Commission's proposal. Situated in the section on Administrative Cooperation (Chapter VI), the proposed clause would provide the option of an opt-out for Member States who were receiving unduly high numbers of asylum seekers (Council 2002/11139/02). To this end, the presidency put forward two scenarios for how such an opt-out might be invoked. The first would allow Member States to request that the Commission call for a suspension of Dublin's provisions in situations where a particular Member State has received a higher proportion of its share of the total number of asylum seekers received in the EU, plus 35%, for a period of 3 years. The Commission would then present this request to the Council, which would vote by qualified majority. The second would also allow Member States to request that the Commission call for a suspension of transfers in cases where "a Member State encounters great difficulties owing to a fundamental change of the situation on which this regulation is based". Requests made on this basis would also go to the Council for a vote by qualified majority, and if the suspension were approved, would be reviewed every three months for up to a maximum period of one year (Ibid).

At the same SCIFA meeting, it was decided that a special drafting group (chaired by the presidency and composed of representatives from the Member States, the Commission and the General Secretariat of the Council) would be convened to help draft compromise proposals for the provisions that were yet to be agreed. Following initial discussions within this drafting group, the presidency presented SCIFA with the resulting compromise proposals on 25 September. While opting to temporarily postpone further consideration of the wording of the criterion relating to responsibility in cases of visa exemptions or airport

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<sup>210</sup> Provided that a Danish opt-in agreement for Dublin could also be subsequently reached, a more effective Dublin (inclusive of the Eurodac regulation) would likely help facilitate the removal of asylum seekers from Danish territory – a goal very much in line with the objectives of the aforementioned centre-right government that was in the power at the time (Aus 2006: 26).

transit zones, the group had proposed a merging of the criterion related to illegal entries, the knowing toleration of unlawful presence (2 months) and prolonged unlawful remain (6 months)<sup>211</sup> “in order to strike a balanced compromise regarding the hierarchy of criteria” thereby “not giving precedence to any of the three responsibility criteria set out in these articles” (Council 2002/12154/02: 2). With a view towards the upcoming implementation of Eurodac, the group also proposed amending the time limit for replying to take back requests accordingly (as registered fingerprints would provide quick and reliable proof as to responsibility). Thus, while the standard one-month time limit remained in place, this time limit was reduced to two weeks in cases where the request was based on data obtained from Eurodac (Ibid: 9). It was further proposed that Member States should have at least one week to respond to urgent reply requests, and that possible extensions to the 6-month transfer limit (1 year in cases of imprisonment<sup>212</sup>) should also cover cases where the asylum seeker absconds (as per the previous requests issued by Denmark, the Netherlands and Sweden) up to a maximum period of 2 years (Ibid: 9-10). Due to a lack of adequate support, the presidency’s previously proposed safety clause had also been deleted (Ibid: 2).

Having obtained ‘general support’ for the drafting group’s compromise proposals within SCIFA<sup>213</sup> (though the other core reservations on the Commission’s proposal remained), the time-conscious Danish presidency forwarded the compromise proposals up to COREPER for approval (Council 2002/12381/02), and then further up to the JHA Council (Council 2002/12616/02). Following discussions in the JHA Council on 15 October, the JHA Council redirected the dossier back down to COREPER (having only proposed a few minor amendments to time limits (Council 2002/13365/02)<sup>214</sup>) with the instruction that they should continue working on the outstanding provisions with a view towards potential agreement at the next JHA Council meeting of 28/29 November (Council 2002/12984/02 Presse 308).

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<sup>211</sup> Articles 10, 12 and 13 in the Commission’s proposal.

<sup>212</sup> Serious illness had been removed.

<sup>213</sup> France, however, objected to the “[blurring] of the hierarchy of criteria” when “illegal entry should take precedence” (Council 2002/12381/02). Located in between but slightly north of Spain and Italy (and therefore vulnerable – as a main destination country - to secondary movements from these more accessible southern border countries), France had an obvious interest in the maintained prioritisation of illegal entry (as this would allow it to return asylum seekers to Spain and Italy) over the tolerance of unlawful presence/remain (as this would put a higher onus on it for monitoring and may more likely result in responsibility being attributed to it).

<sup>214</sup> The JHA Council changed the time for responsibility allocation in cases of unlawful remaining to a continuous period of 5 months and reduced the extension period for executing transfers in cases where asylum seekers have absconded to 18 months (instead of 2 years).

The presidency consequently called upon both SCIFA and COREPER to try to resolve the outstanding issues at their respective meetings on 5/6 November and 7/4/21 November (Council 2002/13596/02; Council 2002/14330/02; Council 2002/14651/02); however, with minimal changes made to the text and with most of the delegations opting to maintain their scrutiny reservations during this time, the prospect of reaching agreement remained unlikely. This was particularly true given that Italy and Greece continued to explicitly block any possibility for unanimous approval by maintaining their formal reservation on the authorisation principle and the hierarchy of criteria (Council 2002/13915/02: 9, footnote 1). This opposition persisted despite the Danish presidency's earlier (second) attempt to accommodate these two Member States (following the deletion of the safety clause) by proposing the inclusion of a draft declaration that would accompany the adoption of Dublin II and which proposed various short and medium term measures intended "to express [the Council's] solidarity with Member States particularly exposed to irregular crossing of the external borders" (Council 2002/12381/02: Annex 1). Thus, with only about a week to spare before the next JHA Council meeting (at which the Danish presidency had hoped a finalised text might be adopted), and with the Seville Council's December deadline right around the corner, political agreement on the Dublin Regulation was yet to be reached as all four layers of the Council's JHA infrastructure had failed to agree a common text.

### *The Eleventh Hour: Reaching Formal Agreement through Informal Means*

Given the lack of success achieved through the more formal negotiation channels, but determined to reach agreement in time, the Danish presidency consequently decided to take things 'offline', so to speak. As recounted by a Danish official involved in the negotiations in an interview with the author:

Nothing had worked, so instead of going for [another] round of negotiations in the Council, we informed the other Member States that we would sit down and try to formulate a compromise...and those who were interested in participating could. So we took it outside of the Council and we actually did it physically in the Danish permanent mission in Brussels (Interview, Civil Servant DK).

In a move clearly designed to place pressure on the recalcitrant states (i.e. Italy and Greece, who, despite lacking credibility on asylum matters were emboldened by their veto power), the Danish presidency sought to use this informal setting to their advantage. Knowing that Italy and Greece constituted a sort of miniature southern alliance<sup>215</sup>, the presidency knew that if they could break that alliance and get one of the states to withdraw their veto, they could likely get the other state to withdraw their veto as well. According to the same official: “we knew if we could get one to say yes, we could put pressure on the other” – and in this regard, “the Italians were the key” (Ibid). Having achieved a compromise text that was more or less acceptable with regards to the remaining reservations of the other Member States, and consequently having obtained the support of several of the crucial northern Member States as well as others “who weren’t really protesting”, the presidency attempted to apply that northern pressure on Italy by “wining and dining [them], from morning to evening [until they] slowly got on board”. Then, “once the Italians agreed, [the presidency] took in the Greeks and told them that Italy had accepted. So [Greece] also accepted” (Ibid).

On the basis of this informal understanding, the Danish presidency went ahead and submitted the draft regulation and supplementary declaration to the JHA Council on 28 November. In a rather unorthodox move, and due to “[uncertainty] as to whether there was actually a compromise or not” (Ibid) (given that Member State positions in the Council can’t often be trusted (Interview, Interior Ministry Anon)), the presidency decided to launch a silent procedure in the hopes of achieving political agreement on time. Described within the Official Rules of Procedure of the Council as a more informal and simplified version of the written procedure<sup>216</sup> (and originally intended for use on the CFSP), the silent procedure can be invoked on the initiative of the presidency and allows for a proposed text or decision to be “deemed to be adopted at the end of [a specified] period laid down by the presidency depending on the urgency of the matter, except where a member of the Council objects” (Council 2000: 28). In other words, unless someone ‘breaks the silence’ during the allotted decision-making period, the tabled proposal is considered to be agreed by default.

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<sup>215</sup> Despite Spain’s honest broker *faux pas* as president, Spain and Portugal had been comparatively reserved in the negotiations (in a manner proportional to their positionality).

<sup>216</sup> The written procedure allows acts of the Council on urgent matters to be adopted by way of written votes, where the usage of this procedure has been approved by the Council or COREPER (its usage can also be proposed by the presidency) (Council 2000: 26-28).

The deadline set by the Danish presidency in this case was 6 December (7 days from the procedure being launched). During the course of the procedure, the Dutch, Swedish, British and French delegations all entered scrutiny reservations on some outstanding issues (as they “still wanted their national preferences put into EU law<sup>217</sup>” (Interview, Civil Servant DK)), but subsequently withdrew them prior to its conclusion (Council 2002/5440/03). Surprisingly, and despite their consistent protestations and reservations throughout the entirety of the negotiations to date, both the Italian and the Greek delegation remained ‘silent’ throughout the duration of the declared procedure, thus staying true to the verbal confirmation that they had previously given the presidency.

In the end, it simply wasn’t worth it to either Italy or Greece to follow through with a veto. While they were obviously incentivised to try to hold out for the best possible agreement (which they were able to do on account of their veto power), Dublin at the time was actually more disadvantageous to them in principle than it was in practice (as shown in Figures 5.2 and 5.3). This is arguably partially why the Danish presidency’s strategy of trying to obtain Italy’s agreement first was so effective; as asylum was actually more salient in Italy than it was in Greece, once Italy backed down, Greece knew that it was in a much weaker position to keep arguing its disadvantage as the issue simply wasn’t salient enough to justify. Greece also lacked credibility in this regard, as it was still viewed as one of the main ‘weak links’ in the EU’s external border. Moreover, actually blocking legislation would have likely carried considerable political costs. Firstly, acceptance of the Dublin rules had been a condition of acceptance into the Schengen area for both of these states (from which they benefited considerably); to then turn around and veto those same rules immediately following the formal integration of the Schengen acquis into the EU legal framework<sup>218</sup> would likely draw the derision of those Member States that had originally formulated that package deal (and who continued to compensate them indirectly through other tools of financial redistribution<sup>219</sup>). Secondly, they would effectively force the failure of the Council to meet

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<sup>217</sup> For example, Netherlands issued a reservation as they still wanted the regulation to apply to applicants seeking subsidiary protection as per its national legislation (Ibid).

<sup>218</sup> Which occurred in 1999 with the Treaty of Amsterdam.

<sup>219</sup> I.e. cohesion policy.

the deadlines mandated by both the European Council and the JHA Council. More specifically, they would be seen to be circumventing more general progress with regards to the CEAS and the AFSJ, given the explicit policy linkages made between development in these areas and broader efforts geared towards combatting illegal immigration and guarding internal security. At the same time, while opposition Member States can be expected to be more obstinate under unanimity voting (and enabled in that regard), actually blocking legislation where consensus otherwise exists is generally frowned upon (Interview, Interior Ministry Anon). Thirdly, given that Greece had voluntarily forfeited its right to preside over this final round of negotiations, having handed it to the more credible and bureaucratically capable Danish administration, it would have been rather brazen for Greece to then turn around and (single-handedly<sup>220</sup>) veto their final compromise proposal<sup>221</sup>.

Even more tactically, however, Italy and Greece arguably also recognised that there was a certain safety in the status quo. In reality, the various difficulties associated with implementing the existing provisions meant that Dublin had barely been used (as shown in section 5.1) and that they had been only minimally affected as a result of its introduction (as shown in Figure 5.2). Given that nothing substantial had changed with regards to those provisions over the course of the negotiations, this was therefore likely to remain true. Even with the increased threat of responsibility presented by the introduction of Eurodac (which was expected to increase the rate of both take back requests and transfers on the basis of verifiable entries at the external borders), this would still be conditional on their compliance; if they didn't register fingerprints, they couldn't be held responsible on the basis of registered fingerprints. Pursuing a continued strategy of calculated evasion was therefore extremely straightforward.

Moreover, while the Italian delegation had previously argued for a burden sharing system, the Danish delegation had pointed out to them during the final informal talks that if such a system were actually introduced, it would be based on a fixed scheme and that they would actually end up "[having] to take people back from the North" – as a result, Italy quickly

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<sup>220</sup> Once Italy had withdrawn its veto.

<sup>221</sup> Especially after repeated attempts geared towards pandering to Italian and Greek reservations, e.g. the (re)introduction of a suspension clause and the inclusion of a supplementary solidarity declaration.

“gave up [this idea] and were okay with the text that was agreed” (Interview, Civil Servant DK). It was thus in their interest to preserve the certainty associated with a dysfunctional - albeit theoretically disadvantageous - system, which they knew they could evade, rather than pursue an uncertain system that might actually ensure that they take a larger ‘share’ of the EU’s asylum burdens in reality. At the same time, eastward enlargement promised to ‘soften the blow’ for Italy in terms of its geographic vulnerability. While it would still face consistent flows from the south, it would have new ‘buffers’ to its east, which meant that the first country of entry/illegal entry criterion might actually start to work to its advantage. Indeed, the potential impact of accession for Italy in this regard was fairly substantial given the increased pressures stemming from illegal immigration between the Italian and Slovenian border, with the number of undocumented migrants apprehended rising from 2,564 in 1998 to 6,068 in 1999 and 18,044 in 2000 (Pastore 2002: 2).

Thus, as a result of the successful completion of the silent procedure, the Danish presidency’s draft regulation and declaration were considered to be unanimously agreed as of 6 December 2002, at which point the General Secretariat of the Council invited COREPER to advise the JHA Council to adopt the regulation as an ‘A’ agenda item<sup>222</sup> at one of its upcoming meetings (Ibid). The Dublin II Regulation was therefore formally adopted on 18 February 2003<sup>223</sup>.

### **5.3.3 *The Final Text: The Preservation of the (Failed) Status Quo***

In the end, only a few modest changes had been made between the text of the Dublin Convention and the text of the Dublin II Regulation. This was primarily because: a) the Commission had had very little leeway to actually propose any deviations from the status quo in the first place; and b) even where they had, these proposed changes had been more or less done away with by the Member States during the course of the negotiations, as those Member States who preferred the status quo were able to effectively ensure its preservation.

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<sup>222</sup> ‘A’ agenda items refer to EU legislative acts that are to be approved without further debate.

<sup>223</sup> Following its formal adoption, the Danish delegation formally confirmed in April 2003 its intention to also ‘opt-in’ to the regulation (Council 2003/8273/03).

The scope of the Regulation still only applied to 1951 Convention Refugees despite the protestations of the Netherlands (who wanted recognition of subsidiary protection status as well in line with their national legislation), as other strongly positioned states such as Germany and the UK (who had a more restrictive domestic practice and only recognised subsidiary protection on a discretionary basis in their national legislation (ECRE 2004)) sought to avoid the potential adaptation costs associated with its expanded applicability. Austria (another strongly positioned state) had been successful in retaining the right to send applicants to STCs outside of the EU, despite the Commission's attempt to remove this ability. The definition of family had remained effectively the same, with the Member States having deleted the Commission's attempt to extend it to also include relatives (in order to reduce possibilities for individuals to be returned to their territories). The criterion pertaining to illegal entry also remained intact (due to the last-minute acquiescence of Italy and Greece as per above) - the requests for which could now also be based on 'circumstantial evidence'. While this relaxation of evidentiary requirements had been resisted by Greece and Spain, it had been supported by more strongly positioned states, such as the UK, whose preferences ultimately prevailed. The other pre-existing criteria remained more or less the same. With regards to the Commission's proposed additions to the criterion, while the Member States had removed the new provisions on 'knowing tolerance' of unlawful presence or prolonged unlawful remain due to likely implementation problems, they had accepted the Commission's proposed extensions to family reunification possibilities to include family members who were in the process of having their applications examined and to ensure that multiple family members submitting simultaneous obligations should be kept together. While both of these additions did present the potential for imposing additional costs on individual Member States, the likelihood for their applicability was ultimately low; the latter was at the bottom of the hierarchy so was unlikely to be used, as was the former, which despite being higher up in the hierarchy, was likely to be ignored by the Member States alongside the existing family reunification provisions because "it's too expensive [to administer], so they disregard it" (Interview, ECRE). The Member States had also accepted the Commission's removal of the consent requirement for the application of the sovereignty clause, as this worked to their advantage by allowing them to exercise their will without potential interference from the applicant.

The time limit for issuing take charge requests had been successfully reduced from 6 to 3 months in response to the challenges that had faced the efficient implementation of the Dublin Convention. And while the Commission had also sought to reduce the time for replying to such requests from 3 months to 1, resistance from the southern Member States had resulted in the compromise of 2 months. Supportive of the Commission's proposed possibility for requesting urgent replies, strongly positioned Member States, including France, the Netherlands, and Sweden had been successful in also pushing for the introduction of a time limit for replying to such requests, which was set at a maximum of 1 month<sup>224</sup>. The time limit for executing transfers was also ultimately extended from 1 to 6 months as per the Commission's proposal (in order to accommodate the various impediments that had been reported in the implementation evaluation). While some of the Northern states for whom Dublin was more salient (namely Denmark, the Netherlands and Sweden, who all had higher rates of net outgoing transfers<sup>225</sup> and who wanted to keep it that way) had initially resisted this idea on the grounds that it would lead to higher rates of absconding (thereby potentially resulting in their default responsibility), they ultimately fought for and were successful in guaranteeing a further extension possibility of up to 18 months in cases where asylum seekers did abscond, as this would allow them a bigger window to successfully execute a transfer following their successful detection. Though there was still no time limit for issuing take back requests, the limit for responding to such requests had been re-set at 1 month (instead of 8 days under the Dublin Convention, which had proved unmanageable) and 2 weeks in the case of Eurodac requests. Appeals and the possibility for suspensive effect were to still be deferred to current national practice.

Thus, taken in scope, nothing about the core features of the Dublin system had really changed as a result of this attempt at reform, despite its previously failed performance; despite the minor tweaks outlined above (pertaining mainly to time limits), the Dublin II Regulation was, for all intents and purposes, effectively the Dublin Convention dressed up as EU law.

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<sup>224</sup> With a respective minimum of 1 week.

<sup>225</sup> As shown in Figure 5.2.

#### 5.4 Conclusion: Dublin Endures – Prioritising ‘Style Over Substance’

This chapter has analysed the adoption of the 2003 Dublin II Regulation, which replaced the 1990 Dublin Convention. By tracing the process of its negotiation via the consultation procedure, its purpose was to explain why, despite the early problems associated with its core features, this first attempt at reform ultimately produced marginal results (despite the partial communitarisation of asylum policy-making), with the resulting regulation effectively replicating the content of its predecessor whilst entrenching it as EU legislation within the CEAS acquis. To this end, it found that policy output in this case (i.e. policy stability) can be explained by the deliberate decisions made by EU actors within the context of the policy-making process, in response to the either empowering or constraining effect of institutional and positional considerations (consistent with this study’s general hypothesis – H1). On top of this general conclusion, three additional conclusions stand out (which are also more or less consistent with the specified Dublin II hypotheses – H2, H3 and H4).

First, although the Commission had gained the right to legislative initiative in time for the negotiations on Dublin II, its formal agenda setting power was significantly constrained by the deliberate preservation of unanimity voting by the Member States. As a result, and despite its clearly stated preference for a fundamental reconsideration of the Dublin system’s foundations, the Commission had absolutely no real manoeuvrability in this regard due to the threat of Member State veto. As the Commission was also conscious of the conditions that had been placed on the further communitarisation of asylum policy-making via the Amsterdam Treaty, the Commission wanted to ensure that it was seen as a responsible agent (acting in line with Member State interests), so that full communitarisation would ensue. Thus, not only did the Commission know that a proposal based on its preferences would be immediately rejected by the Council, it also had an inherent interest in proposing passable legislation – i.e. the status quo.

Second, although the EP had similarly gained the right to issue amendments on proposed legislation in this field, its potential for influence was also extremely limited due to the non-binding nature of its opinions. Thus, while it too, had previously expressed its preference for a more far-reaching reform of Dublin (though it was also forced to accept that this was not

likely), and had advocated several rights-enhancing amendments to the text via its role as consultant, it had nevertheless been completely ignored.

Third, and as expected in the context of the consultation procedure, the Member States were still, by far, the dominant actors in the negotiations; however, some were inevitably more effective in pursuing their preferences than others (all of which were geared towards minimising potential costs and/or burdens that may result from policy change). Before the negotiations in the Council had even started, the more strongly positioned Member States (inclusive of the Schengen-Five) had been able to successfully exercise informal agenda setting power during the pre-consultations in order to flag their preferences to the Commission, which now acted as the gatekeeper<sup>226</sup> for policy-making. In so doing, they were able to successfully assert their insistence that the authorisation principle and the existing policy frame of blame be maintained (despite the fact that a system based on these frames clearly wasn't working) in order to keep sending the right symbolic message to the weaker Member States as to their responsibility for controlling entry (a message which would take on even more importance for them as key destination countries following the accession of the CEECs). As a result, (and due to unanimity voting rules), they were able to effectively block reform before it was even proposed. These states were also more effective at imposing their more specific preferences onto the text *during* the Council negotiations. As for Italy and Greece, who actually preferred a change to the status quo, they had (despite their weak position) been empowered in their resistance during the negotiation process as a result of their right to veto; however, they eventually surrendered their veto for primarily (rational) tactical reasons and due to an after-the-fact preference for the safety of the status quo (i.e. the opportunity for sustained non-compliance). Moreover, the strongly positioned Danish presidency's ability to successfully navigate institutional procedures had helped to ensure their 'silence' in order to push the regulation through prior to deadline.

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<sup>226</sup> See: Héritier 1996: 2.

## **6 An Institutionalised Preference for Sustained Dysfunction: Recasting EU Asylum Legislation under the Co-Decision Procedure - The Negotiation of the 2013 Dublin III Regulation**

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This chapter analyses the adoption of the 2013 Dublin III Regulation, which replaced the 2003 Dublin II Regulation. Its purpose is to explain why, despite the on-going failures of the Dublin system and the continued problems associated with its key features, this second attempt at reform also produced marginal results with regards to the system's underlying foundations, with the resulting recast regulation once again replicating the content of its predecessor, thereby re-legitimising its position as the cornerstone of the CEAS. Following the same overall structure as the previous chapter, this chapter therefore begins with a brief discussion as to the recurring failures of the Dublin system following the introduction of the Dublin II Regulation, which helped instigate the need for further reform. The second section then establishes the institutional context for reform as well as the anticipated positionality of the actors involved. On this basis, the third section analyses the negotiations of the Dublin III Regulation in order to address the puzzle outlined above, by tracing the agenda-setting and decision-making processes that resulted in its agreement. The fourth section concludes with a discussion on how the particular intersection of preferences, positions, and institutions in this case ultimately helped to ensure the continued stability of the Dublin system through this second attempt at reform.

### **6.1 The Need for Further Reform: On-going Problems with the Dublin System**

Despite the changes that had been made to the Dublin system between the 1990 Dublin Convention and the 2003 Dublin II Regulation, the system's overall implementation was nevertheless still riddled with difficulties. Disappointingly, the Commission's Dublin II implementation evaluations<sup>227</sup> seemed to reveal a similarly minimal impact to that of its predecessor, when considered against the total number of applications for asylum lodged throughout the EU. Between September 2003 and December 2005, the number of total

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<sup>227</sup> The request for which was issued in the Hague Programme, adopted by the European Council of 4-5 November 2004.

transfer requests issued under the Dublin Regulation only accounted for approximately 11.5% of the total number of asylum applications lodged in the entire EU during that same period (Commission 2007b: 4). Of those requests issued, 72% of them were accepted, and of those requests accepted, only 42% of them were actually subject to transfer. This further translated into a transfer rate of only 30% of the total number of Dublin requests issued and a mere 3% of the total number of asylum applications lodged in the EU during this time (Ibid).

When compared to the performance of the Dublin Convention, the number of requests based on fingerprint hits now accounted for more than 50% of all incoming and outgoing requests as a result of the introduction of Eurodac (the EU-wide database that facilitates the comparison of asylum applicant fingerprints); however, the overall impact of this change was rather moderate as the overall level of acceptances as a share of the total number of Dublin requests only increased from 69% to 73% (Commission 2007c: 16). A slightly higher increase in the rate of transfers as a percentage of acceptances could be observed between the Dublin Convention and the Dublin Regulation, increasing from 28% of outgoing acceptances under the DC to 52% under Dublin II and from 26% to 40% with regards to incoming acceptances (Ibid). Furthermore, the proportion of transferred applicants as a percentage of total applications had doubled from a meagre 1.66% (incoming transfers) and 1.67% (outgoing transfers) to 4.05% and 4.28% respectively. Thus, while there was clear evidence that the performance of the Dublin Regulation had improved marginally over that of the Dublin Convention, its overall effectiveness and rate of implementation was still extremely low. The actual rate of transfers therefore remained the “main problem for the efficient application of the Dublin system” (Ibid: 17).

