

**ECRE COMMENTS ON THE REGULATION  
OF THE EUROPEAN PARLIAMENT AND  
OF THE COUNCIL ON ASYLUM AND  
MIGRATION MANAGEMENT, AMENDING  
REGULATIONS (EU) 2021/1147 AND  
(EU) 2021/1060 AND REPEALING  
REGULATION (EU) NO 604/2013**

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## Summary of views

### **Part II Common Framework for Asylum and Migration Management (Articles 3 to 8)**

- **Comprehensive approach:** Part II of the Regulation codifies the notion of a “comprehensive approach” on asylum and migration, comprising internal and external components. ECRE considers the introduction of the external component as concerning, as it demonstrates the continued efforts at “externalisation” that are embodied in the Pact, as well as the continued intrusion of internal policy objectives into EU external affairs. Among the internal objectives, that of countering secondary movements between EU countries takes priority, with little regard for research on the dysfunctions of the Dublin system.

- **Annual migration management cycle:** Rules for an annual “cycle” on asylum and migration are introduced. The main objective is to provide a governance structure to the mandatory solidarity mechanism created by the Regulation, but is also a way to monitor the overall situation of asylum and migration at the Union and national level on a yearly basis.

### **Part III Criteria and Mechanisms for Determining the Member State Responsible (Articles 15 to 55)**

**Overall:** The rules on allocation of responsibility are very close to the current Dublin system, albeit with a reinforcement of the first entry criteria. Expansion of the scope of family provisions to include siblings - proposed by the Commission - was not accepted. The definition of family is extended to families formed in transit. Of the new criteria, only the “diplomas” criterion was included, which will likely have limited applicability.

ECRE reiterates its concerns about the stricter rules on responsibility given that they exacerbate unfairness for Member States at the external borders and applicants alike. As such, they will create incentives for irregularity and a lack of compliance. Contrary to the objective of tackling absconding, the likely effect will be less compliance in practice because Member States of first entry will have further incentives to neglect their identification and registration obligations and to avoid investing in reception systems. Asylum seekers may resort to irregularity so as to avoid being identified and confined to the countries of entry.

Beyond the legal changes, ECRE considers that improvements to the functioning of the system will depend on wider use of the family criteria, and dependency and discretionary clauses. Currently, they account for an extremely limited number of the total outgoing requests issued by Member States.

- **Access to the procedure (Article 16):** Article 16(3) does not fully update the legislation to reflect CJEU jurisprudence. As per the article, transfers are impossible when there are “substantial grounds for believing that the applicant, because of the transfer to that Member State, would face a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights (...)”. As such, it does not fully capture all the fundamental rights considerations that might be valid reasons to stop a transfer.

- **Obligations of the applicant and consequences of non-compliance (Articles 17 and 18):** The RAMM introduces or repeats obligations on the applicant and sets out the punitive consequences of non-compliance with these obligations, in particular the exclusion from access to reception conditions if the applicant is not present in the Member State responsible (as detailed in the recast RCD). ECRE reiterates its longstanding concerns about punitive approach to onward movement. Reasons for onward movement, including lack of compliance with required standards at the national level, should be properly addressed instead of punishing applicants.

- **Procedural guarantees (Articles 19 to 22):** On information provision, positive changes are introduced, including specifying the information that a Member State must provide to an applicant, and that the information should be “drawn up in a clear and plain language” and where necessary also be provided orally. In addition, information should be provided “as soon as possible” and “at the latest when an application for international protection is registered”, a welcome clarification. Article 21 introduces an obligation for Member States to provide free legal counselling for first instance procedures on responsibility determination. While this is positive, it should be noted that Member States generally already provided for this in their national legislations, but that obstacles to accessing such support are found in practice, especially due to the limited capacity in terms of human resources and funding of organisations providing legal aid. Article 22 provides that the determining Member State shall conduct a personal interview with the applicant in order to facilitate the process of determining the Member State responsible and includes an obligation on the national authorities to proactively question the applicant about the presence of relatives or other elements that could trigger primary responsibility criteria. However, it also allows national authorities to omit the interview “when the applicant has already provided the information relevant to determine the Member State responsible by other means”, which may mean overlooking relevant information.

- **Guarantees for children (Article 23):** The provisions on guarantees for unaccompanied children has been bolstered compared to Dublin III, and incorporates both case law and the evolution of practice in asylum matters for children. This includes the obligation to appoint a representative and to conduct a best interest assessment including hearing the views of the child. The provision also establishes that procedures including minors will have to be treated with priority and includes additional guarantees for unaccompanied children. ECRE notes that a challenge in practice is ensuring the proper funding of national guardianship systems.

- **Hierarchy of criteria (Article 24 to 33):**

- o **Unaccompanied Children (Article 25):** The first criterion in the hierarchy covers “Unaccompanied Minors” and notably fails to incorporate the relevant jurisprudence determining that the Member State responsible should be the one where the unaccompanied child is present unless this is found not to be in the best interests of the child.

- o **Family members (Articles 26 to 27):** The lowering of evidential requirements to demonstrate a family connection is an improvement compared to Dublin III as it may allow more people to access the right to family unity. The extension of the family definition to families formed in transit and to family members who reside in an EU country on the basis of the LTRD is also positive. However, the fact that the definition of family members was not further expanded to cover siblings or family members legally residing on the basis of other permits is a missed opportunity. This would have had multiple beneficial effects for people and also for their prospects for inclusion, as well as removing reasons for onward movement. In practice, few additional applicants will be able to benefit from provisions on family unit, as these fail to take into account the different realities in terms of family definitions.

- o **Entry (Article 33):** The article reinforces the “first entry criterion”. The country of entry will be responsible if none of the other criteria apply (or are applied), and the responsibility lasts for 20 months rather than the current 12 months. Responsibility will be 12 months only following disembarkation after search and rescue (SAR) operations. The cessation of responsibility of the country of first entry when the applicant has been living for at least five months in a Member State before lodging the application for international protection there, (Article 13(2) of Dublin III) has been deleted.

- **Dependent persons and discretionary clauses (Articles 34 and 35):** A reference to sibling relationships remains, as in the current Dublin system, in the provision on dependent persons. A reference to “meaningful links” has been included regarding elements Member States should

consider when applying discretionary clauses to assume responsibility for a particular applicant. Once more, whether this constitutes an improvement will only be possible to observe through the implementation of the new rules. It should be noted that the discretionary clauses are barely used by the Member States, as previous studies show, hence they have little effect on the overall balance of the system.

- **Cessation of responsibilities and start of the procedure (Article 37 to 38):** New rules on cessation do not incorporate the provisions currently in Dublin III Article 19(2) whereby responsibility ceases after a person has been absent from the territory for three months. Article 38(2) consists of an additional clause on continuation of responsibility, stating that the Member State where the application is first registered should continue the process of determining responsibility even if the applicant “absconds”. The overall aim is to delete the rules allowing for cessation or shift of responsibility due to the behaviour of the applicant (absconding or leaving the territory) on the basis that these could be an incentive for unauthorised movement. A further case of cessation of responsibility intended as an incentive for countries of first entry to use border procedures is introduced. Article 37(2) establishes that for cases examined in a border procedure as regulated by the APR, the obligations of the Member State responsible will cease after fifteen months if national determining authorities issued a rejection decision on the grounds of inadmissibility, unfoundedness or manifest unfoundedness or a decision declaring an application as implicitly or explicitly withdrawn has become final.

- **Submitting a take charge request and replying to a take charge request (Articles 39 to 40):** Shorter time limits are introduced for take charge procedures. For requests, two months rather than three and one month rather than two after a Eurodac hit. For the reply, the deadlines are one month rather than two and just two weeks in the case of a Eurodac hit. This will likely lead to a decrease in the number of successful take charge requests, thus increasing responsibilities for Member States of first entry, as well as limiting applicants’ right to family reunification.

- **Submitting a take back notification (Article 41):** The provision on the take back procedure is subjected to significant changes in RAMM. First is the shift from take back requests in Dublin to take back notifications. Second, very short deadlines (of two weeks) are introduced for the Member State requested to “confirm” receipt of the notification. While the declared objective of these changes is to ensure a faster procedure for responsibility determination, the measure was likely introduced to discourage countries of first entry from allowing “secondary” movement. The limited options available for challenging the notification means that conflicts among Member States on this matter may escalate.

- **Remedies (Article 43):** Concerns emerge regarding both the scope and timing of remedies under RAMM. The remedy will only assess “...whether the transfer would result in a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights”, while the time period of one to three weeks for lodging an appeal is so short as to be unreasonable within the meaning of Article 47 of the Charter, as is the fact that the appeal does not have automatic suspensive effect. Additionally, access to legal assistance at second instance is at risk of being hindered.