Table 6.1: Performance of the Dublin Convention and the Dublin II Regulation Compared

	Dublin Convention		Dublin Regulation	
Geographical Scope	EU-15		EU24 + IS + NO <sup>1</sup>	
Period	January 1998-December 1999		September 2003-December 2005 <sup>2</sup>	
	Incoming Data	Outgoing Data	Incoming Data	Outgoing Data
Requests	42,525	39,521	72,281 <sup>3</sup>	55,310 <sup>3</sup>
Eurodac based	X	X	38,807 <sup>4</sup>	28,393 <sup>4</sup>
Acceptances	29,514	27,588	52,952 <sup>3</sup>	40,180 <sup>3</sup>
Refusals			14,132 <sup>3</sup>	10,536 <sup>3</sup>
Transfers	10,896	10,998	16,099 <sup>5</sup>	16,842 <sup>6</sup>

<sup>1</sup> DK has joined the Dublin system based on the Dublin Regulation only since 1 April 2006.  
<sup>2</sup> Regarding new Member States May 2004-December 2005.  
<sup>3</sup> For IT, UK, LU and ES data available only for the period between January 2004 and December 2005. For FR: no data available.  
<sup>4</sup> For IT, UK and ES data available only for the period between January 2004 and December 2005. For FR and LU, no data available. For SE, no outgoing data available.  
<sup>5</sup> For IT, UK, LU and ES data available only for the period between January 2004 and December 2005. For FR, FI, SE, NO, incomplete data or no data available.  
<sup>6</sup> For IT, UK, LU and ES data available only for the period between January 2004 and December 2005. For FR, SE and BE, no data available.

Source: Commission 2007c: 16.

Returning once again to the four organising features of the Dublin system, several issues continued to stem from the concept of singular responsibility. Despite the optimism surrounding the introduction of Eurodac, the implementation of the Dublin II Regulation had seemingly achieved little in the way of reducing the rate of multiple applications, which was one of the key aims of singular responsibility. In fact, the rate of multiple applications (as registered by Eurodac) had actually increased by 10% between 2003 and 2005. The prevalence of such a high number of multiple applications ultimately indicated that the Dublin system had not had “the expected deterrent effect against the ‘asylum shopping’ phenomenon”. Thus, regardless of the progress that had been made in terms of policy harmonisation since the introduction of Dublin II via the minimum standards directives, asylum seekers still found it in their interest to “continue trying to obtain a favourable decision for their case by lodging more than one asylum application” (Ibid: 47) as a result of on-going discrepancies.

Table 6.2: Multiple Asylum Applications Lodged between January 2003 and December 2005

	No. of Eurodac registered asylum apps.	No. of all multiple apps.	Multiple apps. / Eurodac registered asylum apps.	No. of 3 <sup>rd</sup> and subsequent multiple apps.	3 <sup>rd</sup> and subsequent multiple apps. / Eurodac registered asylum apps. (%)
2003	238,325	16,429	6.89%	1,860	0.78%
2004	232,205	31,307	13.48%	7,873	3.39%
2005	187,223	31,636	16.89%	9,307	4.97%
Total	657,753	79,372	12.06%	19,040	2.89%

Source: Commission 2007c: 46

What was even more concerning, however, was that some asylum seekers were being denied the opportunity to even have their claim examined by a single EU Member State (Ibid: 20). This was the case in Greece, in particular, which had adopted a practice of denying access to the asylum procedure for individuals who had been returned under Dublin – particularly those who had been taken back as a result of irregular secondary movement. This meant that an applicant who had left the originally responsible state and had then been returned to it might ultimately be denied the re-opening of their case on the grounds that it had been implicitly withdrawn. This would in turn require the applicant to resort to the submission of a second application, which may then be subject to more stringent criteria as well as fast track procedures. Moreover, in cases where a negative decision had been issued in the applicant’s absence, the denial of the re-opening or re-submission of their claim meant that they could be automatically subject to expulsion (ECRE 2006: 150-153)<sup>228</sup>. As a result of this practice, “the substance of an asylum seeker’s claim [was] not in all cases examined [by] the responsible State...[which] clearly [undermined] one of the main purposes of the Dublin II system” (UNHCR 2006: 46), and significantly increased the risk of *refoulement*.

Various challenges also continued to apply in regards to the authorisation principle and the hierarchy of criteria. Minors continued to be separated from, or remained separated from, family (UNHCR 2006: 21; ECRE 2006) due to the lack of clarity relating to provisions on minors, unaccompanied minors, and the best interest of the child (Commission 2007c: 23).

<sup>228</sup> For a detailed discussion of Greece’s ‘interruption procedure’, see Papdimitriou and Papageorgiou 2005.

Possibilities for family reunification also remained limited in both scope and practice<sup>229</sup>, due to the restrictive definition of family and the inability to reunite applicants with family members who have received subsidiary protection (Ibid: 19). Proof was also a problem in this regard, as some Member States imposed strict evidence requirements, often requiring DNA, which was both costly and time consuming to obtain (and not always applicable) (Ibid: 23). Together, these limitations worked to “[undermine] the practical implementation of one of the most important provisions in the Dublin Regulation” (Commission 2007b: 7). The criterion on illegal entry remained problematical, with the number of requests submitted far outstripping those actually transferred. This was largely credited to a lack of available Eurodac data. As mentioned previously, the introduction of Eurodac was expected to help considerably towards the more effective implementation of the Dublin system; however, even with Eurodac, evidence of illegal entry will only exist if all Member States comply with the obligation to collect data on aliens that have entered EU territory irregularly (Ibid: 10). While the number of ‘category 2’ transactions<sup>230</sup> on Eurodac increased markedly between 2003 and 2005 (Commission 2007c: 39), the number of registered illegal entrants was still considered to be “surprisingly low”, which consequently raised questions as to the “effective application of the obligation to fingerprint illegal entrants at the border of the Union” (Commission 2007b: 9). As compliance with this obligation would necessarily result in the allocation of responsibility to the registering state, it is therefore not surprising that some Member States chose to deliberately *not* comply with this obligation. This is especially true given that in cases of illegal entry, statements from the applicant are generally not considered sufficient evidence for establishing responsibility, which places even more pressure on the need to gain formal sources of proof (Commission 2007c: 25).

Concerns regarding the allocation criteria’s potential role in exacerbating distributive inequalities of asylum ‘burdens’ also persisted. Most of the Member States located along the EU’s new post-accession external periphery (such as Greece, Malta, Hungary, Italy, Poland, Cyprus, etc.) had all registered higher rates of incoming transfers than outgoing. Meanwhile,

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<sup>229</sup> Looking at Germany and the UK, for example, only 122 of incoming requests and 88 of outgoing requests were based on family unity in the former, while only 54 of incoming requests and 46 of outgoing requests were based on family unity in the latter.

<sup>230</sup> I.e. aliens apprehended in connection with the irregular crossing of an external border.

those Member States occupying more insulated positions (such as Ireland, the UK, Luxembourg and Iceland) had all conversely registered higher rates of outgoing transfers as opposed to incoming. A similar geographically skewed relationship applied when considered against the total rate of asylum applications within the Member States (Table 6.3). In the case of Poland, for example, Dublin transfers had come to account for approximately 20% of their total rate of applications. In Slovakia, Lithuania, Latvia and Hungary, this share was around 10%. This is in sharp contrast to Member States such as Luxembourg and Iceland, who had experienced a 23% and 20% drop in their respective asylum populations (Ibid: 53). Considered in potential terms, this impact would have conceivably been even greater; for example, if Hungary, Slovakia and Poland had actually received transfers for every request they accepted, Dublin transfers would have accounted for 47% of asylum applications in Hungary, 45% in Slovakia, and 42% in Poland.

These concerns have been particularly exaggerated in countries that have “limited reception and absorption capacities and that find themselves under particular migratory pressure”, as the Dublin system can work to exacerbate this pressure by placing additional burdens on those States that find themselves geographically vulnerable to irregular entry<sup>231</sup> (Greece and Malta, in particular, were considered demographically ‘overburdened’). These states have also, moreover, had to engage in the active rescue of those attempting to arrive illegally by sea and then assume responsibility for them, despite the fact that their territorial presence did not reflect a failure to secure the external borders, but was rather a matter of humanitarian obligation (EP 2008: 3).

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<sup>231</sup> Which could in turn result in those Member States being unable to guarantee applicants with the appropriate – and indeed legally required – standard of protection (Commission 2008a: 14-15).

Table 6.3: Dublin Transfers versus Asylum Applications per Member State, 2005

		Net Dublin Transfers (incoming – outgoing)			Asylum Apps. (total no.)			Net Dublin Transfers/ Asylum Apps. (%)
1	Poland	1,048	1	France	42,572	1	Poland	19.28
2	Slovakia	421	2	UK	30,460	2	Slovakia	12.06
3	Italy	372	3	Germany	29,915	3	Lithuania	11
4	Greece	344	4	Austria	22,460	4	Latvia	10
5	Spain	263	5	Sweden	17,570	5	Hungary	9.56
6	Austria	216	6	Belgium	15,360	6	Portugal	9.56
7	Hungary	154	7	Nether.	12,320	7	Slovenia	5.29
8	Slovenia	82	8	Italy	9,346	8	Spain	5.2
9	Malta	38	9	Greece	8,285	9	Greece	4.15
10	Portugal	11	10	Cyprus	7,715	10	Italy	4.13
11	Lithuania	11	11	Poland	5,435	11	Malta	3.67
12	Latvia	2	12	Spain	5,050	12	Austria	0.96
13	Cyprus	2	13	Ireland	4,320	13	Cyprus	0.02
14	Estonia	0	14	Finland	3,595	14	Estonia	0
15	Iceland	-18	15	Czech R.	3,590	15	Germany	-0.1
16	Germany	-32	16	Slovakia	3,490	16	Nether.	-0.97
17	Nether.	-120	17	Hungary	1,610	17	UK	-4.78
18	Luxem.	-185	18	Slovenia	1,550	18	Ireland	-5.02
19	Ireland	-217	19	Malta	1,035	19	Czech R.	-6.82
20	Czech R.	-245	20	Luxem.	800	20	Iceland	-20
21	UK	-1,548	21	Portugal	115	21	Luxem.	-23.1
22	Belgium	N/A	22	Lithuania	100	22	Belgium	N/A
23	Finland	N/A	23	Iceland	87	23	Finland	N/A
24	Sweden	N/A	24	Latvia	20	24	Sweden	N/A
25	France	N/A	25	Estonia	10	25	France	N/A

Source: Commission 2007c: 52.

The overall efficiency of the system was also still less than satisfactory. While some of the deadlines pertaining to take charge/take back requests had been shortened under Dublin II, the lack of respect for these deadlines continued to present problems in terms of the overall speed with which the process could be administered (UNHCR 2006; ECRE 2006: 163). The lack of deadline for submitting take back requests, in particular, had been deemed “detrimental to the efficiency of the...system” (Commission 2007c: 25). At the same time, additional delays continued to persist due to appeals/suspensive effect and pre-transfer absconding (and the lack of common practice in this regard). However, several of the Member States had arguably ‘learned’ from previous practice, and had been trying to circumvent these delays. Whereas appeal rates had increased following the introduction of the Dublin Convention, appeal rates post-Dublin II were actually quite low (despite the fact that all Member States technically provided this possibility). This was credited largely to the

fact that Member States were only notifying applicants of a transfer decision very shortly prior to their actual transfer, which did not leave applicants with an adequate amount of time to prepare or lodge an appeal<sup>232</sup> - and because applicants could simply not gain access to legal aid that quickly (Commission 2008a: 17)<sup>233</sup>. The use of detention had also become more prevalent, with the highest rates of effective transfers corresponding to those Member States that used detention practices most freely (Commission 2007c: 30). Inevitably, these practices had introduced new concerns regarding the rights of asylum seekers and the divergent standards of protection being afforded to them, given the lack of common rules or guarantees contained in the text of the Regulation.

It is also worth noting that additional issues had arisen in terms of Dublin's synchronisation with the implementation of the minimum standards directives. Thus, while the 2004 Qualification Directive had officially introduced subsidiary protection into EU law, for example, the Dublin II Regulation still only covered individuals seeking (or already in possession of) Convention refugee status. Similarly, while the 2003 Reception Conditions Directive specified that the standards contained within it must apply to all applicants for protection, several Member States were not affording the same treatment to Dublin transferees as they were to first instance applicants on the basis that they were subject to Dublin (UNHCR 2006: 50-55; ECRE 2006: 153).

Thus, despite the changes that had been made between the Dublin Convention and the Dublin II Regulation, the implementation of the latter ultimately revealed many of the same problems that had plagued that of the former. Reform of the Dublin system was therefore necessary once again.

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<sup>232</sup> For instance, according to UNHCR, the Czech Republic, Finland, France, Germany and Luxembourg all execute transfers on the same day as notification (UNHCR 2006: 19).

<sup>233</sup> There was also a lack of uniformity regarding procedures for notification due to the lack of detail contained in Dublin II (i.e. whether applicants had to be informed orally or in writing, whether or not transfer decisions had to include information about appeal possibilities, etc.) (Commission 2008a: 17).

## 6.2 The Context for Further Reform: A Fully Communitarised Setting for Asylum Policy-Making Among the EU-27

In the years between the signing of the Dublin II Regulation and the launching of negotiations on the Dublin III Regulation, the governance arrangements pertaining to asylum policy-making in the EU had undergone further changes still as a result of both the Nice and Lisbon Treaties (as detailed in Chapter Two). To briefly recap, while the entry into force of the Nice Treaty in 2003 had roughly coincided with the end of the 5-year transitional period that had been applied to the further communitarisation of asylum policy-making under the Treaty of Amsterdam, the progressive removal of remaining intergovernmental elements was to still take on an incremental approach due to the on-going reluctance of Member States with regards to the *full* communitarisation of this policy area. Consistent with previous practice, the Nice Treaty therefore emulated the staged approach that had been used under the Amsterdam Treaty; thus, while it did ultimately license the transition to QMV, it simultaneously put shackles on the speed with which this process could proceed by stipulating that it would only apply after 1 May 2004, following the successful adoption of the minimum standards directives (for which the Member States wished to retain their veto)<sup>234</sup>.

It wasn't until after the adoption of the Hague Programme in 2004 (which mandated the transition to the co-decision procedure) and the entry into force of the Lisbon Treaty in 2009 (which mandated the empowerment of the CJEU) that all such intergovernmental elements had been officially lifted. This marked a significant coup for the supranational institutions, as it meant that: the Commission would have considerably more flexibility with regards to its right to legislative initiative and its ability to advance proposals that deviate from the status quo (as it would no longer be hamstrung by unanimity voting requirements due to the switch to QMV); the EP would now have full co-legislative powers alongside the Council with the resulting text subject to its final approval; and the CJEU would have full rights to issue judgments on Member State practice in this field. It also meant a change for the Member States. As a result of the move to QMV, the influence of individual Member States vis-à-vis one another was now considerably lower as they no longer held singular

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<sup>234</sup> It was also stipulated that the application of QMV would not immediately apply to policies on burden sharing or the conditions for the entry and residence of TCNs.

veto power (which meant that strategic alignments and coalitions within the Council would likely become more important). Similarly, as a result of the move to co-decision, the collective influence of the Member States vis-à-vis the supranational institutions was also noticeably lower, as they could no longer effectively disregard their presence in the policy-making process. As such, the role of presidency would continue to be extremely important in this area, not least because of the contentiousness of asylum dossiers, but also because the presidency would now have to liaise with the EP on behalf of the Council.

At the same time, the presidency would be faced with the more immediate challenge of reaching a consensus (as per the 'culture of consensus') in an enlarged Council, consisting of 27 Member States. While the acceptance of the Dublin rules had been conditional for their accession, the CEECs would now have the opportunity to voice their input on those rules. Given such a large – and diverse – group of Member States, we can therefore once again anticipate a considerable level of diversity with regards to the relative strength of actor positions (positionality), due to their divergent levels of credibility and intensity, when it comes to the negotiations on Dublin III.

With regards to credibility, and based on the same previously outlined measures, we can arrive at the following categorisation between high and low credibility states, as shown in Table 6.4. While the CEECs (who now joined the southern Member States in the low credibility column) had been similarly obligated to establish immigration, asylum and border control systems consistent with the requirements of the JHA acquis as a condition of their accession, they were still – for the most part – not considered destination countries as such and were nevertheless relatively new to the EU immigration and asylum control brigade (this is particularly true for Romania and Bulgaria who had only acceded in 2007).

Table 6.4: High and Low Credibility Member States in the EU-27 (Expertise + Effectiveness)

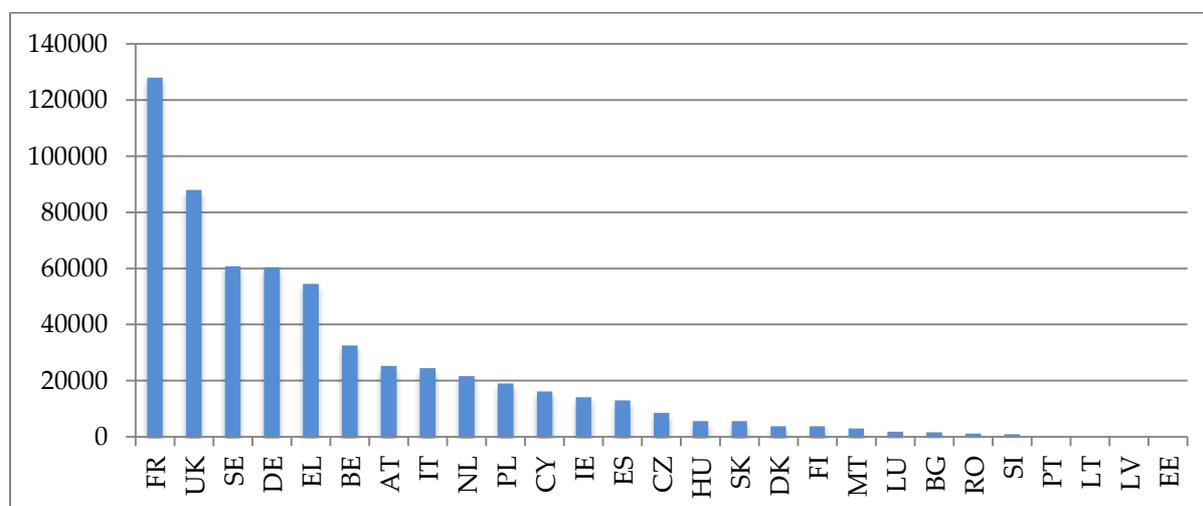
High Credibility (First Generation/Law Observance + Domestic Politics)	Low Credibility (Second + Third Generation/Dead Letters + Transposition Neglect)
Austria Belgium Denmark Finland France Germany Luxembourg Netherlands Sweden UK	Bulgaria Cyprus Czech Republic Estonia Greece Hungary Ireland Italy Latvia Lithuania Malta Poland Portugal Romania Slovakia Slovenia Spain

Source: Author's depiction.

Note: While the scope of the Falkner and Treib (2008) work only allowed a characterisation of 4 of the 12 accession states as belonging to the world of dead letters (specifically, the Czech Republic, Hungary, Slovakia and Slovenia), they did indicate their expectation that other CEECs would also fall under the same category (as a result of similar weaknesses in their bureaucracies, courts, and even civil society) (Ibid: 310). Consistent with this expectation, the author has accordingly categorised the other 8 CEECs as belonging to the world of dead letters.

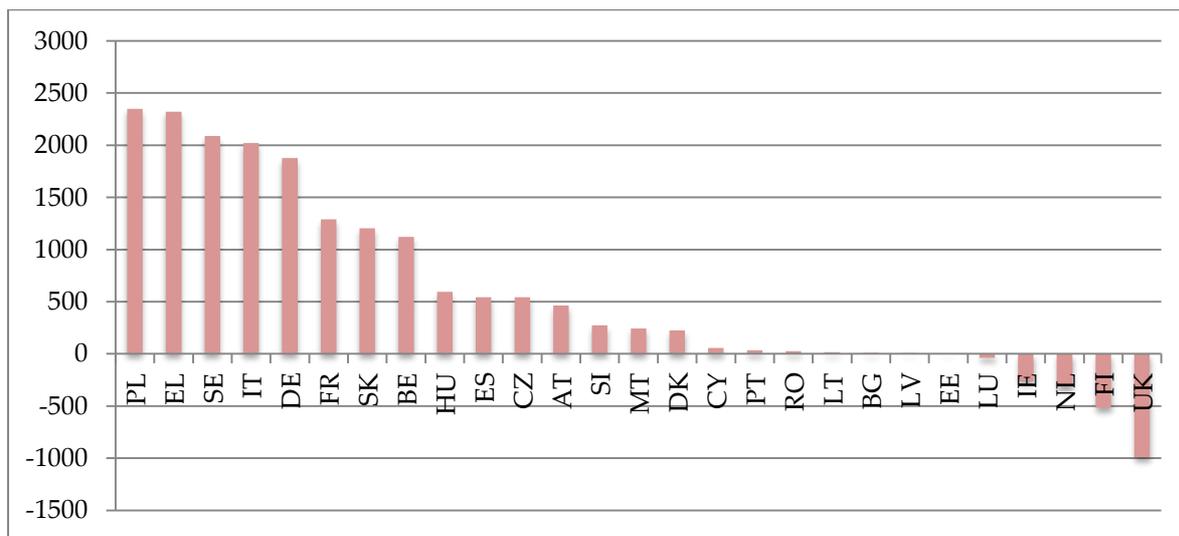
Member State exposure to both asylum inflows and Dublin transfers also continued to vary significantly in the years immediately preceding the start of the negotiations, as seen in Figures 6.1 and 6.2.

Figure 6.1: Number of Asylum Applications per Member State, 2006-2007



Source: UNHCR Yearbook, 2008.

Figure 6.2: Net Dublin Transfers (Incoming-Outgoing), 2006-2007<sup>235</sup>

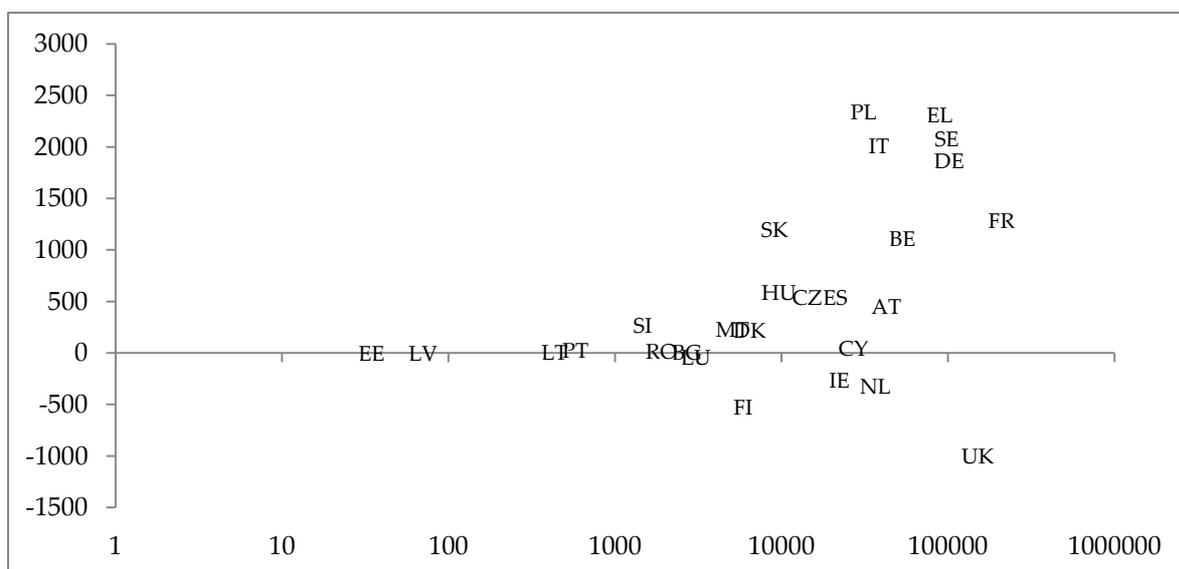


Source: Commission 2008a: 67-73.

Note: 2006 data unavailable for BG, RO. 2006 outgoing transfer data unavailable for BE, SE. 2007 outgoing transfer data unavailable for DK, SE.

As a result, we can therefore also expect that the anticipated level of salience attributed to asylum policy, and the Dublin system in particular, will continue to vary considerably among the Member States (as shown in Figure 6.3).

Figure 6.3: Asylum Salience by Member State, 2006-2007



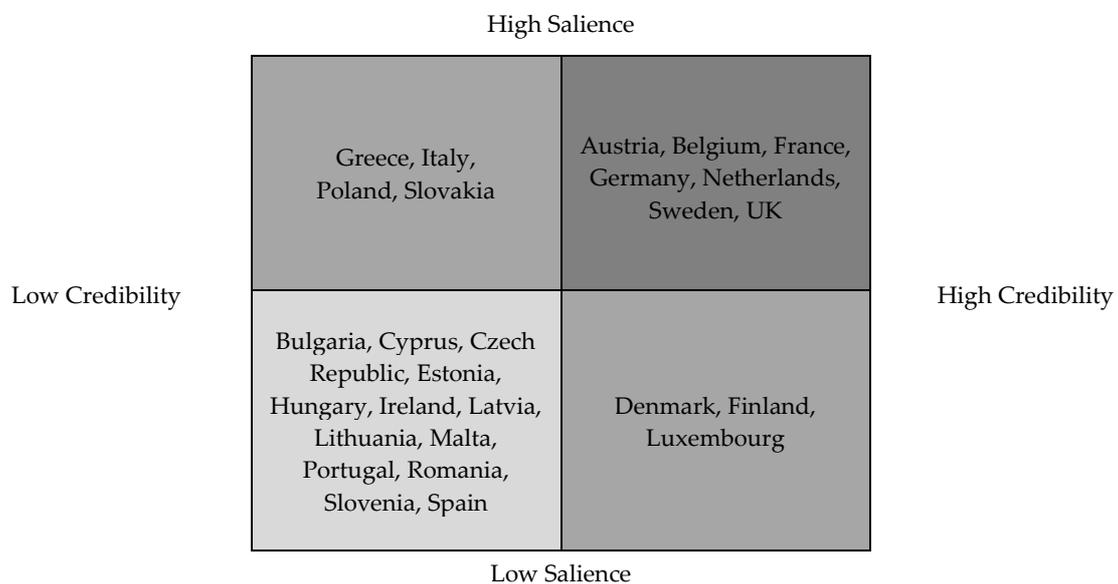
Source: Author's depiction.

Note: Y-axis = Net Dublin Transfers; X-axis = Number of Asylum Applications. The three visible clusters of Member States (from left to right) include: LT and PT; RO, BG and LU; and MT and DK.

<sup>235</sup> These figures for net Dublin transfers only cover the first half of 2007, as this is the time period for which data is available in the Commission Impact Assessment (Commission 2008a).

On this basis, we can arrive at the following depiction of the anticipated strength of Member State positions as it pertains to the Dublin III negotiations (Figure 5.4), with the strongly positioned states occupying the top right quadrant, the medium positioned states in the top left and bottom right quadrants, and the weakest positioned states in the bottom left quadrant. As per the theoretical framework outlined in Chapter Two, and consistent with the Dublin Convention and Dublin II Regulation negotiations, we can therefore expect that the outcome of the Dublin III negotiations will better reflect the preferences of the Northern Member states over those of the Southern, Central and East European Member States.

Figure 6.4: Strength of Asylum Positions in the EU-27 (Pre-Dublin III)



Source: Author's Depiction.

In terms of the overall context for reform, it is also important to highlight that the backdrop for JHA cooperation had undergone some key changes in recent years. As a result of the mandate issued in the 1999 Tampere Presidency conclusions, the early 2000s had marked a very busy period in the field of JHA. While already acknowledged as a top policy priority, the intensity with which internal security cooperation was being pursued had been further spurred on by the terrorist attacks in both New York in 2001 and Madrid in 2004 (and fuelled further still following the London attacks in 2005). As a result, considerable progress had been made in the first five years of the AFSJ's development in terms of police and judicial cooperation as well as the harmonisation of immigration and border controls. A particularly notable development in this regard was the establishment of the European

Agency for the Management of Operational Cooperation at the External Borders of the Member States of EU (Frontex) in 2004. Largely a response to concerns regarding the capacity of the new accession countries (as 'third generation' immigration countries) to effectively patrol their borders (which now constituted a significant portion of the EU's external frontier), the establishment of Frontex marked the first truly collaborative effort in relation to the joint enforcement of the common border.

With regards to the simultaneous establishment of the CEAS, the Member States had, alongside the Dublin II Regulation, concluded the other first phase legislative instruments, which collectively constituted its core building blocks. These additional instruments included the aforementioned 2003 Reception Conditions Directive, the 2004 Qualification Directive and the 2005 Asylum Procedures Directive. As also mentioned previously, these directives – aimed at the harmonisation of the Member States' legal frameworks - were seen as a necessary complement to Dublin and were intended to help reduce the incentives for secondary movements (due to divergent national standards), whilst simultaneously providing support for Dublin's inherent assumption that asylum seekers could be freely and fairly transferred between the Member States (all deemed to be STCs). Around the same time, the Eurodac system – another one of the key flanking measures required for Dublin's successful implementation – had also become fully operational as of January 2003.

On the basis of these developments, the European Council called on the Member States (at their meeting in the Hague in November 2004) to proceed with the second phase development of the CEAS, with an emphasis on the need for improved solidarity and a fairer sharing of asylum responsibility. The Commission consequently announced that it would advance a proposal for the amendment of the Dublin system in order to address its on-going shortcomings. While it asserted that "a system which clearly allocates responsibility for the examination of an asylum claim within the EU [would] still be necessary in order to avoid the phenomena of 'asylum shopping' and '[asylum seekers] in orbit'", the Commission also stressed the necessity of "further reflection...on the underlying principles and objectives of the Dublin system...if the application of the system is to result in a more balanced distribution between the Member States" (Commission 2007a: 11) - for until

it did, Member States would continue to have an incentive to 'game' the system by violating deadlines so that responsibility will be reverted elsewhere (Interview, ECRE) or to try to avoid it entirely by failing to fingerprint irregularly arriving applicants in the first place (Interview, Interior Ministry Anon). Similarly echoing its dissatisfaction with the current system, the EP had also argued shortly thereafter that "unless a satisfactory and consistent level of protection is achieved across the EU, the Dublin system will always produce unsatisfactory results from both technical and human viewpoints, and asylum seekers will continue to have valid reasons for wishing to lodge their application in the most likely advantageous Member State" (EP 2008: 4).

### **6.3 The Negotiations: Navigating New Institutional Opportunities and Constraints - Strategic Interactions and Legislative Entrapment**

The negotiations on the Dublin III Regulation took considerably longer than those on the Dublin II Regulation. Having received the Commission's proposal on 3 December 2008, it took the Member States and the EP a full four-and-a-half years to complete the co-decision process and to adopt the resulting regulation on 26 June 2013. The length of these negotiations is arguably unsurprising, however, given that - despite the transition to QMV - the actors involved were still faced with the considerable challenge of reaching a consensus among 27 Member States within the Council (as per the Council's 'culture of consensus') and agreeing a joint-text with a newly empowered co-legislator (the EP).

This section traces the negotiation process that resulted in the agreement of the Dublin III Regulation. Also following the same structure as the previous chapter, it therefore begins with an examination of the Commission's proposal, proceeds with an examination of the negotiations within the Council and the ensuing dialogues with the EP, and concludes with an examination of the final text in the context of an attempted reform. Similarly consistent, and in keeping with the theoretical framework presented in Chapter Two, its analytical focus throughout will rest on the behaviour of the actors involved, how that behaviour reflected their preferences, and how that behaviour was affected as a result of the either empowering or constraining effect of institutional and/or positional considerations, with a view towards explaining the output of negotiations, which in this case was a Dublin III

Regulation that once again resembled its predecessor, and once again preserved the (failed) status quo.

### ***6.3.1 Bolder but Still Constrained: The Commission's Heightened Ambition as Agenda-Setter***

As indicated above, the Commission's proposal on a recast Dublin regulation was part of a set of recast proposals pertaining to the second phase development of the CEAS. Its submission to the Council therefore coincided with the simultaneous submission of recast Eurodac and reception conditions directive proposals, which were followed shortly thereafter by the submission of recast qualification directive and asylum procedures directive proposals, in addition to a proposal regarding the establishment of a European Asylum Support Office (EASO). Like the Dublin II proposal before it, the Commission's proposal on Dublin III was similarly based on the information collected for the implementation evaluation that preceded its release, and which was also similarly derived from extensive consultations with the Member States and other relevant stakeholders<sup>236</sup>.

### ***A Flawed but 'Set' Foundation: Nowhere to Go on the Authorisation Principle***

As a result of this extensive consultation process, and much like the case with Dublin II, the Commission had been able to gain a considerable degree of insight into the preferences and positions of the Member States prior to issuing its proposal. Though its flexibility in proposing legislation was no longer hamstrung by unanimity voting requirements, the Commission knew that its proposal would nevertheless have to secure the support of a qualified majority of the Member States. While the Commission had once again urged the Member States to use the recast process as an opportunity to reconsider the system's foundations, the consultation process had ultimately revealed that most of the Member

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<sup>236</sup> The Commission had adopted a two-track approach in the pursuit of its evaluation, which included both a technical and policy evaluation. The former was based on contributions from the Member States (including responses to a questionnaire circulated by the Commission), as well as the results of discussions in expert meetings (including consultations with other relevant stakeholders such as the UNHCR), alongside performance statistics. The latter was similarly based on consultations with relevant stakeholders following the circulation of the Commission's 2007 Green Paper on the future CEAS (2007a). The Commission also organised further additional expert meetings with Member State practitioners, the UNHCR, civil society organisations, lawyers, judges and MEPs between October 2007 and July 2008 to gain additional insight into the changes that a recast Dublin regulation would require.

States (and particularly those to the North) - while acknowledging the need for significant improvements to the system - still strongly supported the preservation of Dublin's foundation (Commission 2008a: 5), with the intrinsic policy linkage between Dublin and Schengen continuing to present one of the main roadblocks to more substantial reform. These Member States had therefore once again seized on the informal agenda setting power provided through this pre-consultation process to present their preferences (i.e. maintenance of the status quo) to the Commission, which, as formal agenda setter, ultimately functioned as the 'gatekeeper' for determining which preferences (and preferred policy frames) would ultimately be reflected in the proposed legislation<sup>237</sup>. Although UNHCR, ECRE and various other civil society organisations continued to argue for a system that allocated responsibility on the basis of first country of application (Commission 2008a: 5), the overarching policy frame of responsibility and accountability could not be dethroned on account of this linkage; indeed, it's "very difficult to find a viable alternative to the responsibility principle, especially regarding the overall functioning of Schengen. If you limit yourself to Dublin, then perhaps, but if you think of the protection of borders...[then you can't] justify the fundamental change to Dublin responsibility" – you can't "touch one part, without touching the other" (Interview, Perm Rep CZ).

This was a view strongly supported by several of the more strongly positioned Member States, such as Germany and France, who – as some of the original designers of the system - maintained Dublin's place within the broader Schengen acquis - and if you "stick to that vision, you cannot disconnect [Dublin] from the criteria of irregular entry" (Interview, ECRE). Their position in this regard had also arguably been exacerbated by the performance failures of Dublin II and the continually high rate of secondary movements directed towards their territory (due to the failure of some states to properly implement the minimum standards directives<sup>238</sup>) and who could then not be returned to their original points of entry under the terms of Dublin (due to the failure of some states to properly implement the regulation by registering all incoming fingerprints). They were therefore obstinate in maintaining the responsibility principle, as they saw no reason to reward the malfeasance of

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<sup>237</sup> As discussed in Chapter Two.

<sup>238</sup> Thereby providing on-going incentive for asylum law consumers to engage in asylum shopping in pursuit of more preferable destination countries.

these states by agreeing to change it (Interview, Commission 1). As recounted by a Commission official in an interview with the author (Ibid):

...the contention [of these Member States] was that they were following the rules, they were implementing the law, they were providing the guarantees, the rights and the benefits, and they were playing by the book essentially and they were still getting most of the applications because people were transiting through those member states at the external frontiers and then conversely those Member States at the external frontiers weren't playing by the rules, weren't implementing the law, and were allowing the situation to perpetuate, and were turning a blind eye to people who were moving on whilst also not affording the rights and guarantees required to the people that stayed – and I think that hugely frustrated them because the law was there to be implemented, you know, its *EU law*, and you can't choose when and how you implement it. And I think that played a large part in their political thinking.

Thus, in arguing to preserve the authorisation principle, they were also arguing in favour of preserving their “key tool for disciplining other Member States” (Interview, Perm Rep PL). It was consequently “in the interest of everyone to keep the status quo – and when I say everyone, I mean the more powerful players” (Interview, Perm Rep HU); ultimately, the “northern Member States didn't want [a change] and their voices were heard, although there was clearly a need for it” (Interview, Commission 1).

The Commission therefore knew that “the overall system for allocating responsibility must not be changed” (Interview, Commission 2), as any radical departure from the system's current foundation would fail to gain the necessary support of a qualified majority of Member States (and particularly those with the most political clout). Not only that, but it would also risk political embarrassment in its role as agent: if the Commission had tried to propose an overhaul, “the Member States would have jumped on it and called it mad” (Interview, Perm Rep MT) – “people would just think they'd lost their minds or something” (Interview, Civil Servant DK). As a result, the Commission accordingly advised that the best, and indeed only, way forward was to once again uphold Dublin's existing legal framework (Commission 2008c: 4).

### *Well, What Can We Change? Proposing Procedural Protections*

Having accepted a complete lack of manoeuvrability in terms of the system's underlying foundation, the Commission consequently "turned its attention entirely to what it *could* hopefully improve" – that is, the more regulatory, protection-oriented side of things, "which had not really been present under Dublin II" (Interview, Commission 1). In this regard, the Commission knew that it could be considerably bolder in this round of negotiations, on account of the transition to QMV and the co-legislative powers of the EP, which meant that it should be technically '*easier*' for its proposed amendments to gain the necessary traction.

To this end, the Commission introduced several entirely new procedural safeguards that were intended to "ensure that the needs of applicants for international protection are comprehensively addressed" (Commission 2008c: 3). The first such safeguard was the inclusion of a universal right to personal interview. Under the newly proposed Article 5, whichever Member State is carrying out the process of determining responsibility "shall give applicants the opportunity of a personal interview" in order to allow them to "submit relevant information necessary for the correct identification of the responsible Member State" (Ibid: 29). The second pertained to a new article specifically designated to guarantees for minors, and which required that "the best interests of the child" be the "primary consideration for Member States with respect to all procedures provided for in this Regulation" (Ibid: 29). More specifically, it required: that Member States ensure the (legal) representation of the minor; that in assessing its best interest, it take due account of family reunification possibilities, the minor's well-being and social development (inclusive of ethnic, religious, cultural and linguistic considerations), safety and security considerations, and the views of the minor where appropriate; that Member States establish procedures in their national laws for tracing the family members and/or relatives of minors; and that all authorities designated to dealing with the requests of minors receive appropriate training (Article 6). A third crucial addition was an article on remedies. Whereas the issue of appeals had previously been left to national jurisdiction, the inclusion of this new article promised to harmonise the "right to an effective judicial remedy, in the form of an appeal or a review" (Art. 26). The article also guaranteed that in the event of an appeal, the relevant national authority must decide within seven working days from the lodging of the appeal whether or

not the person will be granted suspensive effect for the duration of its consideration. Regardless of that decision, however, suspensive effect would be guaranteed for that seven-day period, with no transfers permitted prior to the issuing of such a decision. It further required that Member States ensure the applicant's access to legal representation<sup>239</sup>, and that such representation be free of charge where required. Following on from this, a fourth and final key safeguard pertained to the use of detention for the purpose of transfer. Under this new article (27), the Commission specifically required that individuals not be held in detention for the sole reason that they are seeking protection. Moreover, it specified that detention should only be applied where other "less coercive measures cannot be applied effectively" and only where there is a "significant" risk of the applicant absconding. It further required that detention be ordered by national judicial authorities (or approved by judicial authorities within 72 hours where ordered by administrative authorities on the basis of urgency) and that unaccompanied minors ought never to be detained.

The Commission also proposed several 'rights-based' enhancements to the existing provisions. First, it expanded the scope of the regulation to also include applicants for other forms of international protection (which it justified on the grounds of a need for consistency with the broader asylum acquis, as the QD had officially introduced the concept of subsidiary protection into EU legislation). Second, it expanded the definition of family in order to increase possibilities for reunification (by: eliminating the requirement that unmarried minors be dependent; including minors who are married<sup>240</sup>; and including the minor, unmarried siblings of minor, unmarried applicants). Third, it extended family reunification to family members who have either applied for or been granted both asylum protection or international protection more broadly. Fourth, it introduced a new provision on family reunification for cases involving dependent relatives<sup>241</sup>. Fifth, it upgraded the criterion on family unity in cases where applications are submitted by multiple family

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<sup>239</sup> Alongside the provision of linguistic assistance, where necessary.

<sup>240</sup> Which it also justified on the basis of consistency with the rest of the asylum acquis.

<sup>241</sup> This applies in cases where the asylum seeker is either dependent on a relative or a relative is dependent on the asylum seeker, for reasons relating to pregnancy, new-born children, serious illness, severe handicap or old age. In such cases, the responsible state shall be the one considered most appropriate in the circumstances.

members (and where the strict application of the criteria would lead to their separation)<sup>242</sup>. Sixth, it reintroduced the requirement of consent in the application of *both* the sovereignty and humanitarian clauses and provided further clarification as to the use of these procedures so as to minimise the possibility for Member States to use these provisions against the interests or wishes of the applicant.

### ***'Structural Adjustment' for Asylum Burdens: A Proposed Compensatory Suspension Mechanism***

While necessarily accepting of the continued use of the authorisation principle as the core basis for allocating responsibility, but nevertheless conscious of the need to “better [address] situations of particular pressure on Member States’ reception facilities and/or asylum procedural capacities”, the Commission had sought to use its agenda-setting power to also propose a mechanism that would help compensate for the potentially damaging redistributive effects of Dublin by allowing for a temporary suspension of transfers. According to the proposed procedure, a provisional interruption of Dublin transfers would be possible in cases where such transfers were exaggerating situations of particular pressure on Member States with already limited reception and absorption capacities and “where there are concerns that Dublin transfers could result in applicants not benefitting from adequate standards of protection, [particularly] in terms of reception conditions and access to the asylum procedure” (Commission 2008c: 10). In such cases, a request for the temporary suspension of transfers could be submitted to the Commission by either the Member State that is itself facing particular pressure or by a Member State concerned as to the conditions in another. The Commission would then decide (within one month) as to whether or not transfers should be suspended, and if so, would notify the Council to this effect, which would have the opportunity to overturn this decision by qualified majority (also within one month). Suspension periods would last for up to six months, with the possibility for further extension. Though this was but a bandage and not a cure, something was arguably better than nothing (Interview, Perm Rep MT).

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<sup>242</sup> While this had previously been situated at the bottom of the hierarchy, it now sat at the top of the hierarchy amongst the other family-related provisions.

### *Pushing the Envelope: An Emboldened Commission Seeking Improvements on Protection Standards and Solidarity*

Collectively, the changes put forward by the Commission in its proposal for Dublin III revealed a much stronger and more confident agenda setter than that which proposed Dublin II. It had clearly seized upon the transition to QMV and the reality of its less encumbered agenda setting power to advance a proposal that included noteworthy enhancements on the status quo. Though its proposed provisions were likely to be chipped away at during the course of negotiations in the Council, the Commission had nevertheless set the bar respectably high for their starting point. Moreover, the Commission had leveraged upon the EP's new role as co-legislator, by specifically incorporating recommendations that it had previously made. In its Resolution on the Dublin system of 2 September 2008 (EP 2008), the EP had expressly called upon the Commission "to provide for a binding mechanism to stop transfers of asylum applicants to Member States that do not guarantee full and fair treatment of their claims and to take systematic measures against those States", alongside the right to suspensive effect, increased protections for minors, expanded rights for family reunification, clear rules on the use of detention, and the requirement of consent in the application of the sovereignty clause. By incorporating these recommendations into its legislative proposal, the Commission was able to not only legitimise its own preferences by virtue of aligning itself with the (like-minded) preferences of one of the co-legislators, but it had also given the EP a solid position from which it could defend the preferences of *both* institutions in its new role.

In sum, the Commission had put forward a strong proposal that sought to achieve considerable improvements to the standards of protection provided for individuals seeking protection within the framework of Dublin's application. And while the Commission had – once again – been forced to accept that any radical changes to the system's core foundation would not be accepted, it had nevertheless used its power of legislative initiative to include a set of procedural safeguards designed to better protect the rights of applicants and to propose a compensatory mechanism that sought to correct the potential (re)distributional consequences of that foundation.

### 6.3.2 *'It Takes Two': Joint (but Unbalanced) Decision-Making between the Council and the Parliament*

The negotiations on the Commission's proposal began in the Council under the Czech presidency and continued over the course of six further rotating sessions, which covered the Swedish, Belgian, Hungarian, Polish, Danish, and Cypriot presidencies. Following the adoption of an early first reading position under the Czech presidency, trialogues with the EP began under the Danish presidency and concluded under the Cypriot presidency, at which point the regulation achieved first reading adoption in the Council and second reading adoption in the EP. Alongside the previously problematic provisions, inevitably, the most contentious issues within the Council largely related to the Commission's newly proposed procedural safeguards, with the temporary suspension mechanism in particular providing one of the main roadblocks to cooperation. Inevitably, these issues were also the main sources of division between the Council and the EP.

#### *Defending the Status Quo: Immediate Resistance under the Czech Presidency*

The first exchange of views on the Commission's proposal took place within the AWP on 10 February 2009. Off to a discordant start, the Commission's proposal immediately received a general reservation from all 27 Member State delegations. Discussions were immediately focused, however, on addressing the new articles pertaining to remedies, detention and the temporary suspension mechanism. With regards to the first two, the Member States were fairly unanimous in their disapproval on account of the added administrative, financial and physical costs/burdens that providing these guarantees would require<sup>243</sup>. The article on remedies consequently received formal reservations from Estonia, Spain, Ireland, Slovenia and the UK as well as scrutiny reservations from Hungary, Malta, Poland and Romania. France suggested deleting the article altogether "because it runs counter to the efficiency of the Dublin system", whilst Ireland and Austria expressed their similar concern that the envisioned two-step process would "entail considerable delay" (Council 2009/6003/09: 41, footnote 1). Germany, Latvia, Bulgaria, Finland, Lithuania and the Netherlands were all against the proposed 7-day decision period for granting a right to remain, with Germany

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<sup>243</sup> All of which consequently constituted adaptation costs, as they had not been present in the Dublin II Regulation.

and Sweden further opposed to the automatic suspensive effect granted for that 7-day period (Ibid: 42, footnote, 1, 3, 5). Lithuania, Germany, Greece, the UK, Austria and Sweden also all took issue with the provision regarding free legal aid on the grounds that legal aid “should not be provided unconditionally” and that this was likely to cause substantial “administrative and financial burdens” (Ibid: 43, footnote 1-2).

The article on detention fared similarly poorly, as Member States feared that uniform limitations in this regard would increase the likelihood for absconding and evaded transfers, thereby resulting in continued or prolonged irregular presence on their territories (which carried the risk of being attributed responsibility by default). As such, this article received either reservations or scrutiny reservations from the Netherlands, Slovenia, the UK, Austria, Spain, Bulgaria, Latvia, Poland, Belgium, Germany, France, Ireland, Slovakia, and Sweden. More specifically, Germany, Finland, the Netherlands and Sweden all resisted the need to establish a “significant” risk of absconding, whilst Belgium, Finland, Latvia, Slovakia, Slovenia and Sweden all requested that administrative authorities be able to order detentions as well as judicial authorities<sup>244</sup> (Ibid: 43-45).

With regards to the Commission’s newly proposed suspension mechanism, this, too, received a litany of reservations. Whilst many of the Member States were entirely against the inclusion of such a provision, others also questioned if this was the best way to address “the burden sharing problem” and expressed considerable resistance to the idea of delegating such an important competence to the Commission (Ibid: 51, footnote 1; 52, footnote 3). In fact, only Malta dared to suggest that the proposed mechanism didn’t actually go far enough in addressing the issues it meant to confront (Ibid: 51, footnote 1). Whilst clearly a response by the Commission to the deteriorating situation in Greece (as well as the escalating pressures on the other Mediterranean countries)<sup>245</sup>, the idea of suspending transfers to some of the ‘weaker’ states was seen as entirely unpalatable by the ‘stronger’ ones. For their part:

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<sup>244</sup> Not just in cases of urgency subject to 72-hour judicial review.