- **Detention (Article 44):** There is a risk that Article 44 constitutes a breach to the provisions of the Charter that provides that asylum seekers should not be detained purely for reasons of immigration policy and that detention during the determination of responsibility or when awaiting a transfer is not permissible (in the absence of other factors). It is only allowed for the purpose of “securing the fulfilment of an obligation prescribed in law” and the obligation must be sufficiently clear and precise. ECRE further recalls that children should never be detained. The ECtHR has ruled that a detention measure imposed without any consideration as to the best interests of the child, with no proportionality assessment and no use of alternatives to detention, is unlawful.

• **Transfers – detailed rules and time limits (Article 46):** As a rule transfers have to be carried out within six months as in Dublin III. The time limits can be extended to one year for detained applicants, and up to three years for cases in which the applicant resists the transfer through various means, first of all by absconding. Compared with Dublin, the time limit for carrying out transfers is extended from eighteen months to three years for cases of applicants absconding, for cases in which the applicant is physically resisting the transfer, making him or herself unfit for transfer or not complying with medical requirements. The deadline is instead slightly shortened (from six to five weeks) if the applicant is detained for the purpose of the Regulation. Combined with the introduction of take back notifications, the shortening of deadlines for sending take charge requests, and the provisions on the "entry" criterion, it appears that the reform will lead to an increase in the number of applicants for whom countries at the external borders will be responsible. It is also worth mentioning that a further legal basis for the extension of transfer deadlines to one year is provided by Article 12(4) of the Crisis Regulation, for situations of "mass arrivals".

#### **Part IV Solidarity (Articles 56 to 71)**

• **Overall:** ECRE believes that the overall approach of the RAMM is flawed because it largely maintains the Dublin rules on responsibility rather than effecting a deeper change. The RAMM instead adds a "corrective" mandatory solidarity mechanism for situations of migratory pressure. The second solidarity mechanism for arrivals following SAR disembarkations proposed by the Commission was not included in the final text. Further flexibility regarding the possibility for Member States to select among different solidarity measures was introduced. ECRE maintains that a deeper overhaul of the criteria on sharing of responsibility would have been necessary, and considers the solidarity mechanism is at risk of falling short of addressing existing needs in terms of solidarity, especially for countries at the external border of the Union.

• **Solidarity Mechanism:** Considering the increase in responsibility for Member States of first entry, it is positive that solidarity has become mandatory in the new text. The solidarity mechanism creates a "Solidarity Pool" with Member States required to offer solidarity to countries under migratory pressure. All Member States will provide solidarity contributions with the possibility to first choose between "primary" solidarity measures in the form of relocations, financial contributions and alternative solidarity measures (capacity support). There will be an annual minimum for relocations set at 30,000 for the EU as a whole. If relocation pledges at the beginning of a given year, or relocations implemented at the end fall short of 30,000, Member States contributing to the Solidarity Pool will be requested to contribute through "secondary" level solidarity in the form of "responsibility offsets". The new concept of "responsibility offset" means taking charge of applicants sur place – present in the contributing Member State – for whom the benefitting country should be responsible. Member States under migratory pressure might be excluded from accessing the Solidarity Pool if they do not comply with take back procedures. ECRE considers that the high-level flexibility of the new mechanism, while certainly necessary to ensure its functioning, will mean that the positive effects on national asylum systems and asylum seekers will be limited, which will ultimately result in a continuation of onward movement. Additionally, the number of relocations from which countries under migratory pressure would benefit each year does not appear to offer a proper balance, given these countries would become responsible for an increased number of applicants, and the risk of being excluded from the Solidarity Pool does not appear a sufficient incentive to improve their national asylum and reception systems.

• **Types of solidarity measures:** In principle, relocations should be prioritised as a form of solidarity, given that one of the objectives of the mechanism is to mitigate the unfairness of the rules on allocation of responsibility for examination of applications. However, mandatory relocations cannot be considered suitable under all circumstances, for example if conducted by countries whose asylum systems show systemic deficiencies. Moreover, applicants are able present information on

“meaningful links” with a certain country in the relocation process, but would have no role in the final decision regarding the country of relocation.

In this sense, the creation of additional forms of solidarity was a necessity. Both positive and negative elements can be highlighted regarding financial contributions and alternative measures. On one hand, these will likely prove to be a more workable form of solidarity, and could be destined to improve the reception conditions or legal aid provision of a benefitting country, or to increase the Member States capacity to perform search and rescue activities in line with their obligations. On the other, several challenges might emerge in their operationalisation. For instance, contributing Member States might use them primarily to offer support to further reinforce infrastructures or technical equipment that strengthen border control without the same level of consideration for measures aimed at supporting access to rights and protection of people at the borders. In particular, it is concerning the financial solidarity will also support projects in third countries of the benefitting Member State, despite the safeguards added.

Two positive developments that can be highlighted are the removal of return sponsorship from the scope of the Regulation, as it distorted the idea of solidarity and created concerns regarding respect of fundamental rights, and the introduction of “responsibility offsets” - despite the questionable naming choice – as a form of secondary-level solidarity. Even if this was clearly not the intended objective behind their introduction – which is instead meant as a form of punitive measure for countries not conducting a sufficient number of relocations – it allows applicant that have moved to a country different from that of first entry to remain in that country and see their asylum application examined there. However, full discretion is left to national authorities in terms of criteria used to select applicants, both in the case of relocations and offsets, which will likely lead to limited transparency in how the processes are conducted.

## Structure of the Regulation for reference

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

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

Chapter I The comprehensive approach

Chapter II The annual migration management cycle

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

Chapter I General Principles and Safeguards

Chapter II Criteria for Determining the Member State Responsible

Chapter III Dependent Persons and Discretionary Clauses

Chapter IV Obligations of the Member State Responsible

Chapter V Procedures

Section I Start of the Procedure

Section II Procedures for Take Charge Requests

Section III Procedures for Take Back Notifications

Section IV Procedural Safeguards

Section V Detention for the Purposes of Transfer

Section VI Transfers

Chapter VI Administrative Cooperation

Chapter VII Conciliation

### **Part IV – Solidarity**

Chapter I Solidarity Mechanism

Chapter II Procedural Requirements

Chapter III Financial Support Provided by the Union

### **Part V – General Provisions**

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

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

## Introduction

After years of negotiations, the reform of EU asylum law, the Common European Asylum System (CEAS), has been approved. The first proposals for a comprehensive reform of EU asylum law were launched in 2016, when the recast Reception Conditions Directive (rRCD), Asylum Procedures Regulation (APR), Union Resettlement Framework (URF), Qualification Regulation (QR), and Eurodac Regulation were presented. In 2018, a recast of the Return Directive was proposed. Additional proposals were launched in 2020 as part of the New Pact on Migration and Asylum, including amendments to the APR proposal, the Regulation on Asylum and Migration Management (RAMM), the Screening Regulation, and the Regulation for Crisis and Force Majeure (the Crisis Regulation). Finally, more proposals were launched in 2021, including a reform of the Schengen Border Code (SBC reform) and the Instrumentalisation Regulation. In the latest stage of negotiations, provisions from the Instrumentalisation Regulation were included in the Crisis file, and two additional files – the Return Border Procedures Regulation and Regulation on consistency amendments related to screening – were derived from provisions originally included in the APR and Screening Regulation respectively. The 2016 regulation transforming EASO into the EU Asylum Agency (EUAA) is already in force.

In April 2024, the European Parliament voted in favour of a package of reforms including 10 files: recast Reception Conditions Directive, Union Resettlement Framework, Qualification Regulation, the Eurodac Regulation, Screening Regulation, Regulation on consistency amendments related to screening, Asylum Procedures Regulation, Return Border Procedures Regulation, Regulation on Asylum and Migration Management and the Crisis and Force Majeure Regulation.

Based on the overall outcome of the reforms, ECRE maintains its positions that they will likely result in a reduction of protection standards in Europe. As well as the impact on fundamental rights, ECRE questions the workability of the new common asylum system and the continued uneven division of responsibility among the Member States.

These comments will focus on the Regulation on Asylum and Migration Management (henceforth, RAMM) and will aim at addressing relevant changes compared to the current Dublin system, potential areas of legal uncertainty, legal challenges and present relevant recommendations for the operationalisation of the new rules. It should be noted that most files that form part of the reform, including RAMM, will enter into adoption only after a transition period of two years – until summer 2026. In the meantime, the European Commission and Member States will collaborate in developing implementation plans for putting in place the new system.