<sup>245</sup> And given that they couldn’t change the authorisation principle or the criteria, it was still better “than just doing nothing” (Interview, Perm Rep MT).

They saw it as rewarding deliberate neglect. It was seen as something that would encourage states to allow their asylum systems to not operate instead of fulfilling their obligations, as they should (Interview, UNHCR).

It therefore became a highly “principled issue”, as:

Member States didn’t want to go down the line of giving the impression that you could have an asylum system that just didn’t work and in return have the benefit of having Dublin suspended and therefore...not have to take responsibility. It was being seen as, you know, you failed to respect your obligations, and then we alleviate those obligations and relieve you from responsibility. This was something that states were obviously opposed to (Interview, Perm Rep MT).

Moreover, the northern Member States “knew that if a suspension clause were invoked, they would of course have to handle a large amount of the overflow on top of the applicants they were already responsible for” (Interview, Commission 1). As such:

[They] believed that if such a mechanism were inserted in the system, then the southern Member States would use it as an excuse to really not do any work anymore and claim constantly exceptional circumstances at external borders in order to push all flows up north (Interview, Commission 2).

Following further discussions during the month of March<sup>246</sup>, the AWP concluded its first reading of the proposal at its meeting on 27 April 2009. During these meetings, the Member States turned their attention to some of the Commission’s other proposed changes. Several of the Member States immediately resisted the Commission’s attempt to expand the scope of the Regulation to cover applicants for international protection more broadly (i.e. traditional refugee status as well as other subsidiary forms of protection), as this would increase the number of people eligible for return to their territory (thereby potentially increasing costs) (Council 2009/8707/09: 1, footnote 1)<sup>247</sup>. They were also particularly unwelcoming to the proposed extensions to the definition of family, as this would also increase the number of people eligible for return to their territory; indeed, Belgium, Bulgaria, Denmark, Estonia, Spain, France, Lithuania, Latvia, Austria, Portugal, Finland, the Netherlands, Romania, Slovenia, Cyprus, Hungary, Poland and the UK all entered reservations on the proposed

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<sup>246</sup> In the same month, the presidency also agreed the participation of both Ireland (Council 2009/7092/09) and the UK (Council 2009/7247/09).

<sup>247</sup> This included several of the same states that had been opposed to this idea under Dublin II, specifically Germany, Austria and the UK (Ibid).

changes, with the proposed inclusion of sibling relationships receiving particularly strong opposition (Ibid: 4, footnotes 1-3).

Several of the CEECs were specifically apprehensive about the inclusion of a right to personal interview, as they generally had less established asylum systems and less effective administrations, and were therefore resistant to this requirement, which would be both administratively burdensome and costly (Ibid: 12, footnotes 1-2; 13, footnotes 1-5). For similar reasons, Germany, Poland, Ireland, Belgium, France, Estonia, Hungary, Spain, the Netherlands, Slovakia, Bulgaria, Cyprus, Luxembourg, Latvia, Portugal and the UK all objected to the obligation under the new article on guarantees for minors to trace the members of an unaccompanied minor's family or relatives on the basis that this would be "too cumbersome" and "a significant burden" (Ibid: 15, footnote 5) – especially as it carried the high adaptation cost of also requiring the introduction of procedures in their national legislation in order to achieve this end. Germany and the UK entered reservations on the new criterion relating to dependent relatives on the basis that "reverting to the take charge principle would be more appropriate" (Ibid: 22, footnote 1). They also objected, alongside Spain, Luxembourg, the Netherlands and France to the proposed reintroduction of the requirement for consent for the usage of the discretionary clause on the grounds that "it will only add extra administrative work, without [any] added value" (Ibid: 27, footnote 1)<sup>248</sup>.

Thus, in effect, almost all of the changes that had been proposed by the Commission had been met with some form of resistance in the Council, as they all represented deviations from the (Dublin II) status quo, which in turn, presented the potential for adaptation costs for some, if not all, of the Member States. However, as an Interior Ministry official indicated in an interview with the author, this division was arguably not surprising in the context of an enlarged EU (Interview, Interior Ministry Anon):

The Commission's in a tricky position...it's a bit like herding cats...I imagine it's frustrating to try to build a common approach and to then have to deal with mediating [27] positions – and [27] often selfish national positions, as you would expect – so there will always be this sort of tension between the Commission and the Member States.

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<sup>248</sup> France, in particular, proposed the alternative wording: "if the applicant does not expressly oppose it" (Ibid).

This is particularly true given that the preferences of these two bodies are often not in alignment. And while the Commission may have credibility as an issue expert, it simultaneously lacks credibility due to its lack of actual exposure. As articulated by a Member State representative:

The Commission has a lot of expertise and is quite well equipped for drafting different proposals...where we often disagree is the overall direction of those proposals, which are technically very good [but we worry] about the practicability or the possibility to carry out the proposals in practice...I don't know if we are just more sceptical but we don't share the optimism of the Commission [even if we] don't always have, you know, an alternative proposal...to sum up: [we have] confidence in the expertise but don't share the goals (Interview Perm Rep Anon<sup>249</sup>).

In the case of the Dublin III proposal in particular, "there weren't too many Member States with views towards the reinforcement of rights" (Interview, UNHCR), which is why the Commission's proposed changes were met with so much resistance. According to another Member State official:

What was super frustrating for the Member States was that there was no feeling among the states that...there was any real need for these changes, [and that] most of these changes had just gotten in there because the Commission had been talking to a few members of parliament, mainly those that were members of [the Committee on Civil Liberties, Justice and Home Affairs (LIBE)], and some NGOs probably, but there was nothing – to put it bluntly, it didn't come from the Member States. There was no need seen by Member States to make any of the changes made in these areas" (Interview, Civil Servant DK).

This was especially true given that, as outlined above, many of these (perceived to be unnecessary) changes – particularly the newly proposed protections – represented tangible procedural costs. While the avoidance of such costs is generally a key bottom line for Member States regardless (as per the misfit theory), they were particularly conscious of this in light of the global economic backdrop. As noted by a Commission official:

At the time we were negotiating the second phase of the CEAS, we were negotiating during a time of economic crisis and that made it really hard for Member States to commit to things such as enhanced procedural [guarantees] that would cost them a lot more money, for example, always having a representative at an asylum interview, [etc.]...So Member States were

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<sup>249</sup> Though identified by Member State affiliation elsewhere, the interviewee requested anonymity with regards to this particular point.

frustrated by lots of the measures that were brought forward, which while bringing them to a more harmonised position would cost them a lot more money, and they didn't have money because everyone was making cuts – particularly in the public sector” (Interview, Commission 1).

Moreover, the norms of ‘enhanced solidarity and responsibility sharing’<sup>250</sup> (presented by the Commission as a core motivation for the proposed changes) were seen as primarily rhetorical devices in the eyes of the Member States (Interview, Perm Rep MT; Interview, Perm Rep CY); they were negotiation “buzzwords” employed with little actual effect (Interview, Commission 2). In the words of one Member State official:

It's such a mantra: ‘the Common European Asylum System is a system of solidarity and responsibility sharing’. But it doesn't say anything, you know? If you think about, it doesn't say anything at all. In the end, like on any negotiation, there's [27] Member States that are all doing the same thing: I want the text to be as close as possible to my legislation because I don't want to have too many legal changes because that's going to take years. And, I don't want more asylum seekers. That's it. That's the interest of [27] Member States (Interview, Perm Rep NL).

Thus, at the end of the day, all of the Member States were ultimately “looking out for their own best interests rather than that of the collective” (Interview, Commission 1). As a result, proposed changes targeted at solidarity (such as the suspension mechanism in particular) ultimately gained minimal traction amongst the primarily cost-conscious and self-interested Member States.

### *Asserting Early Influence: A First Reading Position from the EP*

At its meeting in Strasbourg on 6 May 2009, the EP debated a report from the LIBE Committee containing 44 proposed amendments to the Commission's draft text as well as several other additional amendments advanced by the parliamentary political groups (Council 2009/9331/09). This debate was quickly followed by a vote the very next day, at which point the plenary formally adopted 40 of the 53 tabled amendments pertaining to both the recitals and the articles.

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<sup>250</sup> Elaborated as guiding foundations for CEAS cooperation.

With regards to the latter, the EP had sought to go a step further than the Commission's proposal in terms of the right to interview; thus, instead of giving an applicant "the opportunity" for a personal interview, Member States "shall call the applicants for a personal interview" (Ibid: 9, amendment 15). In order to speed up the procedure (so that applicants aren't held in limbo for so long), the EP proposed reducing the time limit for issuing take back requests from 2 months to 1 month (from the date of the Eurodac hit) (Ibid: 12, amendment 23). It also sought to reduce the new 7-day time limit for issuing a decision on the right to remain on the territory in which an applicant has lodged an appeal to a 5-day time limit (Ibid; 13, amendment 27). With regards to the new article on detention, while the Commission's proposal required that detention only be applied "if other less coercive measures cannot be applied effectively", the EP specified that applicants ought only to be held in "non-detention [facilities]" and only "if other less coercive measures have [already] not been effective" (Ibid: 14, amendment 29). It also proposed the inclusion of an additional provision that urged Member States to "promote voluntary transfers" but which guaranteed that where transfer by escort was required, that this must be done in a "humane manner...with full respect for fundamental rights and human dignity" (Ibid: 15, amendment 33). The EP further included specific references to the Asylum Procedures Directive with regards to legal assistance (both generally and in the case of unaccompanied minors) to ensure the harmonious application of standards throughout the Member States (Ibid: 10, amendment 17; 14, amendment 28). It also added a reference to the Qualification Directive, (to appear alongside the Asylum Procedures Directive), under the new article on the suspension mechanism, whereby suspected violations of the guarantees provided in either of these directives would warrant a potential suspension of transfers (Ibid: 16, amendment 34, 35). Moreover, the EP recommended that the new suspension article encourage the secondment of officials to Member States facing particular pressures, as well as internal relocation from those same Member States to others better able to provide adequate standards of protection (Ibid: 18, amendment 39).

While the EP had initially indicated its preference for a more fundamental change to the system, "once the Commission hadn't proposed to amend the criteria, then it couldn't be amended [by it as] co-legislator" (Interview, Perm Rep MT). It had therefore instead tried to

send a clear message to the Council, by virtue of adopting these amendments in this early first reading, as to its intention to nevertheless promote higher standards of protection and improved solidarity in its role as co-legislator. According to a Member State official in an interview with the author, this was indeed a deliberately strategic move:

Normally the EP wouldn't adopt its own first reading position before there has been some progress on a compromise text within the Council – you know, informal trialogues before adopting a first reading position. But they tried to put pressure on the Council by going ahead and adopting their first reading position so early (Interview, Perm Rep MT).

This early pressure was then reflected in a 'state of play' on the negotiations that was transmitted to COREPER by the Czech presidency a few weeks later, which indicated that the EP, while supportive of the Commission's proposal, sought to go even further in some areas and that it would therefore be necessary "to bridge the positions of Council and Parliament on these questions" in order to reach an agreement (Council 2009/9786/09: 3).

### *The Swedish Presidency: Scaling Back on the Commission's Proposal*

Shortly after entering its new office, the Swedish presidency put forward a set of compromise proposals for discussion in the AWP, which included changes relating to the definition of family, the right to interview, guarantees for minors, the criterion on dependent relatives, and the requirement of consent in the application of the discretionary clauses (some of which incorporated compromise proposals that been put forward towards the end of the Czech presidency). Consistent with earlier Member State reservations, the Swedish presidency removed the Commission's proposed inclusion of married minors from the definition of family as well as married minor siblings (Council 2009/12006/09: 4-5). Also in response to previously issued reservations, the revised article on the right to interview now only required Member States to conduct interviews where requested by the applicant or where deemed necessary. Moreover, it included a new provision pertaining to circumstances that would justify the omission of the right to interview<sup>251</sup> (Ibid: 10-11). With regards to guarantees for minors, the presidency had removed the requirement that Member

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<sup>251</sup> These included: (a) if the applicant has absconded; (b) if the applicant makes the request after the decision to transfer was taken; or (c) if a personal interview has already been conducted unless they can submit new information regarding the presence of family members or relatives.

States introduce provisions in their national legislation that provide for the tracing of family members/relatives (a proposal, which had been strongly opposed due to the high adaptation costs this would entail). It had also removed the requirement that minors only be dealt with by professionals with appropriate training (which had also been opposed on account of implementation costs). In order to appease Germany and the UK's resistance towards the inclusion of the Commission's new criterion on dependent relatives (both of whom were strongly positioned states), this criterion would now only apply to dependent relatives who were 'legally resident' (as opposed to just present) in one of the Member States (Ibid: 17). Finally, the application of the discretionary clause would no longer require the explicit consent of the applicant, but rather - and adopting the French delegation's previously proposed wording<sup>252</sup> - could be applied freely "unless the applicant opposes to it" (Ibid: 22). These proposals were then discussed at the next AWP meeting of 22/23 July, which ultimately achieved little in the way of compromise, with delegation reservations remaining on each of the relevant articles (Council 2009/12328/09).

In advance of the next AWP meeting, the Swedish presidency decided to also address the new article on remedies, which had received strong opposition but which had not yet been subject to a compromise proposal. To this end, its proposed changes mainly reflected its own previously issued reservations (primarily geared towards avoiding evaded transfers and additional implementation costs). The presidency had therefore deleted the provision that provided for a temporary suspension of transfers during the 7-day decision period on the right to temporarily remain in the case of appeal (as per it and Germany's request) (Council 2009/14116/09: 41). It also loosened the wording around the provision of free legal assistance (to which it had previously been opposed, alongside other strongly positioned states such as Germany, the UK and Austria), which now stipulated that such access need only be ensured "on request...insofar as it is necessary to ensure his/her effective access to justice" (Ibid).

Discussed on 14 and 15 October, France vehemently re-asserted its position that an article on remedies shouldn't even be included in the regulation "because the entire system might fail

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<sup>252</sup> As noted in footnote 248.

if there are abuses” (Council 2009/14283/09: 42, footnote 1). The UK and Germany echoed these concerns, with Germany specifically arguing that it was against the use of binding language regarding a guaranteed right to appeal in all cases (Ibid). Other states remained entirely opposed to the inclusion of any obligation to provide legal assistance (due to the obvious costs involved), despite the presidency’s relaxed requirement (Ibid). At the same meeting, the Council’s Legal Service (CLS) also proposed new wording with regards to the temporary suspension mechanism in order to “avoid possible problems emanating from the fact that the provision may amount to the creation of a derivative legal basis, which is contrary to the treaties” (Ibid: 54, footnote 1). As such, the CLS’ proposed text was a far simplified version of that proposed by the Commission. It therefore simply stipulated that a suspension of transfers could be possible upon the request of a Member State that is facing “a particularly urgent situation that places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure and when the transfer of applicants for international protection in accordance with this Regulation to that Member State would add to that burden” (Ibid), which would in turn justify the invocation of Article 5 on emergency measures under Decision No. 573/2007/EC<sup>253</sup>. Regardless of this simplification, however, most of the Member States (and particularly the more strongly positioned northern states) remained completely opposed to the inclusion of such a mechanism, which they felt would ultimately “negate the value of Dublin” (Interview, Interior Ministry Anon).

It is interesting to note that the Commission had become a much more confident actor in the actual Council negotiations under Dublin III than it had been under Dublin II (arguably due to its overall increase in influence in this policy area). As such, it did not hesitate at this point to express its considerable disappointment with the changes that had been made thus far to the proposed text – all of which represented a far “diminished” standard of their original form (Council 2009/12328/09; Council 2009/17167/09). This included the changes that had been made to the definition of family, the right to interview, guarantees for minors, and applicant consent (Ibid: 5-6; 18, footnote 1; 26, footnote 1). While reluctantly accepting of the CLS’ simplified temporary suspension mechanism (despite the lack of a clearly outlined

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<sup>253</sup> Decision No. 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ and repealing Council Decision 2004/904/EC, OJ L 144/1, 6.6.2007.

procedure), the Commission expressed its regret as to the deletion of the secondary basis for requesting suspension (i.e. concerns as to the inadequate conditions in a Member State on behalf of another) (Ibid: 55, footnote 1). At the same time, the Commission had also issued a sort of forewarning as to the potential difficulties that may arise going forward from efforts to significantly ‘water down’ its proposal, by reminding the Member States that the EP – who the Council would now have to co-legislate with – was strongly in favour of the Commission’s proposed changes (particularly the suspension mechanism), and that it had actually argued that the Commission’s initial proposal had not gone far enough (Ibid). In so doing, the Commission was clearly trying to (once again) leverage off the EP’s new position in order to pressure the Member States into accepting its proposals, as whatever derogations they might make were likely to face opposition from the EP, given the largely aligned preferences of the two supranational institutions.

***The Belgian Presidency: Scaling Back on the Commission’s Proposal Further Still - Multiple Compromises but Minimal Progress***

There is no evidence that any real progress was made on this dossier between January and June 2010 during the course of the Spanish Council Presidency; indeed, discussions only resumed again in July 2010 when the Belgians took occupancy. Given that the rotating presidency is like a “short sprint” (Interview, Perm Rep CZ), and looking to reinvigorate discussions following an unproductive Spanish presidency, the Belgian presidency had actually submitted a new set of compromise proposals to the AWP prior to taking up its new post so that the Member State delegations would have them in time for the next meeting of 1-2 July.

The main thrust of its proposal focused on one of the other new provisions that had been added by the Commission (but which has not yet been discussed in this Chapter) in terms of Member State obligations regarding transfers. This new provision dealt specifically with the issue of withdrawn applications and stipulated that where Member States have discontinued the examination of an application following its withdrawal by the applicant, that decision shall be revoked in cases of taking charge or taking back, with the Member State subsequently obligated to complete its examination of the relevant application

(Commission 2008c: 39). This particular move by the Commission was a clear attempt to prevent potential cases of *refoulement*. More specifically, it was an attempt to prevent a very troubling practice that had developed in Greece, whereby asylum applicants were being returned to their countries of origin prior to having their claim processed in any of the Member States in cases where they had 'interrupted' their initial application in Greece by engaging in secondary movements, and who had then been transferred back to Greece on the basis of Dublin (at which point Greece automatically returned them) (see: Papdimitriou and Papageorgiou 2005). As this new inclusion had received some initial resistance, the Belgian presidency sought to further clarify this provision by maintaining the Commission's inclusion of an applicant's right to request that their examination be completed, whilst also entitling them to request the opportunity to submit a new application, which should not be treated as a subsequent application as defined in the Asylum Procedures Directive (Council 11298/10: 28). While Belgium, as a strongly positioned state, was in a credible position to propose amending wording (bolstered by its position as presidency), this proposed clarification, however, unfortunately did nothing to pacify resistance from other strongly positioned states. France and Austria both entered reservations on any potential link to the asylum procedures directive (preferring to maintain flexibility), while both the German and British delegations argued that Member States should not be obligated to reopen cases where applicants have moved irregularly between States, with the UK specifically insisting that applicants "should be given only one full access to the international protection regime" as any suggestion otherwise would lead to added financial burdens by potentially doubling up on processing costs (Council 11810/10: 30, footnote 1). The Commission, however, reiterated that such a provision was inherently necessary - and indeed consistent with a system of singular responsibility- in order to ensure that every applicant did, in fact, have one *full and complete* access to the international protection regime, regardless of any interruptions, withdrawals or internal movements (Ibid).

Following continued discussions within the AWP over the summer, but with minimal progress achieved on the aforementioned issues, the Belgian presidency consequently turned to the JHA Council for help. As noted by a Member State official in an interview with

the author, this is a quite common strategy among presidencies in the area of JHA, and migration-related issues in particular:

Dossiers are regularly passed from working party level to the JHA Council because of disagreement...when the presidency can't get any further at working group level, it takes the dossier to JHA Council [because] we're more...let's say constructive in finding compromises and moving on positions than the experts coming from the capitals (Interview, Perm Rep MT).

This is arguably because the higher levels are “more political”, and “the more political, the easier to come to a compromise” (Interview, Perm Rep CY). As such, the presidency put forward two compromise proposals relating to the definition of family and detention (Council 2010/13393/10). With regards to the former, the presidency acknowledged a split among the Member States, with some favouring the existing nuclear definition of family (such as the UK, which was consistent with its national practice (Interview, Commission 1)), and others favouring a more inclusive definition (such as Germany, which had degrees of family members under their national law and who wanted that imposed instead (Ibid)). As both of these were strongly positioned states, both were relatively unmoveable in their positions. Thus, taking its role as honest broker seriously, the compromise proposed by the Belgian presidency was consequently based on wording that had been previously put forward by the Dutch delegation (another strongly positioned state, credibly able to advance proposed text on the basis of its expertise) and which had received tentative approval from both Germany and the UK. According to this proposal, the nuclear definition of family would be maintained under the section on definitions; however, the “practical application of the family member definition...would be extended to unmarried minor siblings by including them in every Article where the notion of family members would appear” (Ibid). The presidency argued that this should appease all parties, including the EP, which was a main proponent for the expanded definition. With regards to the latter – and in light of on-going disagreements within the AWP and a clear Member State preference that detention be dealt with in the Reception Conditions Directive alone (with specific resistance coming from the strongly positioned German delegation<sup>254</sup>) – the presidency proposed a simplification of the

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<sup>254</sup> The German delegation had actually issued a separate note regarding detention, arguing that restricting grounds for detention solely for the risk of absconding is too strict: “Irrespective of a reference to the directive on reception conditions, it must be ensured that detention is also admissible when a person to which the Dublin Regulation is applicable has been arrested after illegal entry, he or she is enforceably required to leave the

Commission's proposed article, which would merely stipulate the following: (1) Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection; (2) Member States shall lay down provisions on grounds and conditions for detention for asylum seekers and on guarantees applicable to detained asylum seekers in their national legislation (Ibid: 4).

Yet, despite these efforts, and despite a second referral to the JHA Council following further discussions in the AWP (Council 15757/10), the outcome of the JHA Council's examinations saw the vast majority of the previously outlined reservations maintained with regards to the provisions on definition of family, personal interviews, unaccompanied minors, dependent relatives, remedies and detention. The Council was therefore seemingly no closer to reaching a common, consensus-based, position. Moreover, the draft proposal, as it now existed, was a substantially disintegrated version of its former self as almost all of the compromise proposals that had been advanced derogated considerably from the standards and terms originally proposed by the Commission. Most notable, however, was the outright deletion of the Commission's temporary suspension mechanism that had resulted from more informal discussions with members of the JHA Council (Council 2010/14950/10: 1).

### ***Solidarity as a Sticking Point: Continued Gridlock under the Hungarian Presidency***

Inevitably, the deletion of the proposed suspension mechanism received immediate resistance from Italy, Greece and Malta, with Italy specifically urging that "a compromise wording would be preferable [to] complete deletion" (Ibid: 81, footnote 113). On this basis, and given that it, too, could potentially benefit in the future from the inclusion of such a mechanism in light of its geographic position, the new Hungarian presidency presented a revised version of the temporary suspension mechanism to the AWP towards the end of February for its consideration. Maintaining the same core features and functions as that originally proposed by the Commission, the main changes made by the presidency were geared primarily towards avoiding abuse and ensuring a quick remedy by enhancing

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country under national law and when there is evidence that another Member State is responsible for this person". Germany therefore requested that the presidency seek a more "horizontal" solution on this issue (Council 2010/13733/10: 3).

requesting and reporting requirements<sup>255</sup>. The secondary basis for possible suspensions remained excluded (Council 2011/6816/1/11 REV 1). Discussed at the next AWP meeting on 2 March, the presidency's revised (and re-included) mechanism expectedly received the support of those Member States that had been the main proponents for such a mechanism – namely, Cyprus, Greece, Italy, Spain and Malta. However, it also expectedly received opposition from those Member States that had been most strongly against the inclusion of such a mechanism – namely, Germany, France, the Netherlands, Austria and the UK (among others), as they considered it a “derogation from the basic Dublin principles, which will disturb the functioning of the system and may create a pull factor for secondary movements of applicants” (Council 2011/7675/11: 2). It would also mean that those Member States who “have not complied with their responsibilities under the Dublin system will not bear the relevant consequences” (Ibid), which was at odds with the underlying foundations of the system in terms of the authorisation principle (which they all strongly supported). They also argued that an early warning system would be preferable to the currently proposed mechanism, which they considered to be a “belated and inefficient reaction”, and which was not necessary given that solidarity should be (and is) exercised outside of Dublin via financial burden-sharing tools, such as the ERF (which they primarily fund), as well as through the work of EASO and the potential application of the temporary protection directive (Ibid: 2).

Following the discussions in the AWP, this matter was referred to the JHA Council for discussion at its meeting of 22 March. At this time, Greece – for whom the issue was particularly salient, but who lacked credibility in this area – issued a separate note regarding

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<sup>255</sup> In making a request, Member States would now have to additionally indicate the various measures that they have already taken, or has planned to take, in order to “ensure fulfillment of its obligations” under the EU asylum acquis, which should incorporate “all measures it has taken in order to attempt to restore the asylum situation, including measures taken with the support of EASO” (Ibid: 3). They must also provide “a substantiated explanation” as to why they do not “have the capacity to deal internally with the exceptional situation it is confronted with” (Ibid). In the course of processing a request, the Commission would now have to consult with EASO, UNHCR and where relevant, Frontex, for the purpose of formulating their proposal for the implementation of a suspension of transfers. This proposal would then be presented to and approved by the relevant Committee (in line with the new comitology rules), which must additionally include a proposed end date for the mechanism's application, as well as the steps that will be taken by the affected Member State and other stakeholders (such as EASO), to remedy the situation, alongside an “indicative set of benchmarks and timetables” by which to assess progress. Renewal would still also be possible, however, the Commission would now have to provide the EP and Council with a full report as to the various measures already taken to restore the asylum situation in the affected State and how the mechanism has already helped in achieving this.

the presidency's revised suspension clause. While supportive of its re-inclusion, the Greek delegation asserted that the proposed article shouldn't include a specific obligation to comply fully with the EU asylum acquis as a condition of assistance, because not only is it often unclear as to whether Member States are non-compliant by choice as opposed to out of necessity but also because any judgment as to non-compliance can only be made by the CJEU, and therefore any potential inclusion of such an assessment within the terms of the Dublin Regulation by parties other than the CJEU is highly problematic. Moreover, they insisted that mixed migration flows should also be included in the evaluation as to whether or not a Member State is facing disproportionate pressures. Defending this stance, the Greek delegation asserted that "since illegal entry is a criterion in the Dublin Regulation" (the inclusion of which it had arguably resigned itself to in light of the obstinance of more strongly positioned states), "it's only logical that illegal migration pressure must be taken into account when deciding if there is a disproportionate pressure" (Ibid: 9).

Despite the more political nature of the JHA Council, no real progress was made during this meeting, as the delegations remained fundamentally divided on this issue. In this regard, the presidency noted that Member State inflexibility with regards to the suspension mechanism seemed to be linked with the pending recast Eurodac Regulation, for which the Member States were awaiting a proposal from the Commission: "potential progress on the negotiations for an emergency mechanism seems to be inextricably related to the proposal amending the Eurodac Regulation in which most delegations want to insert provisions allowing access of law enforcement agencies to the Eurodac database" (Council 2011/8821/1/11 REV 1: 2). The Member States were therefore seemingly holding out on achieving any progress with regards to the suspension mechanism – which they knew the Commission desperately wanted – until they got their way with the Commission on the Eurodac Regulation. The presidency also noted, however, that the Commission seemed to be employing a similar tactic. Highlighting the policy linkage between these two proposals, the Commission had indeed explicitly suggested that "flexibility shown by Member States towards the emergency mechanism could lead to the Commission taking into consideration the position of Member States on law enforcement access to Eurodac" (Ibid). Thus, further demonstrating the tension that existed between the Commission and the Member States,

they were seemingly involved in a game of tug-of-war on these two issues as it pertained to these two separate – but intrinsically linked - policies. Nevertheless, and in light of the gridlocked state of the negotiations, the Hungarian presidency decided to set the suspension mechanism aside – consequently re-deleting it - in advance of the next JHA Council meeting in the hopes of achieving progress on some of the other outstanding articles. Outlining its rationale, but urging its tactical and temporary nature, the presidency wrote in the introduction to its compromise proposal:

This presidency compromise suggestion is reflecting the position of the majority of the Member States in order to facilitate the further negotiations at Council level with a view to starting the informal dialogues with the [EP] in due time. However, the presidency would like to highlight, that in order to meet the political mandate for reaching an agreement on the [CEAS] by 2012, both Parliament and Council should seek a compromise on all outstanding issues including the question relating to the emergency mechanism.

Thus, while the Hungarian presidency clearly hoped that the mechanism would be re-inserted into the text at a later date, it had, like the Belgian presidency before it, found the cooperative logjam created by this instrument of solidarity too difficult to overcome. While the presidency's (tactical) removal of the emergency mechanism ultimately received support from the majority of delegations, Greece, Spain, Italy and Malta re-issued their reservations against deletion on the grounds that the exclusion of such a mechanism "did not take into account the on-going developments in the Southern Neighbourhood for which solidarity among delegations is needed, nor does it adopt the appropriate strategy in view of the upcoming negotiations with the EP (which has manifested its strong support for such a mechanism)" (Council 2011/9191/11: 18, footnote 87).

The article on remedies also came to occupy a position of particular importance during the course of the Hungarian presidency in light of recent ECtHR case law relating to Dublin. In this ground-breaking case regarding an Afghan asylum seeker – *M.S.S v. Belgium and Greece*<sup>256</sup> - the ECtHR found Greece to be in violation of Articles 3<sup>257</sup> and 13<sup>258</sup> of the ECHR

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<sup>256</sup> ECtHR, Case of *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011.

<sup>257</sup> "Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Article 3, ECHR).

<sup>258</sup> "Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violated has been committed by persons acting in an official capacity" (Article 13, ECHR).

due to both the applicant's detention conditions and living standard within Greece, as well as the deficiencies in the Greek asylum system, which risked returning him to Afghanistan prior to a full examination of his claim and without recourse to remedy (Ibid: 70, footnote 71). Setting an even more important precedent, however, the Court also found Belgium guilty of Article 3 of the ECHR (as well as article 13 by direct implication), as a result of it having transferred the applicant back to Greece on the basis of the Dublin Regulation with the full knowledge that the aforementioned violations by Greece would likely take place. Thus, in effect, Belgium was guilty by association. This ruling had significant implications for the implementation of the Dublin system, as Member States could no longer claim ignorance should an initial Dublin transfer executed by them ultimately lead to the mistreatment or *refoulement* of an applicant for asylum. Indeed, "the M.S.S. case changed the whole thing", as it effectively shattered "the myth that all systems were of a certain equal level" (Interview, Perm Rep NL). On the basis of this ruling, the Commission therefore reiterated its concerns as to the restrictive changes that had been made to its proposed article on remedies (concerns which were now echoed by the CLS), whilst re-emphasising that it could not accept the current compromise version as it risked depriving applicants of their fundamental rights – an argument, which they were now in a much stronger position to make by virtue of this landmark case.

### ***Overcoming Gridlock: Polish Entrepreneurship and the Proposal of the Early Warning Mechanism***

Despite two and a half years of negotiations on the draft regulation, the Member States were nowhere near the point of agreement, with the Commission's proposed suspension mechanism constituting *the* most significant roadblock to cooperation and effectively stalling the progress of the negotiations. Given that the Commission is also expected to act as a sort of honest broker in the issuing of its proposals, in the case of the suspension mechanism, "the Commission wasn't [seen as] an honest broker...it didn't do the honest broker thing. It was much more on the side of the parliament" (Interview, Perm Rep NL). As such, there was a clear gulf between the majority of Member States on the one side and the Commission (supported by the EP) on the other. As relayed to the author in an interview with an official from Denmark:

I mean there was so much frustration among the ministers at some point that they just started ignoring the Commission and found the Commission to be completely out of line with the interests of the Member States – this was Cecilia Malmström, and her political position is covered by about 5% of the entire European population, so she wasn't in line with the ministers at all. The [Commission] did all it could [to get it through, but it was] beyond what was in the interests of the ministers" (Interview, Civil Servant DK).

The Commission tried to defend its position, however, by pointing out that, in reality, by virtue of the January 2011 M.S.S decision (which had resulted in the suspension of Dublin transfers to Greece), "the suspension mechanism was already there – it just [hadn't been] triggered by the Commission or the Council [but] by the Court" (Interview, Commission 1). They therefore argued that it should be logically preferable "to have a mechanism in the legislation that caters for [these situations] properly and caters to the level of support that would have to be given to get the situation back to normal" (Interview, Perm Rep MT). Moreover, they insisted that the "strong checks and balances" that had been built into the system, and which included the involvement of Member States in the decision-making process for declaring exceptional situations, would effectively avoid the "nightmare scenarios envisaged by Member States" whereby the inclusion of such a mechanism would open the system up to persistent abuse from the south (Interview, Commission 2). However, despite these arguments, "the very idea of such a mechanism was so compromised, that discussions couldn't even take place" (Ibid). This was arguably exaggerated by the fact that there was actually very little sympathy for Greece amongst some of the other Member States, given that "the Greeks were coming in first place in goofing up" (Interview, Civil Servant DK) as they had never actually applied Dublin properly or fixed its asylum system adequately. This was, as alluded to previously, despite the huge amount of financial support that had been funnelled its way from other Member States who were then repaid with additional asylum burdens of their own (i.e. secondary moving asylum seekers) that stemmed from Greece's continued failure to properly fingerprint incoming TCNs who then transited straight through to the north (Interview, Interior Ministry Anon; Interview, Civil Servant DK; Interview, Perm Rep HU). They therefore saw no reason to agree to a built-in mechanism that they felt would effectively sanction its evasion of responsibility.

The tide finally began to turn on this matter, however, during the Polish presidency. Despite being one of the newer Member States, the Polish presidency's strong commitment to try to effectively 'broker' a deal that might ultimately be acceptable to all parties was ultimately the turning point that "unlocked" the negotiations (Interview, Perm Rep MT). In order to suss out what that deal might look like, the presidency "tried to conduct kind of bilateral [discussions] with all the delegations trying to approach the positions in each of the perm reps" (Interview, Perm Rep PL). This proved to be an effective tactic given that "nobody refuses the opportunity to elaborate to the presidency about their own position" (Ibid) in light of the presidency's institutional power to propose compromise amendments. Following these discussions (at SCIFA and JHA Council levels), and acknowledging that an "overwhelming majority of delegations [felt] that the Union's asylum acquis should not include a system for the suspension of transfers carried out in the framework of the Dublin Regulation" (Council 2011/16194/11: 2), the Polish presidency (with the assistance of the incoming Danish presidency) developed a "process for early warning, preparedness and management of asylum crises" instead<sup>259</sup>. This alternative proposal was then presented to SCIFA on 7 November.

Designed as a way to identify and react to "deficiencies and insufficiencies" in Member State's asylum systems caused by "large and fluctuating mixed migration flows", the proposed system was meant to "provide for the on-going monitoring of all Member States to ensure their constant preparedness" and to "establish a structured, sequential course of action to address deficiencies before they grow into a fully-fledged crisis, followed, if need be, by concerted crisis management" (Ibid: 5). The entire process was to consist of four steps. The first step required Member States to regularly submit key data on their asylum systems to EASO and the Commission<sup>260</sup>. Where cause for concern was identified, the second step required a consultation between EASO, the Commission and the relevant Member State. In cases where serious deficiencies were confirmed, these findings would be

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<sup>259</sup> Which reflected the previously expressed preferences of those delegations that opposed the inclusion of a suspension mechanism.

<sup>260</sup> This included the transmission of information on the budget, personnel and other resources allocated to asylum and return systems every 6 months as well as certain statistics relating to asylum flows every three months. The Commission was also required to inform EASO as to details regarding the allocation of solidarity funds among the Member States (Ibid: 6).

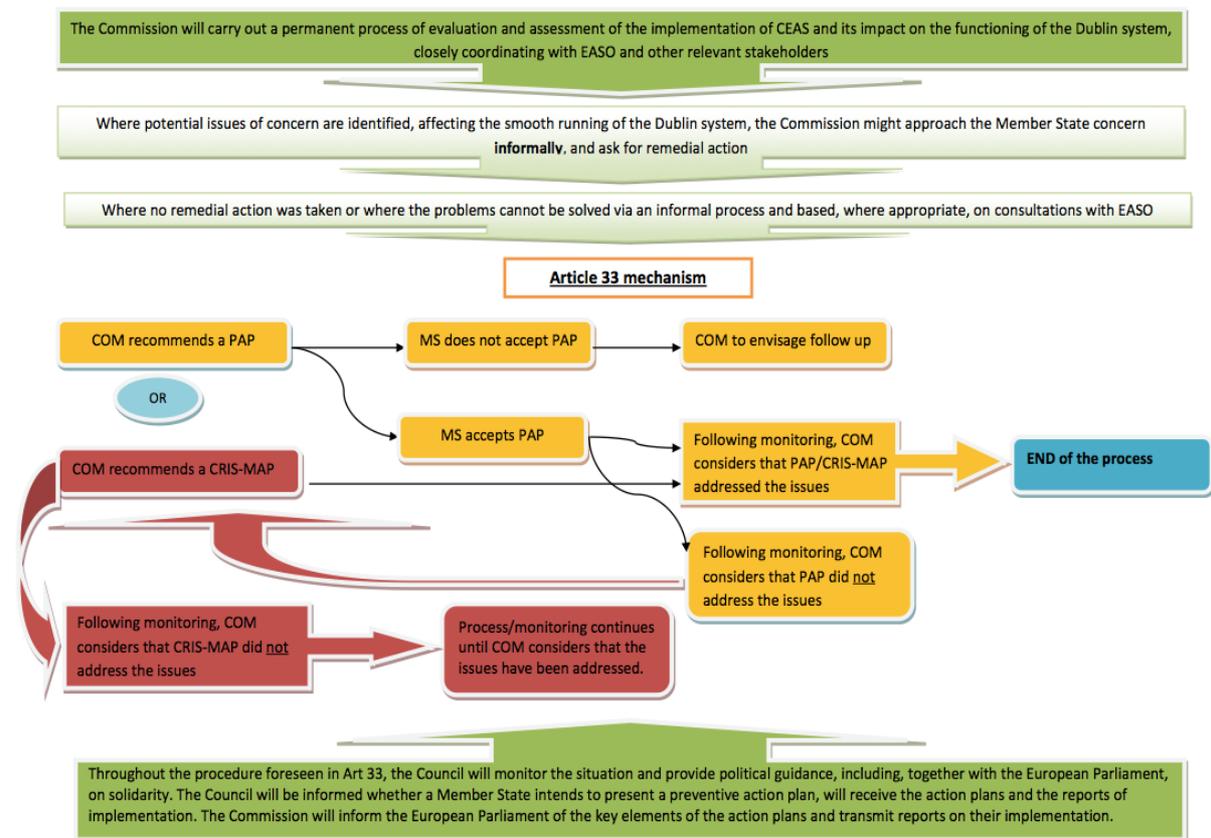
submitted to the Council in a period of two months or less, with the Commission working alongside the affected state to establish a preventive action plan designed to remedy the deficiencies. The resulting action plan and reports on its subsequent implementation would then be submitted to the Council as part of step three, in order to “ensure that Member States are fully informed of deficiencies in the asylum systems of the Member States and that matters of collective concern receive appropriate political attention at an early stage” (Ibid: 8). Where the implementation of the preventive action plan does not yield results within a six-month period, the Commission and the affected Member State would then carry out the fourth step, which would involve the design of a tailor-made crisis management action plan. In the spirit of solidarity, such plans were to consist of at least one of the following elements: European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) support operations; EASO coordinated asylum support teams; extra funding; increased bilateral cooperation with other Member States and key countries of origin; the strategic use of resettlement; a voluntary relocation scheme (modelled on the EUREMA project<sup>261</sup>); or the possible application of the 2001 temporary protection directive<sup>262</sup> (Ibid: 8). Similar to the case with preventive action plans, any crisis management action plans and reports on implementation would be submitted to the Council, however, the EP would also be informed at this stage.

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<sup>261</sup> The EUREMA project was an intra-EU relocation scheme pioneered in the summer of 2009 that involved the voluntary pledges of ten Member States to relocate 227 protection seekers from Malta over the course of two years.

<sup>262</sup> OJ L 212/12, 7.8.2001.

Figure 6.5: The Early Warning, Preparedness and Crisis Management Mechanism<sup>263</sup>



Source: Commission.

Notes: COM = Commission; PAP = preventive action plan; CRIS-MAP = crisis management action plan

Conscious of the 2012 deadline for the completion of the CEAS and aware of the need to obtain the mutual agreement of the EP - which had previously argued the need for an emergency mechanism – the presidency stressed that “the Council’s rejection of the {Commission’s} proposal should be accompanied by the formulation of an alternative provision” that also responds in a spirit of “solidarity and mutual trust” to the pressures placed on different Member States’ asylum systems (Ibid: 4). It also reiterated that such a system must be anchored in Dublin so that it is part of a binding legal act. Ultimately, the Polish presidency knew that, with regards to the Commission’s suspension mechanism, the majority of Member States were both unwilling to give the Commission that kind of power (i.e. the ability to suspend transfers) (Interview, ECRE) and unwilling to let those Member States that weren’t applying the Regulation properly “off the hook” (Interview, Perm Rep

<sup>263</sup> While the early warning mechanism replaced the temporary suspension mechanism as Article 31 of the draft recast Regulation, the diagram presented in Figure 7.1 labels it as the Article 33 mechanism, as this is where it ultimately appeared in the final text Regulation.

HU). And while most of the Member States would “have been happy to scrap the Commission notion altogether”, the Polish presidency had instead proposed “‘solidarity light’” in the form of an early warning mechanism “in order to appease the EP and to untie our hands” in advance of the trialogues (Interview, Perm Rep PL). Quite unlike the case with the suspension mechanism, this proposal ultimately received broad level support within SCIFA during its initial review, which was then relayed by the presidency to COREPER on the 24<sup>th</sup> November with a view towards gaining its endorsement (Council 2011/17509/11). This support is arguably unsurprising, however, given that, as outlined previously, an early warning mechanism was what some of the most strongly positioned Member States (specifically, Germany, France, the Netherlands, Austria and the UK) had previously indicated their preference for in the first place (Council 2011/7675/11: 2). As any compromise would have to obtain the support of these states (all of whom were vehemently opposed to a suspension mechanism), the Polish presidency knew that the most plausible option was to formally advance their suggestion (which would likely also garner the support of the other delegations that - while perhaps less strongly positioned - were also either against or ambivalent towards a suspension clause). Thus, although the EP’s approval of ‘solidarity light’ was yet to be obtained, the Polish presidency had nevertheless overcome gridlock in the Council by successfully exercising policy entrepreneurship on this issue by advancing a concrete compromise proposal that was acceptable to the majority – and most importantly, the key – Member States.

### ***Bringing in the Parliament: Initiating Informal Trialogues under the Danish Presidency***

In the wake of further discussions in the JHA Council at the beginning of the year, the new Danish presidency presented the JHA Council with a revised set of compromise proposals in early to mid-March, which reflected the latest ‘state of play’ in the negotiations (Council 2012/7075/12; Council 2012/7495/12), and which were then examined at the next meeting of the JHA Counsellors on 15 March (Council 2012/7814/12). Seeking to capitalise on the recently changed momentum within the Council, and in the interest of progressing the negotiations, the presidency quickly thereafter presented the results of this examination and the latest compromise proposal to COREPER, whilst inviting it to endorse the latest

compromise package, which would provide the necessary mandate for initiating informal dialogues with the EP (Council 2012/7683/12).

Unfortunately, however, many of the reservations that had been issued on the latest compromise package within the JHA Council were also maintained at COREPER level, following its examination of the presidency's text on 21 March (Council 2012/8011/12). This was despite the fact that the Danish presidency (which was an effective and experienced presidency) had been "pushing very actively and placing very strong pressure on the states to abandon their positions" so that the dossier could move forward (Interview, Perm Rep FR). Following the submission of some further suggestions by the Danish presidency, though various reservations on the text remained, COREPER ultimately endorsed the compromise text, and in so doing, *finally* opened the doors to the instigation of informal dialogues with the EP (Council 2012/8550/12).

Four informal dialogues consequently took place between the Council and the EP during May and June, three-and-a-half years after the negotiations started within the Council and half-a-year before the negotiations were meant to be concluded. While the EP's approval was ultimately necessary in order for that target to be reached, it was clearly at an inherent disadvantage as a supposed co-legislator by virtue of how late it had been brought into the negotiations. As highlighted by a representative of the Commission in an interview with the author:

The EP role as co-legislator is by its nature more limited than that of the Council. Negotiations and discussions in the Council last for years and go into very minute details. Besides, Member States make up [27] national delegations with all their individual political influence, "opposing" in discussions one tiny Commission delegation (an expert and, perhaps, one head of unit). Besides, Member States have the power to vote in the Council, while the Commission can only note of it - or of course withdraw their proposal if they do not like the result, but such a decision is very rarely taken due to political reasons. It is only the result of such discussions that reaches the EP for further negotiations. By that time, there is usually a huge time pressure to deliver on a proposal, both Council and the EP and the Commission (because Commissioners are politicians as well) need to present the world with a result. All that puts great pressure on the EP to carry out short and intensive negotiations, barely having time to focus on the principal aspects but with no in-depth analysis. Add to that the fact that the EP does not have real 'experts' like Member States have,

who apply a law in practice every day and are able to see the added value or pitfalls of every word, etc., [which puts] the EP negotiating position at a disadvantage.

This is arguably exaggerated by the fact, that much like with the Commission, the Member States generally view the EP as quite out of touch with their interests due to the fact that they are not themselves confronted with the realities of migration and asylum pressures. As stated by a Member State representative:

The problem with the Commission and the Parliament is that they think that all asylum seekers are real asylum seekers...[whereas we as Member States] have to try to find the balance between being open to migrants and managing migration. But this approach is only shared by Member States because they are in front of the reality. [The Commission and Parliament] are only on the theoretical level (Interview, Perm Rep FR).

The EP in particular is seen as being “more focused on individual human rights than on the rights of states to sort of manage their own affairs and migration flows” (Interview, Interior Ministry Anon). As a result, the newly developing relationship between the Council and the EP in the field of JHA has been a “very difficult evolution” (Interview, MEP):

You’ve sort of got two parts to it. One is the learning process for the Council - that negotiation actually means a bit of give and take. I mean I have this script where I basically go in at the start of negotiations with the Council and say ‘I know that you’re going to try to tell us that this is all very difficult and that you cannot possibly move from your position, and I’m going to tell you that we also have some strong positions and that this is a negotiation. [Second] is that interior ministries are very different to, I mean its difficult enough on environmental issues, but the issues around migration and asylum in some Member States are a much bigger issue back home so therefore the ministers themselves, they feel that there’s much more public scrutiny on what they’re doing than maybe if you, I don’t know, are discussing plastics or toys or whatever.

Nevertheless, the EP fought quite hard to maintain several of the rights-based provisions that had been proposed by the Commission but diminished by the Council, which resulted in the Danish presidency having to incorporate several adjustments into the compromise text in order to reflect the EP’s position. While several of these compromises were still quite shy of what the EP had requested, they nevertheless marked a compromise that was an improvement on the previously more restrictive Council text.

With regards to guarantees for minors and the EP's request that text previously deleted by the Council pertaining to evaluating the best interest of the child be reintroduced, the presidency recommended a compromise through the inclusion of a recital to the same effect (Ibid: 82-83). As the EP had also requested the inclusion of explicit references to Member State obligations under the reception conditions directive and the asylum procedures directive as it pertains to minors, the presidency recommended that the Council adopt a more generic way to include references to the aforementioned directives (Ibid: 82).

With regards to the definition of family as it pertains to family reunification possibilities for unaccompanied minors, the EP had strongly advocated that grandparents and aunts or uncles of unaccompanied minors not be subject to the qualification of having been previously responsible (as was currently required by the Council text). Although those Member States still concerned about the potential scope for family reunification considered this recommendation problematic, the presidency nevertheless proposed that this requirement be removed (however, it did also include a specification that the burden of proof would ultimately fall to the applicant).