The comments will follow the structure of the Regulation and will address most of its articles. They will not focus on the details of the negotiations between co-legislators that led to the approval of the present text, nor on the differences from the original proposal from the European Commission, apart from cases in which it is deemed useful for better clarity. These should be read together with the ECRE comments on other Pact instruments,<sup>1</sup> ECRE's comments on the original Pact proposals,<sup>2</sup> as well as the policy papers on the state of play of the reform throughout the negotiations.<sup>3</sup>

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<sup>1</sup> *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union, and on the Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum.*

<sup>2</sup> *ECRE Comments on the Commission Proposal for a Regulation of the European Parliament and of the Council for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD), January 2021, available at: <https://bit.ly/4cLyIMl>.*

<sup>3</sup> *ECRE, Quo vadis EU asylum reform? Stuck between gradual approach, (mini)-package deals and "instrumentalisation", September 2022, available at: <https://bit.ly/3x10DT8>; ECRE, Reforming EU asylum law: the final stage, August 2023, available at: <https://bit.ly/4ciMvVx>.*

## Analysis of key provisions

### Part II - Common Framework for Asylum and Migration Management

#### Chapter I The comprehensive approach

*Article 3: Comprehensive approach to asylum and migration management; Article 4: Internal components of the Comprehensive Approach and Article 5: External components of the Comprehensive Approach*

Articles 3, 4 and 5 set out provisions that make up the comprehensive approach to asylum and migration. Article 3 requires that the Union and Member States take actions on the basis of a comprehensive approach which should address the entirety of the “migratory routes and unauthorised movements between the Member States”.

Article 3<sup>4</sup> introduces a direct reference to Article 80 Treaty on the Functioning of the European Union (TFEU) as the legal basis to establish rules on the balance between solidarity and fair sharing of responsibility among Member State, which is further referred to in Article 6 of the Regulation, indicating that “in implementing their obligations under this Regulation, the Union and the Member States shall observe the principle of solidarity and fair sharing of responsibility as enshrined in Article 80 TFEU, and shall take into account their shared interest in the effective functioning of the Union’s asylum and migration management policies.”

However, Article 80 TFEU itself does not clearly define the concepts of solidarity or fair sharing of responsibility that have been at the heart of the debate on asylum and migration in the European Union (EU) for many years. The focus has often been the implementation of the Dublin III Regulation, the “cornerstone” of the Common European Asylum System (CEAS), and frequently a source of tensions among Member States. The European Commission has repeatedly emphasised the solidarity debate, with the balance between solidarity and responsibility indicated as one of the pillars of the 2020 Pact on Migration and Asylum.

As per Recital 2 of the Regulation, the comprehensive approach is intended to have both an internal and external component, defined in Articles 4 and 5.

The internal component includes various elements (Article 4(a) to (k)) related to cooperation and mutual partnership among EU institutions and Member States (a), ensuring swift and effective access to asylum procedures (d) and reception conditions for asylum applicants (g). Effective border management (b), prevention of onward movement (f) and effective management of returns (h) are also mentioned.

One of the main objectives of the reform, showcased already from the first articles of the Regulation, is to increase measures available to Member States to discourage and prevent onward movement of protection seekers among EU countries. ECRE’s longstanding position has been that an overhaul of the rules on responsibility putting at the forefront the place of first entry, the dysfunctionalities of the Dublin system would be reproduced – or exacerbated – by any attempt at reforming the system.

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<sup>4</sup> Reproduced in full: “1 The common actions taken by the Union and the Member States in the field of asylum and migration management, within their respective competences, shall be based on the principle of solidarity and fair sharing of responsibility as enshrined in Article 80 TFEU on the basis of a comprehensive approach, and be guided by the principle of integrated policy-making, in compliance with international and Union law, including fundamental rights. With the overall aim of effectively managing asylum and migration within the framework of the applicable Union law, those actions shall have the following objectives: (a) to ensure consistency between asylum and migration management policies in managing migration flows to the Union; (b) to address the relevant migratory routes, and unauthorised movements between the Member States.  
2. The Commission, the Council and the Member States shall ensure the consistent implementation of asylum and migration management policies, including both the internal and external components of those policies, in consultation with institutions and bodies, offices and agencies responsible for external policies.”

ECRE and others<sup>5</sup> have suggested through their analysis that determining responsibility could be based on a range of factors, including a broadened definition of family member, consideration given to meaningful links with a country – such as, inter alia, on language, culture, community, previous study, or previous residence - and factors linked to the country itself, such as labour market needs. In this sense, the response provided by EU Member States to massive displacement from Ukraine following the invasion by Russia in 2022, with the activation of the Temporary Protection Directive (TPD), could have been an occasion to learn important lessons regarding the effectiveness of a system granting individuals more freedom in the choice of the country in which to reside.<sup>6</sup>

Instead, as will be further discussed as connected to Part III and Part IV of the Regulation, new rules only strengthen responsibility obligations for countries of first entry, while offering a corrective through a solidarity mechanism that will likely fall short of addressing existing needs. As such, it is unlikely that the objective of preventing onward movement will be achieved, as asylum applicants will continue to have several reasons to choose to move to countries different from the ones responsible for examining their asylum application.<sup>7</sup>

### *External policies*

The external component of the comprehensive approach is covered in Article 5, which formally introduces and establishes a direct connection between asylum and external policies. The introduction of this article demonstrates the continued efforts at “externalisation” of asylum policies<sup>8</sup> that are embodied in the Pact, as well as the continued intrusion of internal policy objectives into external affairs. The focus of these efforts is mainly tackling irregular migration, rather than a concerted effort to address displacement and seek global solutions to the plight of refugees worldwide, which would constitute a better approach and one which takes into account the interests and concerns of countries beyond the Union, as well as of people who have been forcibly displaced. The codification of these elements through a Regulation constitutes a material change compared to the previous regime, unfortunately not informed by evidence on effective global approaches to displacement. Beyond legal changes, funding flows also reflect these attempts, considering that, in occasion of the last revision of the multiannual financial framework (MFF) funds for long-term sustainable development of third countries were partly redirected to pursue internal migration control objectives (e.g. return and border management) through external funding.<sup>9</sup>

Under the Article, element (a) refers to the promotion of legal migration and legal pathways, (d) to addressing root causes and drivers of irregular migration and forced displacement; (e) enhancement of effective return, readmission and reintegration; and (f) to visa policies.

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<sup>5</sup> See: ECRE, *To Dublin or not to Dublin?*, November 2018, available at: <https://bit.ly/4cLuC22>; EPRS, *Dublin Regulation on international protection applications*, February 2020, available at: <https://bit.ly/3J6yD3k>; E. Guild, C. Costello, M. Garlick, V. Moreno-Lax (CEPS), *Enhancing the Common European Asylum System and Alternatives to Dublin*, September 2015, available at: <https://bit.ly/3U2nw1D>.

<sup>6</sup> ECRE analysed challenges and good practices for what concerns “pendular” movement to and from Ukraine and presented its recommendations to ensure security of status and rights for people covered by the TPD regime. See: ECRE, *Movement to and from Ukraine under the Temporary Protection Directive*, January 2022, available at: <https://bit.ly/3w7enbp>.

<sup>7</sup> For a brief compilation of literature on the topic, see: Daniel Thym, *Secondary Movements: Overcoming the Lack of Trust among the Member States?*, available at: <https://bit.ly/4avCNgQ>, pp. 158-160.

<sup>8</sup> The topic of externalization of asylum and migration policies has been the subject of extensive literature. See, *inter alia*: B. Frelick, I. M. Kysel, J. Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in *Journal on Migration and Human Security*, JMHS Volume 4 Number 4 (2016), available at: <https://bit.ly/49sovwq>, pp. 190-220; ECRE, *Tightening the Screw: Use of EU External Policies and Funding for Asylum and Migration*, March 2021, available at: <https://bit.ly/43L3Y56>; C. Jones, R. Lanneau, Y. Maccanico, *Access denied: Secrecy and the externalisation of EU migration control*, Heinrich-Böll-Stiftung European Union, December 2022, available at: <https://bit.ly/43SpEMH>; European Parliament, Briefing: *Extraterritorial processing of asylum claims*, January 2024, available at: <https://bit.ly/49pifWv>.

<sup>9</sup> ECRE, Op-ed: *Revision of the long-term EU budget: What implications for migration and asylum policy 2024-2027?*, February 2024, available at: <https://bit.ly/3TNA77s>.