With regards to the new criterion on dependents, the EP had strongly opposed its demotion in the Council text from within the family-related criterion to the bottom of the hierarchy, as it argued that this would result in a "legal situation in which the Article becomes practically void, as the provisions applying prior to [it] would in almost all cases apply before the question of dependent relatives" (Ibid: 4). Aware that it needed to accommodate the EP, but also aware that the main opponents of this article were strongly positioned Germany and the UK, the presidency proposed a compromise that would see the article on dependent relatives moved to the section on discretionary clauses instead, which while less preferable than its previous position in the hierarchy ultimately meant that it wouldn't be limited in its potential to take precedence as a result of its previous demotion. On a related point, the EP had also requested the re-inclusion of the requirement of consent in all cases relating to the discretionary clause (as per the Commission's original proposal); however, as this had received absolutely no support within the Council, the presidency ultimately suggested that the EP not be accommodated on this issue (Ibid).

The EP's main victories, however, came in terms of the articles on remedies and detention. In terms of the former, as indicated previously, the Council had strongly advocated the removal of any reference to the potential suspensive effect of appeals. Despite this strong opposition across the board, the EP had used its roles in the dialogues to reinforce the position previously taken by the Commission and the CLS by insisting that "wording on suspensive effect be reinserted, in order to ensure basic rights and guarantees for an effective remedy for asylum seekers" consistent with the requirements of recent case law (Ibid: 5). As a result of this insistence, the presidency ultimately conceded that "in the course of seeking a basis for compromise [with the EP], it had become clear that the interpretation of the right to an effective remedy already implies that a suspensive effect be granted whilst awaiting a decision on a request for suspensive effect" (Ibid). The M.S.S. case had therefore, indeed, "changed the whole thing" (Interview, Perm Rep NL), as it had given the Commission and the EP the necessary ammunition to argue effectively with the Member States on this point. As such, this court case (while issued by the ECtHR rather than the CJEU) had acted as an important institutional constraint for the Member States, as they were forced to amend their position in response, as it was in direct opposition with what was now legal precedent<sup>264</sup>. As a result, and leading to what was arguably the most important rights-based improvement with regards to the Dublin system, the presidency proposed the following text in relation to the article on remedies:

In the event of an appeal or review...Member States shall provide in their national legislations that: a) the appeal or review confers upon the applicant the right to remain in the Member State concerned pending the outcome of the remedy; or b) an automatic suspension of the transfer which lapses after a certain reasonable period of time, during which a decision whether to grant a suspensive effect of any appeal or review shall have been taken; or c) the person concerned is given the opportunity to request a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his/her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first request is taken.

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<sup>264</sup> In the wake of this case, the Member States have also faced further institutional constraints as to the actual implementation of Dublin transfers stemming from the activities of their national courts, as many have taken the M.S.S. precedent as justification for limiting or blocking transfers to other countries on the same basis (Interview, ECRE).

In terms of the latter, the EP had insisted that the Commission's previously included limitation regarding the detention of unaccompanied minors be reinserted. The EP also argued for the re-inclusion of the previously present definition for risk of absconding. Here, the EP strengthened its position by virtue of reference to pre-existing measures contained in the reception conditions directive and the returns directive. While the Member States had previously eschewed most suggestions that in any way linked Dublin with the obligations elaborated in the minimum standards directive (as they preferred to maintain flexibility), the EP, in the case of detention, successfully used their commitments elsewhere to argue for additional guarantees in Dublin. As recounted by an MEP in an interview with the author: "we could push for [the provisions on detention] because it was nothing more than they'd already accepted in a number of other places – we weren't asking them to do anything too different, we were just asking them to do what they were doing" – but they also wanted to ensure that they were doing it in the case of Dublin applicants as well within the context of a common asylum system (Interview, MEP). In justifying their requests this way, the EP had managed to effectively entrap the Member States by virtue of their own legislative commitments elsewhere. In this sense, the minimum standards directives also presented an institutional constraint that forced the Member States to modify their position on this issue. As a result, the presidency was compelled to reintroduce both of these provisions, on the basis that detention for minors must be consistent with the requirements laid out in the reception conditions directive and that the definitional basis for establishing a risk of absconding must be consistent with that established in the returns directive. As the EP had also expressed further concerns regarding the potential length of detention periods, the presidency relatedly suggested that the time limits for submitting a take back or take charge request be shortened so that they cannot exceed one month from when the application is lodged (Ibid: 6).

And while the EP had initially been "adamant" about the inclusion of a suspension mechanism, they were ultimately forced to acknowledge that they – and the Commission – had "lost that argument" and therefore "settled" on the early warning mechanism (Interview, Commission 1). As the EP ultimately recognised that this was the "least common denominator to have negotiations finalised", it didn't really ask for many further

amendments on it because it was “being more pressured at the time to strike a deal and indicate publicly the end of negotiations, rather than to produce a workable mechanism” (Interview, Commission 2). Nevertheless, and despite the intrinsic limitations to its role as co-legislator by virtue of having been brought into the negotiations with the Council so late, the EP had managed to reverse some of the damage that had been done to the Commission’s procedural guarantees as a result of negotiations in the Council.

Following the presidency’s request that COREPER endorse the latest compromise package following the trialogues with the EP, the Danish presidency issued a letter to the EP’s rapporteur on Dublin – MEP Cecilia Wikström – indicating that the Council would be prepared to accept the package, provided that the EP was willing to agree to a couple of further amendments in relation to the developments that had been made regarding unaccompanied minors and detention (Council 2012/12168/12: 2-3). With regards to the former, the presidency requested that the wording pertaining to unaccompanied minors in cases where family members are absent be reverted back to that currently in force under the Dublin II Regulation, whilst inviting the Commission to consider – subject to approval by the Council and the EP – if revision of the clause would be necessary pending the ruling on CJEU case C648-11 MA and Others v. Secretary of the State for the Home Department<sup>265</sup>. With regards to the latter, the Council requested that there need only be a ‘significant’ risk of absconding, as opposed to an ‘established’ risk (as preferred by the EP), in order to justify detention for the purpose of transfer.

However, no such willingness existed. In a surprising exercise of muscle, Rapporteur Wikström conveyed that the EP’s compromise terms as it pertained to these articles and as relayed during the fourth dialogue was “as far as [it] could go” and that the proposals for modification presented in the presidency letter had not received “sufficient support from the political groups, and need therefore be reworded. On this basis, she concluded that despite “the remarkable job” done by the Danish presidency in “[bringing] this file forward”, work

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<sup>265</sup> This case involved three unaccompanied minors who had applied for asylum in the UK, after having also applied in the Netherlands and Italy. None of the minors had family present in any of the Member States. On the basis of this case, the Court of Appeal for England and Wales had turned to the CJEU for a preliminary ruling on how the Dublin Regulation that was currently in force (Dublin II) would allocate responsibility in such a case. The case was received by the CJEU on 19 December 2011. The ruling was later issued on 6 June 2013.

on the recast regulation would nevertheless have to continue under the incoming Cypriot presidency (Ibid: 6).

***Reaching Political Agreement under the Cypriot Presidency: First Reading Adoption in the Council, Second Reading Adoption in the Parliament***

On this basis, and conscious of the 2012 CEAS deadline, the Council and the EP engaged in a final round of negotiations, following which, the General Secretariat of the Council issued an “I/A” Item Note to COREPER on 21 November announcing political agreement, and inviting the Council’s official confirmation in this regard (Council 2012/16332/12). To this end, the JHA Council subsequently confirmed political agreement on its position at first reading regarding the proposed Dublin III Regulation on 6 December. As the chairman of LIBE also confirmed the EP’s acceptance of the text at this point, the only task that remained was formal adoption.

On 6 June 2013, the Council voted by qualified majority on its first reading position. In order to pass as an “A” item, the Council’s position required the support of at least 14 Member State delegations, consisting of a minimum of 250 votes. Exceeding this requirement by a considerable margin, it ultimately received 25 Member State votes for (at a total of 326 votes), with only a single vote against from the Greek delegation (12 votes)<sup>266</sup>. Thus, despite the protracted and contentious nature of the negotiations, the resulting regulation ultimately faced the formal opposition of just one of the 27 Member States.

In the end, the main dividing line *within* the Council during the course of the negotiations pertained to the temporary suspension mechanism. With regards to the other core issues, however, (i.e. the more regulatory procedural standards), the main dividing line was actually between the Member States versus the Commission and EP. The fact that these issues ultimately dominated the negotiations meant that the pre-existing structural foundations of the system, such as the hierarchy of criteria, were never really touched upon. Thus, once the more strongly positioned northern states had - by virtue of their informal agenda setting power in the pre-consultation process - effectively quashed any possibility

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<sup>266</sup> Due to its special arrangement pertaining to JHA legislation, Denmark did not vote.

for the reconsideration of the systems fundamentals (and particularly the illegal entry criterion), they actually remained quashed as all attention turned to these other issues. And for the most part, everyone seemed to be okay with this, arguably for much the same reason that Italy and Greece had ultimately capitulated on their resistance during the Dublin II negotiations; that is, the apparent safety in the (dysfunctional) status quo. As relayed by a representative from Malta, there was actually fairly widespread hesitation towards revisiting the criteria from the start, as “there was a fear of opening Pandora’s box” with many of the Member States concerned as to “what the impact [of a potentially different set of criteria] on them would be”. For “those who are not at an external border, it gives some sort of assurance knowing that there is a first point of entry criterion which obviously reduces their numbers”, and for those for whom the matter of numbers is less immediately salient, “the main aim [is still] reducing the numbers, so why would a Member State that doesn’t have big numbers risk going towards different criteria which might change that” (Interview, Perm Rep MT).

As for the temporary suspension mechanism, the more strongly positioned northern Member States had also been able to effectively quash this idea. As they would be the ones who would be primarily required to absorb the potential adaptation costs caused by the introduction of such a mechanism, they were understandably against it, and effectively blocked any possibility of receiving qualified majority support on this issue. However, even if there had have been broader support for such a mechanism, it would have still faced considerable difficulties, given that, according to one Member State representative, “there are also sort of some ‘unwritten rules’ – [even] if you have a qualified majority on something but it excludes Germany and France...you’re not going to try and get it through” (Interview, Perm Rep NL). Agreement was therefore made possible by the introduction of the early warning mechanism, which ultimately received the support of the key northern states (a reality that was unsurprising given that they were the ones who initially proposed this compromise, which was then taken up and acted upon by the entrepreneurial Polish presidency).

As for the more regulatory procedural standards (i.e. family definition, unaccompanied minors, personal interviews, remedies, and detention), having been initially diminished or outright deleted in the early Council negotiations (over concerns as to potentially increased costs/burdens), these provisions ultimately survived despite the resistance of even the most strongly positioned states. The reason why they eventually agreed to these inclusions (thereby modifying their original positions) was because of institutional constraints that stemmed from pre-existing legislation, and because the supranational institutions effectively employed a tactic of ‘legislative entrapment’ against them. Given that the Commission and the EP were only asking for the introduction into Dublin of the same standards that already existed in the minimum standards regulations, they were therefore able to entrap them by virtue of their own outstanding legislative commitments. Thereby weakening their claims as to potential adaptation costs, the Member States were consequently in a difficult position to argue against the inclusion of these provisions, given that all of these policies (i.e. Dublin and the minimum standards directives) are part of a supposedly common system based on the premise of supposedly common standards. This sense of entrapment was arguably exaggerated by the fact that it had been the strong northern Member States themselves who had similarly dominated the negotiations on the asylum directives and had therefore played a highly active role in setting the very standards that they were now seeking to avoid (see: Zaun 2016). As a result, they ultimately agreed to the inclusion of these provisions, all of which were to be effectively aligned with the corresponding standards set in the relevant directive<sup>267</sup>. With regards to suspensive effect in particular, and as outlined previously, they were of course additionally compelled towards acceptance in this regard as a result of the ECtHR’s M.S.S. ruling.

While many of the CEECs had issued various reservations at various points throughout the negotiations, they ultimately presented a minimal source of resistance (with the exception of Cyprus and Malta, who had aligned themselves more with the southern states in advocating for solidarity measures due to their similarly southern geography and low reception capacities as small islands). Aware of their weaker positionality on this issue, and given that

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<sup>267</sup> I.e. the definition of family aligned with the qualification directive; the right to interview/free legal aid and suspensive effect aligned with the asylum procedures directive; and the provisions on detention aligned with the reception conditions directive.

they had from the start been forced to accept Dublin as a ‘toll’ for their accession, they were “more quiet and [were just] following the big Member States” (Interview, ECRE). Echoing this assessment, a representative from the Commission noted that:

The east European, the new Member States, who came into the system after 2003, so had no say in the Dublin II negotiations, kept mostly quiet during discussions and contented themselves with following the majority. One should also keep in mind that Bulgaria and Romania were not...Schengen members, though they were Schengen hopefuls. This made them in a cooperative and ‘follow Germany’ mood, which sometimes led to otherwise inexplicable positions, such as their opposition to the [suspension] mechanism, which border countries like themselves would benefit from (i.e. Bulgaria one year after negotiations!) (Interview, Commission 2).

And while the CEECs were (as evidenced by the substance of their reservations) concerned about potential adaptation costs, they were arguably less concerned than the older Member States with more entrenched practices and/or positions. As articulated by a Member State representative from Poland:

We’ve got used to some flexibility and kind of reality that is very demanding and that forces us let’s say be flexible and to introduce fast and amend fast our own behaviour and our own procedures. So we don’t feel particular pain with the changes regarding the terms between Dublin II and Dublin III because, well before entering into the EU, one of the important negotiation chapters was the human rights issue, [which is] of course very much connected with the asylum system. So we were simply forced to let’s say to put something in our legislative heritage, something which is relatively tight, but also something which could also allow us to amend our position very quickly, so this was less of an issue for us (Interview, Perm Rep PL).

With regards to the previously referred to southern bloc of Greece, Italy, Malta and Cyprus<sup>268</sup>, which had actively insisted throughout the negotiations as to the need for the inclusion of a solidarity-based suspension/support mechanism, only Greece ended up following through with this insistence by ultimately voting against the suspension mechanism-free compromise text (as stated at the beginning of this sub-section). The decision by Italy, Malta and Cyprus to not actually vote against the legislation can ultimately be understood as a rational reaction to both formal and informal institutional

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<sup>268</sup> Spain, which had at different points counted itself amongst this bloc, had variably changed its position by both offering and withdrawing its support in this petition. As such, these other southern states would have been unlikely to count on Spain to actually vote against.

voting rules (i.e. QMV and the culture of consensus), accompanied by further positional considerations. In the end, they knew that, under QMV, they didn't have a blocking minority (Interview, Perm Rep MT; Interview Perm Rep CY; Interview, Commission 1). As their votes against would therefore be ineffectual, it came down to an individual determination as to whether or not it was worth it to go against the majority, given that Member States generally "don't want to vote against" compromise texts within the culture of consensus, and only ever turn to this option as "a last resort" (Interview, Perm Rep SE); otherwise, "there's no point...you tend to only vote against something if you know you're going to lose mainly for symbolic value, for your domestic market, you know – 'Hey, I voted against it, what more could I do?'" (Interview, Interior Ministry Anon). Moreover, given that only "a small number of transfers were actually taking place" under Dublin, it "wasn't actually affecting them that much in practice" and therefore likely "wasn't an issue on which they were willing to risk relationships in the Council" (Interview, UNHCR).

Speaking to the Italian position, a Commission official shared the following recollection in an interview with the author:

I think Member States like Italy just acquiesced in the end – you know, they came to the conclusion that this was the way it was going to be...I mean obviously in principle, the Dublin Regulation wasn't good for them, but they didn't vehemently oppose it in the same way Greece did. Greece did, because at the time, politics, the government at the time, but also the situation was exacerbated by the financial crisis, and...while Italy was fighting its own financial crisis, but obviously not as severe as Greece's, it just...followed the others...because they knew there wasn't a big enough minority to block (Interview, Commission 1).

As to the Cypriot position, an official from the Permanent Representation of Cyprus recounted the following:

There wasn't a big enough grouping from the south...Cyprus also had certain political considerations, which were not shared by other Member States. We are coming from a small Member State with a political problem, so for this reason, especially in the first years after accession, we were more on the defensive, so to say. So we tried to go only for issues which we were justified to go for, because, um, Malta can say this or the other thing on migration and people can accept that, but in our case, we have to be very convincing because ...[they] expected Cyprus to accede to the EU after the solution on the Cyprus problem, so they felt wrongly that we owed them...since we voted no [in the Annan Plan Referendum]...all this was misunderstood in the EU, you know

voting in a referendum, that means you have a choice to vote yes or no, but in our case it seemed that we didn't have a choice, we needed to vote yes to accede into the EU as a whole, so the moment we voted no, we found ourselves in a very difficult position and in a very weak negotiating position, so we needed to choose our battles, and this was not our battle (Interview, Perm Rep CY).

With regards to the Maltese position, an official from the Permanent Representation of Malta similarly explained their rationale:

There was no blocking minority, I mean it was us four countries, and then obviously with those four countries, you couldn't have a blocking minority. There were no other Member States in favour of a suspension mechanism, so that wasn't an option. As to whether we would vote against, I mean at the end of the day, it was a compromise that we could live with. It was also something which wasn't – I mean we were in favour of the suspension mechanism and we fought for it, but it was more a matter of principle because ultimately, when we looked at what the real implications on the ground would be...I mean, if it were about the criteria that be another matter, but since it was about the suspension mechanism, in Malta's case, Malta is a small island, we had a detention policy which made it very difficult for asylum seekers to leave Malta while they were still asylum seekers. So in most cases the people transferred to Malta under Dublin were people who had already received a first instance decision, so either they had a decision granting protection or they had a decision rejecting – so in that case, anyway, the impact of the suspension mechanism would not have been that big. So in the end, when it came to whether to vote against or in favour, we decided to not vote against (Interview, Perm Rep MT).

However, in the case of Greece, this calculation clearly produced a different result; for them, it clearly was worth the vote against. Alongside its no vote, the Greek delegation submitted an accompanying statement, which stressed that asylum issues “are of particular importance and priority to Greece, as one of the Member States facing strong pressures at its external borders due to mixed flows of illegal migrants” (Council 2013/10184/13 ADD1 REV 2: 4). It also argued that (Ibid):

The 'Dublin Regulation' recast has proved to be less ambitious than it should have been since, among others, it does not offer substantial answers to the concerns and pressing issues that Member States at EU's external borders face. This is due to three major reasons: (1) The first entry criterion provision was never examined at the discussion of the 'Dublin Regulation' recast; (2) A provision for the suspension of transfers was not included in the final text; (3) The new [early warning mechanism] limits itself to the asylum system and

does not contain any reference to pressures which are due to mixed migratory flows.

As such, the Greek delegation consequently asserted that for these reasons it could ultimately not offer its support for the Council's final position. Not only was it likely important for Greece to symbolically vote against Dublin for the benefit of its domestic audience, Greece arguably also didn't have much to lose in terms of political capital or any sort of normative implications within the Council, given that, as alluded to previously, it was already a bit of a pariah when it came to Dublin.

Thus, with only one vote against in the Council, and with no further amendments submitted, the President of the EP shortly thereafter declared that it had also approved the Council's first reading position at its second reading as of 12 June (Council 2013/10613/13). Thereby concluding the lengthy negotiations on this controversial dossier, the Dublin III Regulation was formally adopted on 26 June 2013.

### ***6.3.3 The Final Text: The Continued Preservation of the (Failed) Status Quo***

In the end, and despite four-and-a-half years of negotiations on a recast Dublin III Regulation that was meant to improve upon the system's continued troubled performance under Dublin II, the core foundations of the Dublin system nevertheless remained intact. The system was still based on the authorisation principle (with negative mutual recognition only), and it was still based on the same hierarchy of criteria, which still carried the ability to transfer applicants between Member States on the basis of the STC assumption. This was because, even with the enhancements to its formal agenda-setting power, the Commission had still had very little leeway to propose any fundamental changes to the system as a result of the resistance of some of the stronger Member States and their arguably even more effective informal agenda setting power, which had been targeted at preserving the status quo.

That said, however, several changes had been made with regards to the inclusion of new procedural protections as outlined above, which involved a lateral transfer of pre-existing

Member State commitments under the minimum standards directives into the recast Dublin Regulation. To summarise these changes: the scope of the Regulation now applied to both 1951 Convention Refugees as well as applicants for subsidiary protection (as this had become a recognised legal principle under the qualification directive); the definition of family had been extended to also include relatives, which covered aunts, uncles or grandparents (although the Commission had also included married minors in its proposed definition, their inclusion had not been allowed by the Member States under the qualifications directive and were consequently also not included here); Member States 'shall' now be required to conduct personal interviews with Dublin applicants, consistent with the requirements of the asylum procedures directive (though an interview can be omitted under certain circumstances); the first criterion regarding family reunification for minors would now also include siblings, consistent with the terms of the qualification directive; with regards to minors, Member States must also take appropriate measures to identify family, siblings or relatives of the minor as soon as possible whilst protecting their best interests, consistent with their obligations under the asylum procedures directive; and Member States must now also aim to keep or bring dependent persons together (whether the applicant is dependent on a child, sibling, parent or vice versa), which is an objective also included in the reception conditions directive. Consistent with both the asylum procedures directive and recent ECtHR case law, Member States must now also provide a right to appeal with suspensive effect. Moreover, the use of detention for the purpose of effecting Dublin transfers must now also align with the guarantees provided in the reception conditions directive, and can only be used where there is a significant risk of absconding and where less coercive measures cannot effectively be applied. Where detention is applied, expedited time limits also apply, whereby take charge or take back requests must be submitted within 1 month of the application being lodged, with an automatic requirement for a maximum 2 week urgent reply, with transfers then executed within 6 weeks in order to avoid prolonged periods of detention.

With regards to regular timelines, the new Regulation also introduced for the first time a time limit for issuing take back requests (which was set at 2 months, or 3 months if based on Eurodac), whilst also specifying that take charge requests based on Eurodac hits must be

issued within 2 months. Finally, the recast text of course also introduced the new early warning mechanism, which while arguably a valuable tool for identifying overburdened Member States, did not provide very much in the way of solidarity so as to lessen those burdens, nor did it do anything to address the fact that Dublin itself might further contribute to those burdens.

Thus, while the newly introduced procedural guarantees did constitute regulatory improvements to the Dublin system, taken in scope, however, nothing about the core features of the Dublin system had actually changed once again as a result of this second attempt at reform, and despite its consistently poor performance. As such, and despite the changes outlined above, the Dublin III recast Regulation had therefore only served to reinforce and further institutionalise in EU law the ultimately flawed and dysfunctional foundations of the Dublin system.

#### **6.4 Conclusion: Dublin Endures Again – Safety in the Status Quo (‘If It’s Broke, Don’t Fix It’)**

This chapter has analysed the adoption of the 2013 Dublin III Regulation, which replaced the 2003 Dublin II Regulation. By tracing the process of its negotiation via the co-decision procedure, its purpose was to explain why, despite the on-going failures of the Dublin system and the continued problems associated with its key features, this second attempt at reform also produced marginal results with regards to the system’s underlying foundations (despite the full communitarisation of asylum policy-making), with the resulting recast regulation once again replicating the content of its predecessor, thereby re-legitimising its position as the cornerstone of the CEAS. To this end, it found that policy output in this case (i.e. policy stability) can, once again, be explained by the deliberate decisions made by EU actors within the context of the policy-making process, in response to the either empowering or constraining effect of institutional and positional considerations (consistent with this study’s general hypothesis – H1). Four additional conclusions also warrant highlighting (and which are also more or less consistent with the specified Dublin III hypotheses – H5, H6, H7 and H8).

First, the Commission had been able to exercise considerably more influence over the Dublin III negotiations than it had over Dublin II as a result of the transition to QMV. It was also able to successfully leverage off the new position of the EP, given the alignment of preferences between the two supranational institutions. However, due to its need to still actually get a qualified majority of votes in order to successfully propose legislation, it had been unable, once again, to propose more fundamental reforms to the core features of the Dublin system as a result of the strong informal agenda setting powers exercised by the strongly positioned Member States, who, despite the continued failures of the Dublin system persisted with their insistence that the existing system – and more importantly the policy frame of blame – be maintained. Nevertheless, the Commission was – consistent with its preferences - able to exploit its role as a formal agenda setter (subject to QMV) in order to include various rights-based amendments in its proposal as well as a temporary suspension mechanism that sought to provide relief for the redistributive consequences of both naturally occurring asylum flows and Dublin itself. And while the suspension mechanism didn't ultimately survive negotiations in the Council, the rights-based provisions did. The Commission's confidence in this regard did, however, invite some antagonism from within the Council, who, while accepting of Commission expertise, generally saw the Commission as quite out of line with their own preferences as a result of its lack of direct exposure to asylum flows (salience) and preoccupation with asylum seeker rights (which resulted in a sort of "bullying" relationship between the Council and the Commission (Interview, Commission 2)).