Particularly notable, however, is element (b) on support to third countries hosting large numbers of migrants and refugees, including through capacity building on migration, asylum and border management. The reference to border management support appears in line with recent attempts at creating partnerships on migration management – such as those sought through the EU agreements with Tunisia and Mauritania – that present several critical aspects in terms of guarantees of rights of persons in need of protection.<sup>10</sup>

Element (c) includes the effective prevention of irregular migration and combat to migrant smuggling and trafficking in human beings. This topic has been of particular interest at the EU level in recent years. In this context, the European Commission has launched the so called “Facilitators package”<sup>11</sup>, including proposals for Directives on anti-smuggling and anti-trafficking. While negotiations will likely not come to an end before the European Parliament’s election in June 2026, it appears clear that the fight on smuggling and trafficking will remain as a relevant topic of discussion in connection to migration and asylum policies. Several civil society organisations have warned against risks of that the fight on smuggling and trafficking could translate to further criminalisation for persons irregularly reaching European borders while looking for protection.<sup>12</sup>

As part of the comprehensive approach, Member States are also expected to address “the relevant migratory routes”, “with the overall aim of effectively managing asylum and migration within the framework of the applicable Union law” (Article 3). Read in conjunction with article 5, this relates to the introduction to the “entirety of the migratory routes” and the references during the Pact preparation and from the Commission to a “whole of route” approach,<sup>13</sup> despite concerns being raised as to its unsuitableness to address the number of irregular arrivals to Europe.<sup>14</sup>

#### *Article 6: Principle of solidarity and fair sharing of responsibility*

Article 6 provides further details on Member States’ obligations in terms of solidarity and fair sharing of responsibilities. It sets out several actions Member States should take in cooperating with one another (Article 6(2)). These actions also have different components, relating to internal functioning of national asylum systems and reception systems (a) – including through the allocation of sufficient personnel (b) -, internal functioning of the system for responsibility allocation (d) and solidarity mechanism (e) set out in the Regulation itself. Component (f) reproduces the requirement set out in Article 3 regarding the measures MS should put in place to “reduce incentives to and prevent unauthorised movements”. Article 6(2)(c) also includes, as part of sharing responsibility, the obligation for Member States to put in place “all measures necessary and proportionate” to curb irregular migration, including through actions directed at preventing smuggling and trafficking in human beings. Similar concerns as does outlined regarding Articles 3, 4 and 5 can be raised

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<sup>10</sup> Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia, 16 July 2023, available at: <https://bit.ly/4cJTDu9>, see also: ECRE, *Le mémorandum entre la tunisie et l’union européenne : vers un renforcement de la dépendance, de l’autoritarisme et de l’europe forteresse ?*, December 2023, available at: <https://bit.ly/3xjXTQR>; European Commission, *The European Commission launches new migration partnership with Mauritania*, March 2024, available at: <https://bit.ly/4aDnAdE>.

<sup>11</sup> The so-called ‘facilitators package’ includes two proposals presented by the Commission in November 2023, revising and amending existing European Union (EU) legislation. The first is a proposal for a directive of the Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the EU, replacing Directive 2002/90/EC and Decision 2002/946/JHA, see: European Commission, *Migrants smuggling*, available at: <https://bit.ly/3Tlmal8>; EPRS, *Implementation Appraisal: Revision of the anti-smuggling package The ‘facilitators package’ and Europol’s mandate*, February 2024, available at: <https://bit.ly/4clecqs>.

<sup>12</sup> See, for example: PICUM, *Joint Statement: The EU must stop the criminalisation of solidarity with migrants and refugees*, September 2019, available at: <https://bit.ly/3J5e4nR>; Red Cross EU Office, *The EU must stop the criminalisation of solidarity with migrants and refugees*, July 2019, available at: <https://bit.ly/49mF9xB>; K. Arrouche, A. Fallone, L. Vosyliute, *Between politics and inconvenient evidence. Assessing the Renewed EU Action Plan against migrant smuggling*, December 2021, available at: <https://bit.ly/3VG2Fm0>.

<sup>13</sup> European Commission, *Striking a balance on migration: an approach that is both fair and firm*, March 2024, available at: <https://bit.ly/4cG4Uf7>.

<sup>14</sup> L. Achilli, G. Sanchez, *Chasing the Smugglers Out: Why the “Whole-of-route” Will Not Address EU-bound Irregular Migration*, EU – MPC blog, June 2022, available at: <https://bit.ly/441rRWp>.

regarding this provision. In addition, incentivising Member States to reduce the number of people arriving in the EU has significant implications for the ability of people to access asylum in Europe, and may promote increased use of harmful measures, including detention, ill-treatment and even *refoulement* in EU partnerships with third countries. In many cases, people seeking asylum have to travel irregularly due to the lack of regular routes available. The ambition of preventing irregular migration may undermine the right to asylum in the EU and exacerbate risks for people moving irregularly.

Article 6(3) introduces an “EU Migration Support Toolbox”, that would be offered to Member States in fulfilling their obligations. The Toolbox would comprise various elements: (a) support from relevant EU Agencies; (b) support provided through EU funds; (c) derogations as foreseen in the Crisis and Force Majeure Regulation;<sup>15</sup> (d) the activation of the Union Civil Protection Mechanism; (e) measures to facilitate return and reintegration activities; (f) strengthened actions in the external dimension of migration; (g) enhanced diplomatic and political outreach; (h) coordinated communication strategies; (i) support to migration policies in third countries; (k) promotion of legal migration and well-managed mobility.

### Implementation considerations

Not part of the original proposal for the Regulation, the Toolbox is a worrying introduction when considered within the overall governance structure of the Regulation. It both codifies the nexus between internal and external actions in migration policies and legitimises the link between the efficiency of cooperation with third countries and Member States’ respect for their obligations in terms of responsibility and solidarity. This feeds into the narrative that numbers of asylum seekers and beneficiaries of international protection in Europe are currently unmanageable, and that without curbing new arrivals there is no possibility for national systems to withstand pressure. This idea has been disproven in practice by the EU’s response to displacement from Ukraine which showed that European systems were able to effectively manage the arrival of more than 5 million displaced people. While challenges have emerged,<sup>16</sup> countries have so far been able to face the situation without any of the national systems collapsing, through the use of the relevant legal tools, adequate funding allocation and efforts to increase capacity.

Additionally, by directly including a reference to the Crisis Regulation<sup>17</sup> among the measures meant to provide support to Member States, it introduces the idea of adaptable responsibility based on derogations. While derogation under the Crisis Regulation are meant to provide countries with flexibility, they may result in the creation of a variety of separate rules that co-exist, constituting a risk of arbitrary treatment of applicants, who will be subject to different asylum rules based on the time and place of arrival. They may also generate an increased number of conflicts among Member States.

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<sup>15</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*.

<sup>16</sup> Among them, the fact that distribution of temporary protection beneficiaries is not homogeneous among EUMS. However, had freedom of movement as per Article 11 of the Temporary Protection Directive not been granted, the ratio of TP beneficiaries would have been significantly higher in countries of first entry, which would have in turn led to a more uneven situation. Additionally, obstacles have been observed in several Member States regarding the possibility for temporary protection beneficiaries in access to socio and economic rights, which might have discouraged persons fleeing from Ukraine from moving to certain countries. See: ECRE/AIDA, *Access to Socio-economic Rights for Beneficiaries of Temporary Protection*, August 2023, available at: <https://bit.ly/3VLYgCP>, Politico, *Why Ukraine’s refugees aren’t going to France*, March 2024, available at: <https://bit.ly/3xuEwVi>.

<sup>17</sup> For further details on the provisions of the Crisis Regulation and how it risks incentivising Member States’ reliance on derogating from standard asylum rules, see *ECRE Comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*.

*Article 7: Strategic approach to managing asylum and migration at national level and Article 8: A long-term European Asylum and Migration Management Strategy*

These articles introduce new outputs regarding asylum and migration management, both at the EU and national level:

- National strategies for Member States, to ensure they have the capacity to implement their systems (Article 7);
- A long-term strategy at the EU level, drafted by the European Commission upon consultation with Member States (Article 8).

National strategies will have to include preventive measures to reduce the risk of migratory pressure and contingency planning, information on how the country is implementing the comprehensive approach, information on the results of different monitoring exercises from agencies' mechanisms (EUAA and Frontex), or under the scope of the Schengen Borders Code (SBC) and the Screening Regulation. No direct reference is made to the same mechanism introduced in the Asylum Procedures Regulation (APR) for the border procedure, which might be an oversight, as the mechanism in the context of border procedures was included only at the last stage of negotiations. It should then also be included in national strategies.

Six months before the adoption of the EU strategy referred to in Article 8, Member States have to share their national strategies with the European Commission, which in turn provides support through monitoring and provision of information on the migratory situation, and establishes a template to ensure uniformity among national strategies.

Article 8 sets the basis for the creation of a general EU Strategy drafted by the European Commission, taking into account reports from relevant Agencies and having consulted with Member States, that would be in place for five years, with the first being established 18 months after entry into force of the Regulation. The Strategy, which is not legally binding, will then be transmitted to the Council and European Parliament. The Commission strategy comprises different components, and has to take into account (a) the implementation of national strategies; (b) relevant information gathered through the Migration Preparedness and Crisis Blueprint;<sup>18</sup> (c) information on implementation of the *acquis* collected by the Commission and the EUAA and (d) other relevant Agencies; (e) information collected by other actors. Component (b) should be read as a continuation of the EU efforts directed at developing a functioning mechanism on crisis prevention.<sup>19</sup>

### Implementation considerations

Although the status and importance of the Strategy will only become clear with during implementation of the new rules, it can be assumed that it is intended to guide European asylum and migration policies and funding. It should then give appropriate weight to all elements of the asylum *acquis*. It is positive that a clear mention is made, in component (a) to the obligation for the Commission to consider, within the strategy, whether Member States practices in the implementation of their national strategies are in compliance with Union and international law, and that while considering all components it will be bound to "prominent role to the case-law of the Court of Justice of the European Union and the European Court of Human Rights" (Article 8(3)). Given its non-binding nature,

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<sup>18</sup> Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint), available at: <https://bit.ly/3VQmoQ9>.

<sup>19</sup> H. Hahn, *Keeping a cool head: How to improve the EU migration crisis response*, October 2022, available at: <https://bit.ly/3vCxldk>.

however, its effective potential as an instrument meant to guide and improve the overall efficiency of EU asylum systems might remain limited.<sup>20</sup>

### **ECRE's recommendations on the EU Strategy**

- In the development of its strategy, the European Commission should duly consider breaches and violations of EU primary and international law. The Strategy should be informed also by the views and reports of relevant international organisations, human rights bodies and civil society organisations, and broadly address all elements of compliance and implementation in national asylum and reception systems, including regarding respect of fundamental rights.

## Chapter II - The Annual Migration Management Cycle

Chapter II introduces the annual migration management cycle. It is composed of several steps, set out in Articles 9 to 15 and involving a wide range of stakeholders. The main purpose of the cycle is to ensure oversight over the activation and operationalisation of the solidarity mechanism, set out in Part IV of the Regulation, as well as to monitor the overall situation of asylum and migration at the Union and national level on an annual basis. A similar governance structure is foreseen for situations of crisis, force majeure or instrumentalisation as per the Crisis Regulation, with some differences regarding the mechanism to trigger a response to these situations.<sup>21</sup>

New functions are entrusted to the Commission, which will conduct an assessment of the overall migratory situation in the Union, as well as assessing whether a Member State can be considered under one of the three situations of migratory pressure (migratory pressure, risk of migratory pressure or a “significant migratory situation”) that would allow it to become a beneficiary of solidarity or to derogate from its solidarity obligations.

Chapter II sets out three new outputs that the Commission will be required to produce:

- The European Annual Asylum and Migration Report (Article 9);
- The implementing decision on determining Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation (Article 11);
- The proposal for a Council implementing decision establishing the Solidarity Pool (Article 12).

Under Articles 11 and 12, the Commission is given the power to determine which of the three situations applies to a Member State, and to present a proposal on the measures state should benefit from.

### Implementation considerations

A cautious welcome can be offered to the increased role of the Commission that is envisaged throughout the RAMM: ECRE has argued for the Commission to take a more active role in monitoring and evaluating Member States' implementation of the CEAS.

Nonetheless, there are also risks attached to an enhanced role for the Commission, in particular, the high level of discretion it will be allowed in assessing the overall situation of the Union and in defining whether a Member State is at risk of, under a situation of migratory pressure or “facing a significant migratory situation”, with little oversight from the European Parliament (which only has to be informed). The EU's overall strategy, taken up and shaped at times by DG Home, has been focused on certain aspects of asylum and migration policy at the expense of others. The Pact continues this

<sup>20</sup> See F. Maiani, *A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact*, in The Special Series of blogposts on the “new” Migration and Asylum Pact (Odysseus Network), September 2021, available at: <https://bit.ly/4avCNgQ>, p. 43.

<sup>21</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*.

trend with a strong focus on return, restricting movement and borders, with limited references to other elements of asylum policy, including important areas covered by the asylum *acquis*.

In addition, while it can be assumed that the Commission's Annual Report will be public, the proposal for a Council implementing act will remain of restricted access before the issuance of the act. It will then be left to the Member States, in the context of the newly introduced "High Level Solidarity Forum", to determine which solidarity responses should be given, and to amend the Commission proposal. While ECRE considers that the enhanced role of the Commission could lead to better coordination of migration strategies, the mechanism in itself will be largely controlled by Member States and may reflect national interests, such as limiting arrivals rather than reinforcing asylum systems.

### *Article 9: The European Annual Asylum and Migration Report*

According to Recital 12, the European Annual Asylum and Migration Report is intended "as an early warning and awareness tool for the Union in the area of migration and asylum", which should also "provide a strategic situational picture and forward-looking projections for the coming year".

#### *Sources of information for the Report*

Article 9 establishes that the Commission will be responsible for producing and adopting the Report on a yearly basis. The report will draw on information shared by Member States, the European External Action Service (EEAS), the EUAA, Frontex, Europol, and FRA, and the Commission will have the possibility (a "may" clause) to take into account information provided by other relevant bodies, agencies or organisations. The Report will assess "the asylum, reception and migratory situation over the previous 12-month period and any possible developments (...)."

Further clarification as to which other relevant sources the Commission might take into account is offered by Recital 13, mentioning that: "Information from other relevant sources, including the European Migration Network, the United Nations High Commissioner for Refugees, and the International Organization for Migration should also be taken into consideration."

#### *Timeline for the Report*

The report will be adopted each year by 15 October. The first report should be issued in the year after entry into force of the Regulation, hence by 15 October 2025. Member States and EU Agencies will be requested to provide information each year by 1 June. The Commission then convenes a meeting of the EU Mechanism for Preparedness and Management of Crisis,<sup>22</sup> after which updated information will be provided by 1 September. By 30 September of each year, the Commission shall convene another meeting of the Mechanism to present information on the updated assessment of the situation (Article 9(4) and (6)-(10)).

#### *Content of the Report*

Article 9(3) lists the elements that will have to be included in the report. The elements can be divided into different categories.

Most notable is (a) the assessment of the overall situation covering all migratory routes to the Union and in all the Member States. To realise the assessment, the Commission will have to take into account a broad range of statistical information on asylum and migration. The list provided in the paragraph indicates to which level and which data will be considered relevant. Most of the assessment will be based on the number of third country nationals arriving or present in the Union

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<sup>22</sup> Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint), available at: <https://bit.ly/3VQmoQ9>. According to the Recommendation, the mechanism involves several actors: the European Commission, the European External Action Service (EEAS), Member States, the Council, Frontex, EUAA, FRA, large scale IT-systems, Europol, and EU-LISA.

and in each Member State, and thus on what could be considered as external factors. Specifically, the assessment covers the numbers of asylum applicants; unaccompanied minors and persons with special reception or procedural needs; the number of beneficiaries of protection; return decisions issued and the actual number of returns; admissions under EU and national resettlement and humanitarian schemes; third-country nationals disembarked following SAR operations and activities and the number of asylum applications they lodged; refusals of entry issued according to the Schengen Borders Code; temporary protection beneficiaries; persons apprehended at the external borders.

Other information to be provided is instead directly linked to Member States' obligations, and directed at assessing whether and to what extent individual countries comply with obligations under the CEAS. The following elements of the assessment fit in this category: the number of asylum decisions; third-country nationals in an irregular situation, be it because they do not fulfil or no longer fulfil the conditions for entry, stay or residence; the reception capacity of the Member States; incoming and outgoing take charge requests or take back notifications; third-country nationals subjected to the border procedure.

A third category of information is connected to the objective of evaluating the general functioning and stability of the migration and asylum system at the European level. Here, the assessment include: information on the level of preparedness in the Union and in the Member States and the possible impact of the projected situations; the Member States which experienced recurring arrivals by sea, in particular through disembarkations following search and rescue operations and activities; the support provided by Union bodies, offices and agencies to the Member States.

Besides the assessment of the situation, the report will also have to include (b) projections for the migratory situation for the following year; (c) information on the level of preparedness in the Union; (d) information on the capacity levels, in particular focusing on reception, of the Member States; (e) the results of different monitoring mechanisms; (f) an assessment of whether solidarity measures and measures under the EU Toolbox are needed. As per Article 50 APR, information on measures applicable when adequate capacity in border procedures is reached will also be included and evaluated as a relevant factor in the Annual Report.<sup>23</sup>

*Article 10: Information for assessing the overall migratory situation, migratory pressure, risk of migratory pressure or significant migratory situation*

Article 10 establishes the criteria the Commission will have to take into account to assess and establish whether Member States fall under one out of three different levels of migratory pressure which national asylum systems might face (as per Article 11):

- Migratory pressure;
- Risk of migratory pressure;
- Confronted with a significant migratory situation.

To evaluate whether one of these situations exists, the Commission will use the Annual Report itself and any other relevant information related to the assessment of the overall migratory situation in the Union.

Recital 28 offers some clarification regarding the methods and information to be considered by the Commission while evaluating whether a country is under migratory pressure, at risk of migratory pressure or facing a significant migratory situation, indicating that the assessment will have to be based on a wide range of quantitative and qualitative information, and should take into account “a

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<sup>23</sup> See ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union, Articles 49 and 50.

broad range of factors”, including recommendations provided by the EUAA, and relevant data on migration and asylum (e.g. number of applicants, irregular border crossings, “unauthorised movements” between Member States, return decisions, etc.).