Second, the EP had also been able to exercise considerably more influence over the Dublin III negotiations than it had over Dublin II as a result of its promotion to co-legislator. It was, however, limited in the scope of what it could argue on the basis of the scope of the Commission's proposal. As such, it was unable to push for more fundamental reforms to Dublin's foundations given that such reforms weren't actually 'on the menu' (and even if the EP had tried to initiate such reforms in the Council, this would have arguably resulted in negotiation failure anyways due to Member State unwillingness). Moreover, despite being technically labelled as co-legislator, the realities of how the procedure is actually administered meant that it was at an inherent disadvantage due to its late involvement in

the negotiations (exacerbated by the Council perception as to its weak position in terms of both expertise and first-hand issue salience). Nevertheless, the EP was able to use its intrinsic veto power as co-legislator to ensure the (re)inclusion of the Commission's procedural safeguards (though it accepted defeat on the suspension clause in order to reach agreement in time). According to one interviewee, the EP also played hardball by tactically linking the negotiations on the various second phase CEAS dossiers:

[The EP] used their influence effectively and the negotiations were quite tough because of the different positions, and because they...linked progress between the files – they didn't limit the negotiations to pure [asylum procedures directive] or pure [reception conditions directive] or pure Dublin, but they said okay, we're going to make the pie bigger and the field for negotiation bigger so we can't have progress on this one if we don't get our way on that one, so they were...it was quite tough negotiations (Interview, Perm Rep NL).

As such, the EP was able to successfully exert a rights-enhancing impact over policy output in this case.

Third, and as expected by Servant and Trauner (2014) in the case of the second phase of the CEAS, the Member States were still the main actors in the negotiations; however, once again, some were inevitably more effective in pursuing their preferences than others (though all were united in their goal of minimising the potential costs/burdens that might result from policy change). The possibility for more fundamental reforms had (like in the case of Dublin II) been vetoed before the negotiations even started due to the informal agenda setting power of the strongly positioned Member States during the pre-consultations, who insisted – despite the continuing problems associated with it – on the preservation of the existing policy frame of authorisation/blame. Many of the other Member States went along with this (even if it was principally disadvantageous for many of them, such as several of the CEECs) due to their preference for the safety of the status quo. The more strongly positioned Member States had also made it clear during the negotiations (and who were generally more assertive) that they would not agree to a recast regulation that included a suspension mechanism and were ultimately accommodated in this regard. Moreover, they were able to effectively convey their preference for an early warning mechanism instead to the Polish presidency, which then ultimately made it into the final text. As for Greece, Italy, Malta and Cyprus, who had insisted on the need for the suspension mechanism throughout the

negotiations, they were ultimately overruled in the pursuit of their preferences as a result of the transition to QMV. While Greece then voted against for primarily domestic and symbolic motivations, Italy, Malta and Cyprus followed the majority in keeping with the culture of consensus, and reflective of their weaker negotiating positions.

Fourth, the feedback loops from the ECtHR rulings and the Member States' pre-existing legislative obligations under the first phase CEAS played a hugely significant role in the negotiations and in guaranteeing the inclusion of the procedural safeguard provisions. In this regard, the M.S.S. decision and the minimum standards directives represented a crucial institutional opportunity for the Commission and the EP, by virtue of both legitimising their preference for their inclusion and legitimising their argument for their inclusion within the context of a common system based on common standards. At the same time, they represented a crucial institutional constraint for the Member States, by virtue of both delegitimising their preference for exclusion (based on a preference for flexibility) and delegitimising their argument for exclusion, as they couldn't argue misfit on things they were already obligated to do. As a result, they were forced to capitulate on their initial positions of resistance, thereby permitting the provisions' inclusion.

## 7 Conclusion: Reflections on the Evolution of the Dublin System and the Limits of Communitarisation

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This chapter concludes this work by summarising the Dublin system's evolution against the backdrop of asylum policy communitarisation. Its purpose is to explain *why the Dublin system has endured despite its failures and despite the communitarisation of asylum policy-making*. The first section will briefly revisit the argument presented in Chapter One. The second section will draw together the findings of the empirical chapters into a comprehensive evaluation of the Dublin system's evolution, considered within the theoretical framework presented in Chapter Two. The third section will then present the broader contributions and implications of this work, while the fourth and final section is devoted to a closing discussion on the proposed way forward for this embattled but ever-resilient system.

### 7.1 The Argument Revisited

This study has argued that the Dublin system has been able to endure despite its failures and despite the communitarisation of asylum policy-making because of the deliberate choices made by both the Member States and the supranational institutions in pursuit of their preferences (bolstered or weakened by their relative strength of position) in the context of the (either empowering or constraining) institutional settings within which the reform negotiations took place. On the basis of an RCI-grounded framework, the analysis presented in the empirical chapters has conceptualised EU actors as inherently rational actors with varying degrees of positional strength, engaged in strategic interactions in the pursuit of their policy preferences, to which end, they have been either helped or hindered by the dense network of institutional rules and norms that ultimately structure the EU asylum policy-making process. The study has therefore treated actor preferences as the main independent variables, which have then intersected with the relevant institutional setting and the relative strength of actor positions within the context of the asylum policy-making process, together constituting the causal mechanisms that have in turn shaped policy output (the dependent variable) - which in the case of both the Dublin II and Dublin III Regulations was ultimately the preservation of the (failed) status quo.

## 7.2 The Dublin System in Perspective

This study has analysed the decision-making processes that resulted in the agreement of each of the three Dublin instruments: the 1990 Dublin Convention; the 2003 Dublin II Regulation; and the 2013 Dublin III Regulation. In so doing, it has sought to understand how and why the Dublin system emerged in the problematic form that it did, and to explain how and why that problematic form has since remained stable over the course of two attempted reforms, and against a backdrop of the communitarisation of asylum policy-making. This section reviews this study's main findings as it pertains to these two objectives.

### *Understanding the Emergence of the Dublin System*

This work has shown how the circumstances that prompted the development of the Dublin system, which was itself born of the Schengen regime, had a decisive impact on its formulation, as evidenced in Chapter Four.

First, it demonstrated how the original design of the system was a reflection of the interests of its designers – i.e. the Schengen-Five. Given that they all had an interest in enjoying the economic benefits of free movement, whilst guarding against new security threats and reducing the rate of asylum applications they received, they all wanted to ensure that once internal borders were removed for the sake of achieving free movement for European nationals, that that free movement would not apply to asylum seekers wishing to engage in secondary movements towards their preferred destinations. This was particularly true in light of the impending completion of the single market and the inevitably expansion of the free movement area to also include the southern Member States, who, due to their porous borders and underdeveloped (or undeveloped) immigration/border control system, promised to function as a sort of open gateway for facilitating the free movement of asylum traffic from the south to the more developed asylum systems of the north. As a result, the Schengen-Five had an interest in developing a system that not only ensured the clear allocation of responsibility to a single Member State, but which also guarded against the potential for such an open gateway, by stressing the individual responsibility of all Member States for the effective management and control of their borders and which further allowed for the redirection or redistribution of asylum responsibilities on the basis of a failure to

uphold that accountability given the increased importance of the EU's external borders in an area absent internal ones. The four organising features of the Dublin system were consequently born on this basis in the form of the 1990 SIC's asylum provisions.

Second, it demonstrated how the Schengen-Five were ultimately in a strong position to then impose/import these interests from the intergovernmental Schengen venue into the simultaneously occurring negotiations on an EC-12 wide agreement (within the intergovernmental Ad Hoc Group on Immigration), due to the fact that they had successfully acted as the first movers of asylum cooperation by virtue of the Schengen agreements, and because the Commission had effectively legitimised their role as the agenda setters for asylum cooperation by virtue of the Schengen Group's function as a so-called Schengen laboratory for future European cooperation. It also showed how they were further enabled in this regard due to their higher credibility as asylum actors and their gatekeeping role with regards to Schengen access. In terms of the former, they were among the most experienced and the most affected EU actors when it came to the handling of asylum matters and were therefore best poised to steer the asylum cooperation ship. In terms of the latter, they were able to effectively encourage (compel) the southern Member States to agree to their preferred terms of cooperation given that they held the keys to free movement, which was something that the southern states desperately wanted access to for economically beneficial reasons. Thus, from the outset, acceptance of the Dublin rules was presented to them as the necessary toll for gaining access to the Schengen area, given its framing as a compensatory mechanism whose necessity stemmed from the erosion of internal borders. Moreover, with virtually no experience in this area, these Member States also had a growing interest in trying to replicate the more effective regulatory practices of the North in light of the changing immigration/asylum patterns in their own countries. Thus, as a result of these dynamics, the subsequently agreed Dublin Convention effectively replicated the 1990 SIC's asylum provisions.

Third, it demonstrated how the intergovernmental setting within which both agreements were negotiated had a crucial impact on the overall content of cooperation (i.e. policy output). Given that the Member States were themselves both agenda setters and decision

makers, they were institutionally unfettered when it came to negotiating the terms of agreement (with the Commission only afforded 'observer status' in the discussions). As the general mind-set of the Member States at the time was one geared towards restriction, this was in turn reflected in the establishment of an allocation system, which presented the reception of asylum seekers as unwanted costs and burdens (rather than human rights-related responsibilities), and which allocated that burden on the basis of a failure to prevent access to EC territory. Moreover, and given the default unanimity requirement, the more specific provisions of the agreement generally reflected the most restrictive or basic common point of agreement (i.e. the lowest common denominator). Thus, as a result of the work done in these intergovernmental forums, the overall foundation for early EC-level cooperation on asylum had been set – and that foundation was one of restriction. More importantly, the more specific foundations for the Dublin system had also been set; in this case, however, and as a result of the aforementioned circumstances, the frame for cooperation had taken on an even more negative tone in that the resulting system was meant to at once circumvent asylum seekers who meant to *abuse* the generosity of European asylum systems (by virtue of asylum shopping and irregular secondary movements), while also *punishing* weaker Member States that might attempt to *cheat* on their expected contributions to both internal security and the protection regime more broadly (by virtue of trying to free-ride on their provision of these public goods). And as the following sub-section demonstrates, these foundations have ultimately been hard to shake.

### *Explaining the Stability of the Dublin System*

This work has also shown how the specific intersection between preferences, and the causal impact of the relative strength of actor positions and their institutional setting within the context of the policy-making process, has ultimately shaped policy output in the case of both the Dublin II and Dublin III Regulations, as evidenced in Chapters Five and Six.

*Actor Preferences.* In both cases, and consistent with theoretical expectations, the Commission and the EP demonstrated a clear preference for more substantive reforms to the Dublin system, in terms of both enhancing the rights/protections afforded to asylum seekers, and achieving a fairer distribution of asylum burdens (by minimising Dublin's potential

(re)distributive effects). However, these preferences were discernably at odds with those of the majority of the Member States. In both cases, and consistent with the modified parameters of misfit theory as elaborated in Chapter Two, the Member States generally displayed a clear resistance to any proposed changes to the system that might result in either an increase in individual asylum costs or an increase in relative asylum burdens. While the Member States were therefore generally quite unified in their opposition to any changes regarding the former, their preferences in terms of the latter manifested themselves differently in that those Member States who benefitted (in principle) from the maintenance of the status quo consequently had a preference for the maintenance of the status quo (regardless of its failures), as any potential change might result in an increase in their relative burdens. Conversely, those Member States who were at a disadvantage (in principle) from the maintenance of the status quo consequently had a preference for reform, as change might potentially result in a prospective decrease in their (attributed) relative asylum burdens.

*The (Causal) Role of Positions.* The weight that these preferences then carried in the negotiations on Dublin II and Dublin III were ultimately impacted by the relative positional strength of the actor that held them. This in turn impacted their ability to effectively influence the output of negotiations. In both cases, policy output generally reflected the preferences of the most strongly positioned actors. This was due to both the higher *credibility* of their positions (based on their asylum expertise and the credibility of their commitments) and the higher *intensity* of their positions (based on the salience attributed to asylum policy as a result of exposure to asylum inflows and Dublin transfers). With regards to the former, those states with higher credibility positions were in a better position to argue in favour of their preferred policy options (and to issue specific proposals/wording) as a result of their experience in the area and more effective government administrations. With regards to the latter, those states with higher intensity positions were also in a better position to argue in favour of their preferred policy options, due to the fact that they would be most affected by the policy output that would result. Conversely, the preferences of the more weakly positioned states were not generally reflected in policy output, given that: they had less experience to draw upon in advancing specific preferences; they were deemed less credible in that they were unlikely to actually implement the resulting policy properly (thereby

minimising its prospective impact); and they were less able to argue as to the necessity of having their preferences accommodated given that they were not as highly affected. In the case of Dublin III in particular, the CEECs, who were generally aware of their weaker positionality, deliberately played a less active role in the negotiations on this basis. Given that the stronger/weaker position categorisations elaborated in sections 5.2 and 6.2 generally confirmed a North/South and North/South + East division, both Dublin regulations ultimately better reflected the preferences of the northern Member States, who collectively held an overall preference for the preservation of the status quo.

*The (Causal) Role of Institutions.* The actual ability for actors to exert their preferences within the context of the policy-making process was also crucially dependent on the institutional setting within which the Dublin II and Dublin III negotiations took place. As actors were required to (rationally) modify their strategies in accordance with this setting, this in turn impacted the extent to which the policy output in both cases better reflected the preferences of certain actors over others.

With regards to the agenda-setting stage of the policy-making process, its access to *formal agenda setting* power was absolutely essential for the Commission's ability to try to steer policy output in its preferred direction. While this influence was ultimately constrained in the case of Dublin II due to unanimity voting rules, which resulted in the Commission's proposal tactically reflecting the lowest common denominator approach – i.e. the status quo), it had considerably more leeway in the case of Dublin III as a result of the transition to QMV, which resulted in a Commission proposal that more strongly reflected its own preferences, and which ultimately resulted in the inclusion of various rights-based procedural protections in the final text. With regards to achieving more fundamental reforms, however, the Commission's formal agenda setting powers were ultimately trumped by the stronger *informal agenda setting* powers of the most strongly positioned Member States (exercised within the context of the pre-consultations), who insisted on the retention of Dublin's core features in both cases. Given the power that these states wield within the Council (in terms of both their formal voting power under unanimity and QMV, as well as their strong positionality), the Commission was ultimately forced to bend to their

will. In this sense, *policy frames* also played a crucial role in determining output, as the policy frame of responsibility/accountability/blame (encompassed by the authorisation principle and the hierarchy of criteria) proved impossible to shake. Not only did the strongly positioned Member States insist on the preservation of this policy frame, but also the Commission, who would have preferred its replacement, was unable to come up with a viable alternative policy frame, which ultimately ensured its survival. This consequently cancelled out the possibility for more fundamental reform in the case of both the Dublin II and Dublin III negotiations. Moreover, in the particular case of the Dublin system, this overarching principle/policy frame has arguably come to take on a symbolic value that has been prioritised over the actual functionality of the system. As such, the commitment to this policy frame has helped it to obtain ideational institution status.

With regards to the actual decision-making phase of the policy-making process, the variable applicability of *voting rules* had an important impact on the negotiations on both Dublin II and Dublin III. In the case of the former, Italy and Greece's access to veto power ultimately jeopardised the prospect for maintaining the status quo (which was ultimately favoured by a majority of the Member States) given their joint preference for more fundamental reforms. Their veto threats were ultimately overcome, however, by virtue of strong *council presidencies* occupied by strongly positioned Member States, who were variably able to apply strong political pressure on them by virtue of policy linkages made at more political levels within the *Council structure* (in this case, the linkage made by the JHA Council between the Dublin dossier and broader efforts to combat illegal immigration), and by strategically navigating the usage of different institutional procedures in order to compel them to withdraw their reservations (i.e. ensure their 'silence') and to push the majority-favoured agreement (i.e. the status quo) through (via the Danish presidency's invocation of the silence procedure). Moreover, and unfortunately for the *EP*, the application of the *consultation procedure* rendered it virtually impotent in terms of its ability to influence the resulting regulation. In the case of the latter, the application of qualified majority *voting rules* helped swing the majority position in favour of the status quo. Given that the main division in the Council during the Dublin III negotiations pertained to the proposed suspension clause, and given that the qualified majority were against it, this ultimately ensured that it didn't make

it through the negotiations. However, given that several of the other Member States supported its inclusion (alongside the Commission and the EP), this issue – and the need for *consensus* on this issue – had resulted in negotiation gridlock. This was only overcome by the entrepreneurial strength of the Polish *presidency*, which proposed the early warning mechanism in its stead, which ultimately did gain the support of a qualified majority of Member States and which ultimately made it into the final regulation. As for the opposing *coalition* between Greece, Italy, Malta and Cyprus, the latter three states ultimately withdrew their opposition (by not voting against the proposed regulation) due to the recognition that they did not constitute a sufficient blocking majority under QMV rules and because, on the basis of strategic rational calculations, it wasn't worth it for any of them to go against the established *cultural norm of consensus*. Moreover, as a result of the transition to the *co-decision procedure*, the EP was able to exert far more influence over the Dublin III negotiations compared to the last, as the resulting regulation required its approval before it could be passed. As a result, the EP was able to petition much harder for the inclusion of provisions that more closely aligned with its preferences, and more effectively. To this end, it, and the Commission, had also been massively assisted by the feedback implications of recent *court cases* and existing Member State *legal obligations* in that they were able to legislatively entrap Member States into accepting their preferred provisions, which ultimately enabled them to ensure the inclusion of the procedural protections despite the fact that the negotiations in the Council had previously seen them either deleted or significantly scaled back.

***Policy Outputs.*** Thus, in the case of both the Dublin II and Dublin III negotiations, the specific intersection that occurred between actor preferences and the causal impact of both positional and institutional considerations, while following different paths as a result of the partial and full communitarisation of asylum policy-making, ultimately yielded the same result – that is, the endurance of the Dublin system. Though various changes have been made between the successive final texts as a result of the reform negotiations (the first of which importantly transitioned Dublin from an international convention to EU law), the underlying foundations of the system have nevertheless remained intact (for an in-depth overview of the changes made between the three Dublin agreements, see Appendix 3). Thus, while the system has technically evolved, it also hasn't really changed.

### 7.3 Contributions and Implications

First and foremost, this study provides an important contribution to the existing literature on the Dublin system in that it is, at the time of submission (and to the author's knowledge), the most comprehensive investigation into the Dublin system to date. While most other works relating to Dublin have focused primarily on its problematic principles (see: Hurwitz 1999; Blake 2001; Kjaerum 1992; Bhabha 1995; Hailbronner and Thiery 1997; Barbou des Places and Oger 2004) and its legal and/or practical implications (see: Hurwitz 1999; Marx 2001; Noll 2001; Lavenex 2001; Blake 2001; Vink and Meijerink 2003; Neuman 1992, 2003; Schuster 2011; Papadimitriou and Papageorgiou 2005; Noll 2001; Kjaergaard 1994; Costello 2005; Battjes 2002), this study has instead devoted itself entirely to understanding how and why this flawed system originated and why it has survived relatively untouched – a contribution which has thus far been absent. With regards to the former question, it has provided a novel contribution in that its reliance on original archival material pertaining to the SIC and Dublin negotiations has helped to uncover the specific motivations and rationalisations that led the Member States involved to design the system in the way that they did. With regards to the latter, it has also provided a novel contribution in that its detailed process tracing of the negotiations on both the Dublin II and Dublin III Regulations (based on original EU documents and original interview data) has similarly uncovered the specific motivations and rationalisations that led the Member States and the supranational institutions to adopt the strategies they did, which has, in both cases, resulted in Dublin's stability. Given Dublin's role as the cornerstone of the CEAS, this study consequently also makes an important contribution to the literature on the CEAS more broadly by enriching our understanding of one its core policies.

Through its analysis, it has lent support to the conceptualisation of refugee protection as a public good, the Schengen area as a club good, and Dublin as the toll for entry (see: Thielemann and Armstrong 2013). It has also lent support to the misfit theory as it pertains to decision-making on asylum policies, whilst adapting it for the specific purpose of this

thesis. Moreover, it has introduced the concept of ‘legislative entrapment<sup>269</sup>’, to denote situations where Member States may find themselves forced to accept policy provisions to which they would otherwise object, as a result of parallel commitments made with regards to different legislative instruments in different negotiating arenas.

This study is further relevant to the literature on EU asylum policy-making, in that it has unpacked the policy-making process as it pertains to asylum policy-making under both the consultation and the co-decision procedure (the applicability of which have coincided with the development of the first and second phases of the CEAS respectively) in order to better understand how EU actors behave in these settings and how this in turn impacts output. While various works have very importantly examined the causal impact of various individual institutions and/or actors on asylum policy output (see, for example: Servant and Trauner 2014; Kaunert 2011; Zaun 2016), this study adds to these works by providing an at once detailed and holistic overview of the EU asylum policy-making process more broadly as it pertains to the impact of multiple actors and multiple institutions across multiple procedures.

Finally, this study is also relevant for broader conversations on the impact of communitarisation. As outlined at the beginning of this study, one of the core motivating puzzles behind this research was the fact that the communitarisation of asylum policy-making seemingly hadn’t produced the theoretically and empirically expected results in the case of the Dublin system (contrary to the case in other policy areas, as well as the minimum asylum standards directives). To this end, it has shown how the uniquely protracted and carefully managed path to asylum communitarisation has in turn affected its overall impact, which arguably stems from the particularly contentious and sovereignty-sensitive nature of asylum policies. Moreover, the findings of this study seem to suggest that in the particular case of Dublin, the fundamentally negative foundation on which the justification for its operation is based sets it apart from the asylum directives, which although by no means aspirational (by virtue of the fact that they are, indeed, minimum standards), their premise

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<sup>269</sup> While Schimmelfennig (2001) has previously introduced the concept of ‘rhetorical entrapment’ to capture how Member States can get locked in to certain policy measures as a result of previously issued rhetorical commitments, this usage expands on this idea and applies it to actual pre-existing legislative commitments.

is nevertheless based on the need to guarantee an adequate level of protection for asylum seekers. This is in stark contrast to the Dublin system, which is based on the need to guard against 'abusive' asylum shoppers and 'negligent' Member States. As such, it speaks to an antagonism between Member States and asylum seekers and between Member States themselves, which has in some ways seemingly negated the prospective more liberal influence of the supranational institutions. That said, however, Dublin III does provide clear support for the expectation that, where enabled, the supranational institutions will seek to entrench stronger protections. While in this case, it was just a lateral transfer of pre-existing standards, it was nevertheless an improvement on the previous Dublin II Regulation. Notwithstanding this improvement, however, this study showed how, despite the full communitarisation of asylum policy-making, the Member States were indeed still the core actors in the second phase development of the CEAS (Servent and Trauner 2014).

#### **7.4 Looking Ahead: What Way For Dublin IV?**

As of 4 May this year (2016), the Commission released its proposal for a Dublin IV Regulation, as part of yet *another* round of reforms targeted at the improved functioning of the CEAS. Emphasising both the need and urgency for the introduction of more far-reaching reforms than those achieved under the second phase development, the Commission stressed that the current migratory and asylum crisis has served to dramatically "[expose the] significant structural weaknesses and shortcomings in the design and implementation of the European asylum system, and of the Dublin rules in particular" (Commission 2016: 3). And yet, despite the damning body of evidence against Dublin – in terms of both its pre- and in-crisis performance - it would seem that history might be doomed to repeat itself.

Like the two regulations before it, the issuing of the Commission's proposal similarly followed the completion of an implementation evaluation, conducted alongside a series of targeted consultations with Member States, the EP and other relevant stakeholders (such as UNHCR and ECRE) that were geared towards obtaining their views on prospective reform. With regards to the former, the evaluation revealed the persistence of many of the very same problems that had appeared in the previous two implementation evaluations, as well as evidence of substantial inconsistencies in the application of Dublin III's new procedural

safeguards (Ibid; 9). It also revealed the system's continued ineffectiveness and low rate of implementation, as only 13% of asylum applications lodged in 2014 had been subject to Dublin requests, of which only two-thirds were successful, and of which only a further quarter were actually transferred (Ibid: 10). The system's ineffectualness in actually reducing multiple applications also remained consistent, with around 25% of all applications coming from applicants who had previously applied elsewhere. Moreover, and notwithstanding the extreme strains being placed specifically along the periphery of the Union in light of the crisis, the distribution of asylum applications among the Member States remained highly skewed, with 70% of all first-time applications going to just 5 of the Member States in a union of 28 (Ibid: 12). The failures of Dublin have therefore continued to persist.