The elements to consider in the evaluation are further detailed in Article 10(2). Most relate to the internal dimension:

- (a) the information presented by the Member State itself;
- (b) the level of cooperation on migration and in the area of return and readmission;
- (d) relevant recommendations from monitoring mechanisms;
- (e) information gathered through the Migration Preparedness and Crisis Blueprint; (g) the Integrated Situational Awareness and Analysis (ISAA) reports<sup>24</sup> on the EU Integrated Political Crisis Response Arrangements;<sup>25</sup>
- (h) quarterly bulletins on migration, and other FRA reports;
- (i) the support provided by Union Agencies to the Member States;
- (j) parts of the vulnerability assessment report as per Frontex Regulation; and
- (k) scale and trends of unauthorised movements of third country nationals or stateless persons between Member States.

Two elements refer instead to the situation of or cooperation with third countries:

- (c) the situation in relevant third countries, root causes of migration and possible situations of “instrumentalisation”, and other developments that may affect migratory movements; and
- (g) information from the visa liberalisation reporting process.

When evaluating whether a “significant migratory situation” exists in a certain Member State, it will be also possible to take into account “the cumulative effect of current and previous annual arrivals” (Article 10(3)).

#### Implementation considerations

Beyond the list of elements that the Commission should evaluate, the Regulation does not provide any clarification as to a minimum threshold to determine whether a Member State is under migratory pressure. Given the implications it for access to solidarity measures (see Part IV – Solidarity), the lack of clarity might generate conflict between Member States or between specific Member States and the European Commission.

In addition, the fact that the Commission on its own initiative identifies the states that fall under the described situations may create ambiguity and can further lead to legal uncertainty. According to the CJEU, the principle of legal certainty requires “*that rules of law be clear, precise and predictable as regards their effects*”.<sup>26</sup> In the context of state aid cases, the CJEU underlined that to observe the principle of legal certainty “*the Commission must, as a matter of principle, avoid inconsistencies that*

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<sup>24</sup> Council Implementing Decision (EU) 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements, available at: <https://bit.ly/3TMLU5W>.

<sup>25</sup> Provided that the Integrated Political Crisis Response is activated or the Migration Situational Awareness and Analysis (MISAA) report issued under the first stage of the Migration Preparedness and Crisis Blueprint, when the Integrated Political Crisis Response is not activated.

<sup>26</sup> CJEU, Criminal proceedings against Costa (C-72/10) EU:C:2012:80, para 74.

*might arise in the implementation of the various provisions of Community law*”, particularly when those provisions pursue the same objective.<sup>27</sup>

Evaluating clarity and consistency of the Commissions own assessment might present a challenge. While unlikely, Member States identified by the Commission would challenge the assessment criteria in front of the court, there is more of a chance that a challenge is raised when states claim migratory pressure under Article 59. If their claim is denied and access to the Solidarity Pool rejected, challenges related to the interpretation of the criteria provided for by Article 10 in front of the CJEU could follow.

The ambiguity related to the elements informing the Commission implementing decision may also lead to procedural shortcomings. Before adopting the implementing decision identifying the states under migratory pressure, the Commission has to consult on the decision with the committee. Consultation with the committee is considered to be “*an essential procedural requirement*”.<sup>28</sup> Failure to adhere to a specific rule regarding committee consultation can invalidate the final decision of the relevant institution. To be invalid, the breach has to be significant enough to adversely affect the legal and factual circumstances of the party claiming a procedural irregularity. However, such situation may arise, in case the failure to provide certain crucial information prevented the committee from forming an opinion based on complete information, and if this led to material inaccuracies or omissions, then the decision could be considered unlawful.<sup>29</sup>

*Article 11: Commission implementing decision on determining Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation*

At the same time as the adoption of the Annual Report on Asylum and Migration, the Commission shall also adopt an implementing decision determining whether a Member State is under migratory pressure, at risk of migratory pressure during the upcoming year, or is facing a significant migratory situation, after having consulted with the Member State concerned. The decision will be adopted each year by 15 October, and transmitted to the Council and European Parliament (Article 11(1) and (3)).

Together with the information gathered under Article 10 and the elements regarding the overall migratory situation as per Article 9(3)(a), the Commission will also take into considerations two additional elements: the numbers of disembarkations after SAR operations, and unauthorised movements between Member States (Article 11(2)).

For cases in which a Member State “has faced large number of arrivals due to recurring disembarkations following search and rescue operations” in the previous year, the Commission will have to consider it under migratory pressure, on the condition that arrivals are of such a scale “that they create disproportionate obligations on even the well-prepared asylum, reception and migration systems” (Article 11(3)).

The reference to disembarkation as a specific element to take into account while analysing migratory pressure on a Member State is one of the few mentions to the specificity of the phenomenon of disembarkations throughout RAMM following the deletion of the separate solidarity mechanism for SAR disembarkations foreseen by the initial Commission proposal for the text. A separate mechanism would have created an additional layer of complexity in the management of the overall solidarity system, however it would have recognised the particular situation at the EU’s maritime borders and the ongoing humanitarian crisis underway, as well as allowing solidarity in recognition

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<sup>27</sup> CJEU, Judgment of 31 January 2001, RJB Mining plc v. Commission of the European Communities, Case T-156/98, ECLI:EU:T:2001:29, para. 112.

<sup>28</sup> CJEU, Judgment of 11 September 2014, Gold East Paper (Jiangsu), Case T-443/11, EU:T:2014:774, para 99.

<sup>29</sup> CJEU, Judgment of 11 September 2014, Gold East Paper (Jiangsu), Case T-443/11, EU:T:2014:774, para 99.

of the specific needs of maritime states and above all the need to save lives. It is yet to be defined how the large scale of arrivals will be evaluated.

It is also relevant to mention that, despite being declared as under migratory pressure, Member States might still be excluded from accessing the Solidarity Pool in case “systemic shortcomings” with regard to the rules on responsibility outlined in Part III of the Regulation were identified (see Article 60(3)).

*Article 12: Commission proposal for a Council implementing act establishing the Solidarity Pool*

A third output introduced by the Regulation is the Council implementing act establishing the Solidarity Pool. The proposal is submitted by the Commission each year together with the Annual Report on Asylum and Migration, on which it will be based (paragraph 1). It is transmitted to the Council and European Parliament. Until the adoption by the Council implementing act, the Commission proposal for a Council implementing act will not be made public as it is classified “RESTREINT UE/EU RESTRICTED” (Article 12(6)).

According to Article 2(2)(d) of the Council decision<sup>30</sup> referred to in Article 12(6), RESTREINT UE/EU RESTRICTED means that information and material the unauthorised disclosure of which could be disadvantageous to the interests of the European Union or one or more of the Member States.

This is also backed by the possibility to restrict access to documents by the Regulation No 1049/2001 which includes the list of exceptional situations when access can be restricted. In the current context, this situation is previewed by Article 4(3) which allows to limit access to a document “which relates to a matter where the decision has not been taken by the institution and if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure”.

Moreover, the Commission adopted the Decision 2019/1962<sup>31</sup> of 17 October 2019 on implementing rules for handling RESTREINT UE/EU RESTRICTED information. In Article 4(2) of this decision it describes the situation in which access to the document can be restricted. In the current context, most probably the justification for such restriction will be tied to Article 4(2)(g) which states that the restriction can be applied in case the disclosure of information can impede the effective development or operation of Union policies.

The issue of restricted access to the Commission proposal is closely linked to the procedural aspects of adoption of implementing acts. From the RAMM text it is clear that the establishment of the Solidarity pool was vested to the Council, while other implementing acts are to be adopted by the Commission with the use of examination procedure. Using the examination procedure means that the Commission’s proposal for the implementing act has to be accepted by the qualified majority of the Committee composed by Member States that are part of the Committee. In such situation, both the Council and the Parliament have a right of scrutiny.

However, Article 12 does not specify which procedure should be applied, which means that the Commission might follow the advisory procedure, in which case the Committee’s opinion would not be binding.

From the context of Article 12, the restricted access to the Commission proposal for the Council implementing act on the Solidarity Pool should cease upon the adoption by the Council of the implementing act. This would mean that once the decision is adopted, the content of the documents that preceded this decision should be accessible, at least upon request.

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<sup>30</sup> Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), available at: <https://bit.ly/4cG6LR7>.

<sup>31</sup> Commission Decision (EU, Euratom) 2019/1962 of 17 October 2019 on implementing rules for handling RESTREINT UE/EU RESTRICTED information, available at: <https://bit.ly/4aK7XRT>.

Access to restricted documents can be challenged on front of the Court of Justice, whose case law in the context of access to information confirms that legislation should be guided by the principle of granting legal certainty to EU citizens and the EU administration.<sup>32</sup> However, this is not going to offer immediate solution to the lack of information on whether Member States have tried to meet the proposed solidarity needs.

Recital 15 clarifies that the Commission proposal is introduced in the system with a view “to provide predictability to Member States under migratory pressure and to contributing Member States”.

Particularly relevant as connected to the overall functioning of the solidarity mechanism is Article 12(2):

The Commission proposal referred to in paragraph 1 shall identify the total annual numbers of required relocations and financial contributions for the Annual Solidarity Pool at Union level, which shall be at least:

- (a) 30,000 for relocations;
- (b) EUR 600 million for financial contributions.