With regards to the latter, the consultations have once again revealed highly "divergent views" among the stakeholders as to how Dublin should be reformed (Ibid: 4), with a "majority of Member States still pushing for the [maintenance of the] status quo", a reality which, according to a representative from ECRE, is "shameful – it's unbelievable, but its true" (Interview, ECRE). As a result, and due to a "resurgence in the importance of national interests in the [midst] of the crisis" (Interview, Council Secretariat), the Commission has once again, been forced to arrive at the conclusion that the only feasible way forward is for the authorisation principle and "the current criteria in the Dublin system [to be] preserved" (Commission 2016: 4). Thus, even in the face of the virtual collapse of several Member States' asylum systems, and despite widespread acknowledgement as to Dublin's axial role in helping to exacerbate and fuel the crisis facing the EU and its Mediterranean Member States in particular, Dublin will, once again, endure.

The main changes put forward by the Commission in its proposal are consequently aimed at improving the system's efficiency. These include: a new obligation for Member States to check whether applications are inadmissible prior to the start of a Dublin procedure<sup>270</sup>; the deletion of the provision relating to the cessation of responsibility after 12 months from illegal entry as well as the criterion on illegal stay; the narrowing of potential usage for the discretionary clause; the further shortening of time limits; and the replacement of take back

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<sup>270</sup> On grounds of first country of asylum or STC.

requests with take back notifications that do not require a reply<sup>271</sup>. In order to avoid the deliberate avoidance of responsibility, the expiry of deadlines would also no longer result in an automatic shift of responsibility, as this encouraged procedural circumvention or obstruction (“once a Member State [is] determined responsible, that Member State shall remain responsible” (Ibid: 16)). Other proposed changes, geared more towards improving the situation for asylum applicants, include: the extension of the definition of family to also include siblings and family relations formed after leaving the country of origin but before arrival on Member State territory<sup>272</sup>; the granting of automatic suspensive effect on transfers in cases of appeal; and the guarantee that unaccompanied minors be dealt with in the country of first application (unless it is demonstrated that this is not in their best interest).

The Commission has, however, also proposed the introduction of a corrective allocation mechanism that is intended to coexist alongside Dublin, which would help to address cases where Member States are forced to deal with a “disproportionate number of asylum seekers” and which would be “triggered automatically as soon as a Member State carries a disproportionate burden” (Ibid: 4). Despite initial speculation that the Commission might actually seek to replace the Dublin system in its entirety with a permanent relocation mechanism, or at the very least, insist on the direct inclusion of such a mechanism within it (as per the Commission’s September 2015 proposal<sup>273</sup>), the Commission has – in the wake of the pre-consultations – ultimately settled for a complementary mechanism.

According to the Commission’s proposal, the corrective allocation mechanism will entail the creation of an automated system for the registration of all applications by Member State upon receipt. In cases where another Member State is deemed responsible under Dublin, the system will be updated. It will also monitor the total number of asylum applications lodged

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<sup>271</sup> As there is a clear basis for responsibility in these cases, and given that they constitute about 75% of all requests at present, this is expected to help expedite procedures considerably (Ibid: 16).

<sup>272</sup> The latter change is intended to address situations pertaining to prolonged stays in refugee camps, and which should also help to reduce the likelihood for subsequent secondary movements.

<sup>273</sup> In response to the acute situation facing Italy and Greece, the Commission called for the internal relocation of 120,000 persons in clear need of protection from within Greece, Italy and Hungary to other EU Member States on the basis of this key (this was in addition to the call for the internal relocation of 40,000 persons from Greece and Italy, which it issued in May). The Council also issued two decisions in September 2015 relating to the ‘establishment of provisional measures in the area of international protection for the benefit of Italy and Greece’ (Council Decision 2015/1523 of 14 September and Council Decision 2015/1601 of 22 September).

in the EU, the number of applications lodged per Member State, the number of applications that each Member State must examine as a result of Dublin responsibility and the share this represents with respect to all Member States, as well as the number of persons resettled by each Member State. This, in turn, constitutes the basis for an automatic calculation of each Member States' respective share of asylum responsibilities (calculated on a rolling one year basis), which is measured against a set reference key. The reference key is to be based on size of population and GDP (with each criteria given an equal weighting of 50%). The corrective allocation mechanism is then automatically triggered whenever the number of applications for which a Member State is responsible exceeds 150% of its corresponding figure in the reference key. Once the mechanism is triggered, all new applications directed towards the relevant Member State will be automatically redirected to and shared among those Member States that currently have a share of applications below that indicated in the reference key in a proportional manner (at which point, they can initiate the regular Dublin procedure). Automatic reallocation will then continue for as long as the disproportionate pressure measures in excess of 150%. The proposal also affords any Member State with the option of temporarily exempting itself from the mechanism for a 12-month period. In such cases, applicants that would have been directed towards that Member State will be redirected towards another; however, the non-participating Member State must then make a solidarity contribution of €250,000 (per applicant) to the Member State deemed responsible instead.

It is indeed unfortunate that the Member States have once again proven unwilling to even consider a reconsideration of the Dublin system's foundations. Nevertheless, the proposed corrective allocation mechanism would arguably go some way in helping to rectify some of the unmanageable 'burdens' that seem to naturally arise from the ever-volatile ebbs and flows of migratory waves. Of course, one need not look too far back to feel rather pessimistic as to the proposal's prospect for success. Whilst many of the Member States have been quite happy in the past to avow themselves to the goal of enhanced solidarity and to acknowledge the need to alleviate pressures on overburdened states in cases of mass influx, they have simultaneously eschewed any formal commitments to achieving such ends. Though the Commission has repeatedly broached the subject of introducing more fixed systems of

suspension and/or reallocation in order to remedy otherwise unsustainable situations, any such proposals have been quickly defeated in favour of voluntary and non-binding pledges. Moreover, as the asylum crisis wears on, and as the faces of the threats to European security – stemming from both internal and external sources - continue to change against a backdrop of the seemingly growing magnetism of right-wing populism, the rhetoric targeted at ‘outsiders’ (be they migrants or refugees) will foreseeably get nastier before it gets nicer, likely pushing politicians towards an increasingly protectionist stance.

In the end, however, it will likely take several years before political agreement can be reached and before ‘Dublin IV’ comes to fruition. As to whether or not the proposed corrective allocation mechanism will actually survive negotiations in the Council and in any way resemble that which has been initially proposed by the Commission, only time will tell.

The proof will be in the proverbial pudding.

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## Appendix 1: Country Codes

Austria	AT
Belgium	BE
Bulgaria	BG
Croatia	HR
Cyprus	CY
Czech Republic	CZ
Denmark	DK
Estonia	EE
Finland	FI
France	FR
Germany	DE
Greece	EL
Hungary	HU
Iceland	IS
Ireland	IE
Italy	IT
Latvia	LV
Lithuania	LT
Luxembourg	LU
Malta	MT
Netherlands	NL
Norway	NO
Poland	PL
Portugal	PT
Romania	RO
Slovakia	SK
Slovenia	SI
Spain	ES
Sweden	SE
Switzerland	CH
United Kingdom	UK

## Appendix 2: List of Interviews

Citation	Interviewee (by institutional affiliation)
Civil Servant DK	Civil Servant from Denmark, Anonymous
Commission 1	European Commission, DG Home Affairs, Asylum Unit
Commission 2	European Commission, DG Home Affairs, Asylum Unit
Council Secretariat	Head of Asylum Unit, DG Home Affairs, General Secretariat of the Council of the European Union
ECRE	Daphné Bouteillet-Paquet, Senior Legal Officer, European Council for Refugees and Exiles
Interior Ministry Anon	Ministry of Interior Official, Anonymous Member State
MEP	Member of the European Parliament
Perm Rep CY	Permanent Representation of Cyprus to the EU
Perm Rep CZ	Permanent Representation of the Czech Republic to the EU
Perm Rep DE	Permanent Representation of Germany to the EU
Perm Rep FR	Permanent Representation of France to the EU
Perm Rep HU	Permanent Representation of Hungary to the EU
Perm Rep MT	Permanent Representation of Malta to the EU
Perm Rep NL	Permanent Representation of the Netherlands to the EU
Perm Rep PL	Permanent Representation of Poland to the EU
Perm Rep SE	Permanent Representation of Sweden to the EU
UNHCR	Madeline Garlick, United Nations High Commissioner for Human Rights

### Appendix 3: The Dublin Texts Compared (Key Issues)

	Dublin Convention	Dublin II Proposal	Dublin II Regulation	Dublin III Proposal	Dublin III Regulation
<b>Scope of application</b>	1951 Refugees	1951 Refugees	1951 Refugees	1951 Refugees + <b>Subsidiary (“International protection”)</b>	1951 Refugees + <b>Subsidiary (“International protection”)</b>
<b>Mutual recognition</b>	Negative only	Negative only	Negative only	Negative only	Negative only
<b>Transfers to non-EU STCs</b>	Included	Removed	Included	Included	Included
<b>Unaccompanied minor definition</b>	N/A	TCN under 18 who arrives without an adult responsible for him/her by law or custom	TCN under 18 who arrives without an adult responsible for him/her by law or custom <b>-Also includes minors left unaccompanied after arrival</b>	TCN under 18 who arrives without an adult responsible for him/her by law or custom -Also includes minors unaccompanied after arrival	TCN under 18 who arrives without an adult responsible for him/her by law or custom -Also includes minors left unaccompanied after arrival
<b>Family definition</b>	-Spouse -Unmarried minor child of under 18 -Father or mother of minor of under 18	-Spouse/ <b>unmarried partner in accordance with national law</b> -Unmarried minor child of under 18 ( <b>irrespective of their filiation or his ward</b> ) -Father, mother or guardian of <b>unmarried</b> minor of under 18 - <b>Another relative with whom the applicant used to reside if one is dependent on the other</b>	-Spouse/unmarried partner in accordance with national law -Unmarried <b>and dependent</b> minor child of under 18 ( <b>regardless of wedlock or adoption in accordance with national law</b> ) -Father, mother or guardian of unmarried minor of under 18 <del>-Another relative with whom the applicant used to reside if one is dependent on the other</del>	-Spouse/unmarried partner in accordance with national law <del>-Unmarried and dependent</del> minor child of under 18 (regardless of wedlock or adoption in accordance with national law) - <b>Married minor child of under 18 (regardless of wedlock or adoption in accordance with national law)</b> -Father, mother or guardian of unmarried minor of under 18 ( <b>also married minors where it is in their best interest to reside with</b> ) - <b>Minor, unmarried siblings of the applicant when the latter is an unmarried minor (also applies to married minor siblings where in best interest to reside together)</b>	-Spouse/unmarried partner in accordance with national law -Unmarried minor child of under 18 (regardless of wedlock or adoption in accordance with national law) <del>-Married minor child of under 18 (regardless of wedlock or adoption in accordance with national law)</del> -Father, mother or <b>other adult responsible for</b> unmarried minor of under 18 ( <b>also married minors where it is in their best interest to reside with</b> ) Minor, <b>unmarried siblings of the applicant when the latter is an unmarried minor (also applies to married minor siblings where best interest to reside together)</b> -Relative: aunt or uncle or grandparent of applicant (regardless of wedlock or adopted in accordance with national law)

Right to interview	N/A	N/A	N/A	<p>-Determining MS “shall grant opportunity” for personal interview, prior to a decision to transfer</p> <p>-Conducting MS shall produce a short written report containing main information (to which the applicant has access)</p>	<p>-Determining MS “shall <b>conduct” personal interview</b></p> <p><b>-This may be omitted if the applicant has absconded or if the necessary information has already been submitted by other means (omitting MS must then ensure the applicant has an opportunity to submit any further information subsequently, prior to a decision to transfer</b></p> <p>-Conducting MS shall produce a <b>written summary (report or standard form)</b> containing main information (to which applicant <b>and/or legal advisor/representing counsellor</b> has access)</p>
Guarantees for minors	N/A	Accompanying minor who meets family definition ‘indissociable’ from parent/guardian whether or not an applicant him/herself	Accompanying minor who meets family definition ‘indissociable’ from parent/guardian whether or not an applicant him/herself <b>-Same situation if minor is born after arrival</b>	<p>-Best interests of the child primary consideration (taking into account family reunification possibilities, well-being and social development, safety and security and views of minor)</p> <p>-MS must ensure the assistance of a representative for all procedures</p> <p>-MS to establish national legislation regarding procedure for tracing family members/relatives ASAP after application lodged</p> <p>-Relevant authorities shall have minor-specific training</p>	<p>-Best interests of the child primary consideration (taking into account family reunification possibilities, well-being and social development, safety and security and views of minor)</p> <p>-MS must ensure the assistance of a representative for all procedures <b>who has the qualifications and expertise necessary to ensure best interests of the child and who shall have access to all relevant information</b></p> <p><b>-MS shall take appropriate measures to identify family, siblings or relatives of the minor ASAP whilst protecting best interests (may rely on assistance of relevant organisations)</b></p>

<p><b>Allocation criteria</b></p>	<ol style="list-style-type: none"> <li>1. Family reunification in cases of recognised refugee status</li> <li>2. Issued residence permit, visa, transit visa</li> <li>3. Irregular border crossing (ceases to apply if applicant has resided in country of application for 6 mos.)</li> <li>4. First country lodged in cases where visa requirements waived/Applications made in transit zones of airports</li> <li>5. First country lodged</li> </ol>	<p><b>(Explicitly hierarchical)</b></p> <ol style="list-style-type: none"> <li><b>1. Family reunification for unaccompanied minors</b></li> <li>2. Family reunification in cases of recognised refugee status <b>(as well as pending applications)</b></li> <li>3. Issued residence permit, visa, <del>transit visa</del></li> <li>4. Irregular border crossing (ceases to apply if applicant has resided in country of application for 6 mos.)</li> <li>5. First country lodged in cases where visa requirements waived/Applications made in transit zones of airports</li> <li><b>6. Knowing tolerance of unlawful presence for more than 2 mos.</b></li> <li><b>7. Unlawful remain for more than 6 mos.</b></li> <li><b>8. First country lodged</b></li> <li><b>9. Where multiple family members submit in the same MS and would be separated by criteria, responsibility for examining all applications goes to MS where most of them would be allocated or would be allocated to the oldest family member</b></li> </ol>	<p>(Explicitly hierarchical)</p> <ol style="list-style-type: none"> <li>1. Family reunification for unaccompanied minors <b>(otherwise first country lodged)</b></li> <li>2. Family reunification in cases of recognised refugee status (as well as pending applications)</li> <li>3. Issued residence permit, visa</li> <li>4. Irregular border crossing <b>(established on the basis of proof or circumstantial evidence)</b> (ceases to apply if applicant has resided in country of app. for 5 mos.)</li> <li>5. First country lodged in cases where visa requirements waived/Applications made in transit zones of airports</li> <li><del>6. Knowing tolerance of unlawful presence for more than 2 mos.</del></li> <li><del>7. Unlawful remain for more than 6 mos.</del></li> <li>6. First country lodged</li> <li>7. Where multiple family members submit in the same MS and would be separated by criteria, responsibility for examining all applications goes to MS where most of them would be allocated or would be allocated to the oldest family member</li> </ol>	<p>(Explicitly hierarchical)</p> <ol style="list-style-type: none"> <li>1. Family/<b>relative</b> reunification for unaccompanied minors <b>in line with best interests of the child</b> (otherwise first country lodged)</li> <li>2. Family reunification in cases of recognised refugee status (as well as pending applications)</li> <li><b>3. Family reunification in cases where the asylum seeker is dependent on assistance of a relative or where a relative is dependent on asylum seeker</b></li> <li><b>4. Where multiple family members submit in the same MS and would be separated by criteria, responsibility for examining all applications goes to MS where most of them would be allocated or would be allocated to the oldest family member</b></li> <li>5. Issued residence permit, visa</li> <li>6. Irregular border crossing (established on the basis of proof or circumstantial evidence) (ceases to apply if applicant has resided in country of application for 5 mos.)</li> <li>7. First country lodged in cases where visa requirements waived/Applications made in transit zones of airports</li> <li><b>8. First country lodged</b></li> </ol>	<p>(Explicitly hierarchical)</p> <ol style="list-style-type: none"> <li>1. Family/<b>sibling/</b> relative reunification for unaccompanied minors in line with best interests of the child (otherwise first country lodged)</li> <li>2. Family reunification in cases of recognised refugee status (as well as pending applications)</li> <li><del>3. Family reunification in cases where the asylum seeker is dependent on assistance of a relative or where a relative is dependent on asylum seeker</del></li> <li>4. Where multiple family members submit in the same MS and would be separated by criteria, responsibility for examining all applications goes to MS where most of them would be allocated or would be allocated to the oldest family member</li> <li>5. Issued residence permit, visa</li> <li>6. Irregular border crossing (established on the basis of proof or circumstantial evidence) (ceases to apply if applicant has resided in country of application for 5 mos.)</li> <li>7. First country lodged in cases where visa requirements waived/Applications made in transit zones of airports</li> </ol>
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Dependent persons	N/A	N/A	N/A	(Provision on dependent persons originally included in allocation criteria above)	(New Article) Where an applicant is dependent on a child, sibling or parent or vice versa, MS 'shall normally keep or bring [them] together'. If present in diff. states, the resp. MS is that where child, sibling or parent is legally present, unless applicant's health prevents travel, in which case, resp. shifts to the other
Sovereignty and humanitarian clauses	Included (Applicant consent needed for both)	Included (Applicant consent needed for hum. but not sov.)	Included (Applicant consent needed for hum. but not sov.)	Included ( <b>Applicant consent needed for both</b> )	Included ( <b>Applicant consent needed for hum but not sov.</b> )
Take charge requests	-Requests must be issued within 6 mos. or responsibility defaults to country of application (based on indications enabling the receiving MS to assess responsibility) -Requests must be responded to within 3 mos. – failure to reply tantamount to acceptance -Transfers must take place within 1 month of acceptance	-Requests must be issued within <b>65 working days</b> or responsibility defaults to country of application ( <b>based on proof or corroborating evidence</b> ) <b>-Possibility of requesting urgent reply</b> -Requests must be responded to within <b>1 month</b> – failure to reply tantamount to acceptance -Transfers must take place within <b>6 mos.</b> of acceptance ( <b>otherwise default to country of application</b> )	-Requests must be issued within <b>3 mos.</b> or responsibility defaults to country of application (based on proof or <b>circumstantial evidence</b> ) -Possibility of requesting urgent reply ( <b>min. 1 wk.</b> ) -Requests must be responded to within <b>2 mos. (or 1 month at the latest in cases of urgent reply)</b> – failure to reply tantamount to acceptance -Transfers must take place within 6 mos. of acceptance (otherwise default to country of application) ( <b>can be extended to 1 yr. if imprisoned or 18 mos. if absconded</b> )	<b>*Minors indissociable from a parent or guardian</b> -Requests must be issued within 3 mos. or responsibility defaults to country of application (based on proof or circumstantial evidence) -Possibility of requesting urgent reply (min. 1 wk.) -Requests must be responded to within 2 mos. (or 1 month at the latest in cases of urgent reply) – failure to reply tantamount to acceptance -Transfers must take place within 6 mos. of acceptance (otherwise default to country of application) (can be extended to 1 yr. if imprisoned or 18 mos. if absconded) <b>-Costs rest with transferring state. Information on special needs of applicants to be communicated prior</b>	<b>*Minors indissociable from a parent or guardian</b> -Requests must be issued within 3 mos. ( <b>or 2 mos. in the case of a Eurodac hit</b> ) or responsibility defaults to country of responsibility (based on proof or circumstantial evidence) -Possibility of requesting urgent reply (min. 1 wk.) -Requests must be responded to within 2 mos. (or 1 month at the latest in cases of urgent reply) – failure to reply tantamount to acceptance -Transfers must take place within 6 mos. of acceptance (otherwise default to country of application) (can be extended to 1 yr. if imprisoned or 18 mos. if absconded) -Costs rest with transferring state. Information on special needs of applicants to be communicated prior

<p><b>Take back requests</b></p>	<p>-No time requirement for issuing requests -Requests must be responded to within 8 days -Transfers must take place within 1 month of acceptance</p>	<p>-No time requirement for issuing requests -Requests must be responded to within 8 days <b>(or can send a provisional reply within this time, which can extend response time up to 14 days from date of issue) – failure to reply tantamount to acceptance</b> -Transfers must take place within <b>6 months</b> of acceptance <b>(otherwise default to country of application)</b></p>	<p>-No time requirement for issuing requests -Requests must be responded to within <b>1 month or 2 weeks in cases of Eurodac requests</b> – failure to reply tantamount to acceptance -Transfers must take place within 6 months of acceptance (otherwise default to country of application) <b>(can be extended to 1 year if imprisoned or 18 months if absconded)</b></p>	<p><b>*Minors indissociable from a parent or guardian</b> <b>-Requests must be issued within 2 mos. if based on Eurodac, 3 mos. (regardless of whether or not a new application is submitted in requesting MS) otherwise or responsibility defaults to country of application (based on proof or circumstantial evidence)</b> -Requests must be responded to within 1 month or 2 weeks in cases of Eurodac requests – failure to reply tantamount to acceptance -Transfers must take place within 6 mos. of acceptance (otherwise default to country of application) <b>(can be extended to 1 yr. if imprisoned or 18 mos. if absconded)</b> <b>-Costs rest with transferring state. Information on special needs of applicants to be communicated prior</b></p>	<p>*Minors indissociable from a parent or guardian -Requests must be issued within 2 mos. if based on Eurodac, 3 mos. (regardless of whether or not a new application is submitted in requesting MS) otherwise or responsibility defaults to country of application (based on proof or circumstantial evidence) -Requests must be responded to within 1 month or 2 weeks in cases of Eurodac requests – failure to reply tantamount to acceptance -Transfers must take place within 6 mos. of acceptance (otherwise default to country of application) (can be extended to 1 yr. if imprisoned or 18 mos. if absconded) -Costs rest with transferring state. Information on special needs of applicants to be communicated prior</p>
<p><b>Remedies (appeals/suspensive effect)</b></p>	<p>Deferred to national practice.</p>	<p>Appeals rest with national courts. No suspensive effect on performance of transfer.</p>	<p>Appeals rest with national courts. No suspensive effect on performance of transfer <b>unless ordered by the courts or competent bodies on a case-by-case basis where national legislation allows.</b></p>	<p><b>-All applicants shall have the right to an effective remedy before a court/tribunal</b> <b>-Authorities shall decide within 7 days if applicant will remain on the territory of the MS pending outcome (no transfer prior to decision)</b> <b>-MS shall ensure applicant access to legal assistance (free where required) and linguistic assistance (where required)</b></p>	<p>-All applicants shall have the right to an effective remedy before a court/tribunal <b>-MS ntl. law shall provide that: an appeal confers right to remain pending outcome; or transfers subject to automatic suspension for reasonable period during which a court/tribunal will decide right to remain pending outcome; or applicants have an</b></p>

					<p><b>opportunity to request suspension pending appeal, with transfer suspended pending decision on a suspension of transfer</b></p> <p>-MS shall ensure applicant has legal assistance (free if needed, <b>but treatment not more favourable than for nationals/may refuse legal assistance where appeal has no chance for success, but decision must be subject to right to appeal</b>) and linguistic assistance where required</p>
<b>Detention</b>	N/A	N/A	N/A	<p>-MS may detain if there is a significant risk of absconding (if less coercive measures cannot be applied effectively)</p> <p>-Detention only applied from moment decision of transfer is notified to applicant concerned (and not longer than required for transfer)</p> <p>-Must be ordered by judicial authorities (or admin if urgent- to be reviewed/ approved by jud. in 72 hrs;)</p> <p>-Detainees must be notified of reasons with access to legal assistance (free if necessary)</p> <p>-Unaccompanied minors shall never be detained</p>	<p>-MS may detain if there is a significant risk of absconding (if less coercive measures cannot be applied effectively)</p> <p><b>-Where detention applied, take charge or take back requests must be submitted within 1 month of lodging of application, with urgent reply of max. 2 wks. (or resp. transfers to non-responding MS), with transfers executed within 6 wks. of acceptance – if not met, detainee must be released</b></p> <p><b>-Detention conditions/ guarantees in 2013 Reception Conditions directive apply</b></p>
<b>Possibility for suspension of transfers to over-burdened MS</b>	Yes (requests to be submitted to Article 18 Committee)	No	No	Yes (requests from affected MS or other concerned MS to be submitted to Commission, which will decide within 1 month. Council can overrule by QMV. Suspension period up to 6 mos. with possibility for extension)	No (introduction of Article 33 mechanism instead)