The Commission proposal referred to in paragraph 1 of this Article shall also set

<sup>32</sup>

In the recent [Case C-588/21 P](#), the Court referred to the legal foundations of the principle of transparency recalling that this principle “*is inextricably linked to the principle of openness, which is enshrined in the second paragraph of Article 1 and Article 10(3) TEU, in Article 15(1) and Article 298(1) TFEU and in Article 42 of the Charter. It makes it possible, inter alia, to ensure that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*”(para. 83). In [Case C-39/05 P and C-52/05 P](#), the Court underlined that the purpose of the Regulation No 1049/2001 is “*to give the public a right of access to documents of the institutions which is as wide as possible*” (para. 33). Similarly, in the [Case C-64/05 P](#), the Court confirmed that *recitals 2 and 3 in the preamble to that regulation show that its aim is to improve the transparency of the Community decision-making process, since such openness inter alia guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system* (para. 54). In the Access Info case ([Case C-280/11 P](#)), the ECJ Grand Chamber underlined the responsibilities of the EU governments with regards to their democratic duties: “*the possibility for citizens to find out the considerations underpinning legislative action is a precondition of the effective exercise of their democratic rights. And if citizens are to find these out, they must necessarily be able to scrutinise all the information which has formed the basis of a legislative act.*” (para. 33). At the same time, the case [Case C-64/05 P](#) clarified that in case the institution denies access to the document it is obliged to give reasons for such refusal. The obligation also means that in the decision the institution must “*not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies. That information will allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review.*” (para. 89). This was later confirmed in the [Case C-178/18 P](#), where the Court confirmed that *where an EU institution, body, office or agency that has received a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001 to the fundamental principle of openness recalled in paragraph 49 above, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical* (para. 93). In the scenario where the refusal of access to the requested documents is challenged by relying on the first sub-paragraph of Article 4(3) of Regulation No 1049/2001, concerning the protection of the ongoing decision-making process (the scenario where the request was made to access the text of the Commission proposal for the Council implementing text) there is a possibility that the CJEU might take a different stance. In the [Case T-448/21](#) (unpublished), the CJEU underlined that the undisclosed information was intended to safeguard the ongoing negotiations with other vaccine producers. The Grand Chamber (GC) concluded that withholding this information was warranted to prevent disclosure of specific provisions of existing agreements that could potentially undermine the Commission's position in the ongoing negotiations (para 73 – 75). Among other exceptions on the right to access the documents applicable to the present context is the refusal to grant access on the basis of art. 4 (1) a where disclosure would undermine the protection of: (a) the public interest as regards: - public security, - defence and military matters, - international relations. In the [Case T-301/10](#), the Court ruled in the context of international negotiations held by the EU. In para. 125 the Court underlined that the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. In that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union.

out annual indicative contributions for each Member State by applying the reference key set out in Article 66 with a view to facilitating the exercise to pledge its solidarity contributions (the ‘pledging exercise’) pursuant to Article 13.

Article 12(5) includes a corrective to ensure that sufficient solidarity contributions are dedicated to Member States in a situation of migratory pressure due to “large numbers of arrivals stemming from recurring disembarkations following search and rescue operations”. For these cases, the Commission sets out an indicative percentage of the Solidarity Pool that should be made available to such Member States. Article 12(4) outlines that, where consultations and relevant information shared by the Member States and the Union agencies do not indicate a need for solidarity measures for the upcoming year, the Commission proposal will take this into account.

In drafting the proposal, the Commission also has to take into account which states will become beneficiaries of solidarity, and as such not be obliged to implement their pledged solidarity contributions, and may identify a higher number of relocations and financial contributions than the minimum, and indicate alternative solidarity measures as set out in Article 56(2)(c) (Article 12(3)).

### Implementation considerations

The overall functioning of the solidarity mechanism will be analysed in depth as connected to Part IV. Some preliminary considerations are presented here.

The Article introduces a minimum amount of solidarity contributions, both the number of relocations to be conducted and the amount of financial contributions to be provided EU-wide in a given year. The Commission can propose higher levels of solidarity contributions for the year if the overall migratory situation requires it. As the Commission solidarity proposal will be influenced by the political context, it is likely the process will entail complex negotiations with Member States with contrasting requests and needs.

While Member States at the external borders will likely request high levels of solidarity contributions, northern countries might prefer the minimum level, especially if they face onward movement. A second consideration is the minimum target itself. It can be predicted that numbers set will not significantly depart from it, but still might be somewhat higher, for example, relocations may be set at 40,000 or 50,000 rather than 30,000 per year.

The question arises as to whether this is sufficient to address likely needs of countries at the external borders. Italy and Spain respectively registered 155,673<sup>33</sup> and 56,852<sup>34</sup> irregular arrivals in 2023. Assuming both would be beneficiaries of solidarity in a given year, together with, to provide an example, Bulgaria, Romania and Greece, they would likely benefit from a maximum of 5,000 to 10,000 relocations (or relocations plus “responsibility offsets” per year, see below, Articles 63 and 66), while at the same accepting higher numbers of transfers under the new responsibility rules compared to those under Dublin.<sup>35</sup>

Regarding financial contributions, the EUR 600 million figure was derived from multiplying 30,000 (the minimum number of relocations) by EUR 20,000, which was identified in the phase of negotiations as the economic equivalent to one relocation. Contributing Member States will directly transfer the set amount to the Union Budget (contributing to AMIF and BMVI) to implement the solidarity actions in the form of “external assigned revenues”.

To give an example, the overall yearly target of EUR 600 million is a considerable contribution. It is sufficient to say that, if this full amount was added to the Union Budget each year, it would represent

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<sup>33</sup> Infomigrants, *Italy 2023: Central Mediterranean becomes busiest route to Europe*, December 2023, available at: <https://bit.ly/3PNkmfE>.

<sup>34</sup> Reuters, *Irregular migrant arrivals almost doubled in Spain in 2023*, January 2024, available at: <https://bit.ly/3vEvNzk>.

<sup>35</sup> See ECRE/AIDA, *Statistical briefings*, available at: <https://bit.ly/3vHA1j9>.

EUR 4.2 billion of additional budget for seven years (the duration of the Multi-annual Financial Framework (MFF), the budget cycle). By a way of comparison, the current AMIF and BMVI programmes are together worth around EUR 18 billion for the period 2021 – 2027, including the recent mid-term revision of the MFF that added EUR 2 billion.<sup>36</sup> However, as financial contributions are only one form of solidarity, lower amounts might be provided each year (see below, Article 66). Nevertheless, it would still represent an increase between 5 and 15% of the Union Budget destined to the two programmes. It should be noted that the additional resources made available under the Solidarity Pool will only become available in three years from now (two years for the Regulation to enter into force, and one additional year before the first solidarity cycle actually takes place).

The Commission can take the initiative to assess whether a Member State is facing migratory pressure, even without the Member State declaring this to be the case (and potentially against its will, although in practice it would be difficult if not impossible for the assessment to be carried out without the cooperation of the Member State). However, solidarity measures will only be activated after the Member States' decisions during the High-Level Solidarity Forum (see Article 13) and through the Council implementing act establishing the Solidarity Pool (see Article 57).

Finally, the factors that serve as a “basis” for the decision or to be “taken into account” are so broad that assessments may vary. The question then arises as to how to ensure an impartial assessment of the situation in Member States.

#### *Article 13: The High-Level EU Solidarity Forum*

Article 13 establishes the High-Level EU Solidarity Forum (“the Forum”) to ensure implementation of the solidarity mechanism. The Forum will consist of “representatives of the Member States at the ministerial or other senior political level” (Recital 24) and will be chaired by the Council’s Presidency. Third countries may be included if they have an agreement “on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or lodged in that third country may, for the purpose of contributing to solidarity on an ad hoc basis be invited to participate in the High-Level Solidarity Forum as appropriate” (Article 7d(1)), which opens up the possibility of participation of Schengen associated countries in the solidarity mechanism.

The Forum is convened within 15 days of the adoption of the Commission’s Annual Report and issuance of a proposal for a Council implementing act, with the objective of defining Member States’ solidarity pledges and creating the Solidarity Pool. The Solidarity Forum can be reconvened by simple majority for cases in which the Council, at the initiative of a Member State or upon invitation from the Commission, considers that the solidarity contributions to the Solidarity Pool are insufficient in relation to the needs identified (Article 13(2) to (4)).

It will be then left to Member States to establish which solidarity measures should be provided within the Pool, provided that the minimum level of solidarity contributions as set out in Article 13(2) or the higher number provided by the Commission is fulfilled.

#### *Article 14: The Technical-Level EU Solidarity Forum; and Article 15: The EU Solidarity Coordinator*

While the High-Level Solidarity Forum will be in charge of the pledging exercises that will lead to the creation of the Solidarity Pool, a Technical-Level Solidarity Forum (“the Technical Forum”) is also established by the Regulation, which is responsible for the operationalisation of solidarity measures.

The Technical Forum will be convened and chaired by the EU Solidarity Coordinator appointed by the Commission, responsible for the coordination at technical level of the implementation of the solidarity mechanism (Article 15(1)), who will be supported by an office (Article 15(3)). In addition, the EU Solidarity Coordinator will be responsible for support to relocation, coordination and support among Member States, surveying the needs of benefitting Member States and follow up on the

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<sup>36</sup> European Council, Mid-term revision of the EU long-term budget 2021-2027, available at: <https://bit.ly/4aGrWk9>.

implementation of solidarity measures, as well as organising meetings among Member States where relevant and promoting best practices on implementation of solidarity (Article 15(2)). It will have a similar role in the operationalisation of solidarity measures under the Crisis and Force Majeure Regulation<sup>37</sup> (Article 15(6)).

The Technical Forum will be composed of representatives of relevant national authorities (Article 14(2)), representatives of third countries where relevant (Article 14(3), under the same conditions set out in article 13), the EUAA and, where appropriate, Frontex and FRA. The Solidarity Coordinator will also have the possibility to invite relevant UN Agencies involved in the solidarity mechanism to take part in the meetings (Article 14(4)).

The role of the Solidarity Coordinator, modelled on that of the Returns Coordinator under the Returns Directive, was introduced at a late stage of negotiations. Given the overall complexity of the solidarity system, this introduction is welcome, as well as the reference to the necessity to provide the Coordinator's office with sufficient resources and funding. However, if Member States do not make sufficient solidarity contributions, the presence alone of such a figure will likely have limited effects on the functioning of the solidarity mechanism.

Some recommendations can be made regarding the functioning of the new governance structure on asylum and migration management. While the creation of a mandatory mechanism is a step in the right direction, its functioning will mainly depend on the decisions of the Member States. Risks exist regarding the lack of transparency – which could translate to a lack of accountability – and regarding the analysis realised to establish solidarity needs.

#### **ECRE's Recommendations on the Annual Migration Management Cycle**

- The European Commission is granted an enhanced role under the Regulation. It will be important that a fair and balanced evaluation of solidarity needs is realised, taking into account all relevant factors – including the existence of potential violations of fundamental rights, both on the territory and at the borders. Information from relevant monitoring mechanisms will be key in this sense. However, the broader possible pool on stakeholders should be taken into consideration while collecting data and information, ensuring involvement of UN agencies and civil society where possible.
- MS should make put forward solidarity pledges that properly address existing needs, especially taking into account how Member States at the external borders will assume further responsibilities and their national systems might as such become further overburdened. Where possible, relocations should be prioritised.

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<sup>37</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*.

## Annual Migration Management Cycle

By 1 June

Member States and relevant Agencies provide information to the Commission, relevant for the adoption of the Annual Report (Article 9).



The Commission convenes a meeting of the EU Mechanism for Preparedness and Management of Crisis (Article 9).

By 1 September

Member States and Agencies provide updated information to the Commission (Article 9).

By 30 September

The Commission shall convene another meeting of the Mechanism to present information on the updated assessment of the situation (Article 9).

By October 15<sup>38</sup>

The European Commission adopts

- ➔ European Asylum and Migration Report (Article 9)
- ➔ Implementing decision on determining Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation (Article 11)

And submits

- ➔ Proposal for a Council Implementing Act (Article 12)

The Report assesses the asylum, reception and migratory situation over the previous 12-month period and any possible developments, the proposal for a Council Implementing Act identifies the target numbers for solidarity contributions. It does not yet identify benefitting and contributing Member States.

<sup>38</sup> The first by 1 October 2025.

Within 15 days of the Commission proposal

The Council convenes the High-Level EU Solidarity Forum (Article 13) where Member States pledge their solidarity contributions according to their fair share calculated based on a reference key (Article 66).

Before the end of the year

The Council adopts an implementing act establishing the Solidarity Pool, which includes



3 equivalent forms of solidarity: relocations, financial contributions and alternative solidarity measures (Article 56)

After adoption of the Council implementing act

And on a regular basis afterward

The EU Solidarity Coordinator (Article 15) convenes the Technical-Level EU Solidarity Forum (Article 14), in charge of the operationalisation of the Solidarity Pool.

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

The third part of the Regulation covers the allocation of responsibility in Articles 16 to 55 inclusive, which are divided into seven chapters:

Chapter I General Principles and Safeguards

Chapter II Criteria for Determining the Member State Responsible

Chapter III Dependent Persons and Discretionary Clauses

Chapter IV Obligations of the Member State Responsible

Chapter V Procedures

Chapter VI Administrative cooperation

Chapter VII Conciliation

Similarly to the Dublin Regulation, the RAMM establishes an additional procedure which operates within the overall procedural context. Thus, among other procedural requirements, Member States will apply the procedure determining the Member State responsible (currently the “Dublin procedure”). The situation is more complex than under Dublin III however because the Pact has introduced the screening process and the expanded and mandatory use of special procedures, so the context in which responsibility determination takes place is more complex. In addition, discretion is left to the Member States concerning when and by whom the responsibility determination procedure is carried out.

The scope of application of the responsibility determination procedure is limited by the Screening Regulation and by the amended Asylum Procedures Regulation (APR). Certain applicants are filtered out at different stages with different outcomes meaning that responsibility determination does not take place for them. This occurs first during the screening process when outcomes could be a refusal of entry, a return procedure, or channelling into an asylum procedure (Screening Regulation, Article 18). The fourth possible outcome is “relocation” (Screening Regulation, Recital 17).

For applicants channelled into the asylum border procedure for examination of applications for international protection, Article 52 APR establishes that Member States will carry out the procedure at the same location as the border procedure.<sup>39</sup> Where the conditions for applying the border procedure are met in the Member State from which the applicant is transferred, a border procedure “may” be applied by the Member State to which the applicant is transferred. This is an improvement compared to the original proposal, which established that the Member State in which the applicant was present, could – but was not obliged to – apply the procedure for responsibility determination, thus risking introducing a high degree of unfairness towards the applicants involved.

### CHAPTER I GENERAL PRINCIPLES AND SAFEGUARDS

#### *Article 16: Access to the procedure for examining an application for international protection*

Under Article 16(2), the default principle of “country of first arrival” is maintained. When no Member State can be designated on the basis of the criteria established in Chapter II of Part III, “the first Member State in which the application for international protection was registered shall be responsible for examining it”. While the criteria that follow in Chapter II describe some additional situations in which countries other than the one of first registration will be responsible compared to Dublin III the

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<sup>39</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union*.

fundamental principle does not change. This is reinforced by Article 33 on “Entry” in the section on criteria, which states that the responsibility of the country of entry applies unless the application is registered 18 months after entry, reduced to 12 only in the case of arrival after SAR disembarkations.

### Implementation considerations

Article 16(3) fails to update the legislation in accordance to CJEU jurisprudence. It provides that transfers to the responsible Member State are halted only when there are “substantial grounds for believing that the applicant, because of the transfer to that Member State, would face a real risk of violation of applicant’s fundamental rights that amounts to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union”. Under these conditions, responsibility shifts to the determining Member State. While it is positive that the wording of the RAMM no longer incorporates the reference to “systemic flaws” in the national asylum procedure and in reception conditions, which would have unduly restricted the assessment depending on the source of the risk,<sup>40</sup> the Article still limits the evaluation to violations within the meaning of Article 4 of the Charter. In practice, this is likely to result in Member States seeking and investigating individual guarantees from destination countries that only aim at assessing potential violations of Article 4, without evaluating broader shortcomings such as delayed access to the asylum procedure and to reception conditions.

As previously highlighted in ECRE’s comments on the RAMM proposal,<sup>41</sup> the correct human rights test, as elaborated by the ECtHR has further been confirmed by the CJEU in *C.K.* in 2017, where it was held that risks may relate to a person’s medical condition,<sup>42</sup> and in *Jawo* in 2019, where the Court elaborated on the violation of human dignity as a result of extreme material poverty.<sup>43</sup> In practice, individuals have been protected from deportation when other fundamental rights are at risk of being gravely violated,<sup>44</sup> such as the right to a fair trial (Article 47 of the Charter and Article 6 ECHR). Other grounds for *non-refoulement* protection acknowledged by the ECtHR are flagrant breaches of the prohibition of slavery under Article 4 ECHR (Article 5 of the Charter),<sup>45</sup> the right to liberty under Article 5 ECHR (Article 6 of the Charter),<sup>46</sup> the right to private life under Article 8 ECHR (Article 7 of the Charter),<sup>47</sup> and freedom of religion under Article 9 ECHR (Article 10).<sup>48</sup>

In the recent case of *X v Staatssecretaris van Justitie en Veiligheid*, the CJEU ruled that despite the practice of pushbacks and detention at the border control posts by the Member State responsible, applicants can still be transferred to that Member State.<sup>49</sup> However, the Court emphasised that, before transferring an applicant, the Member State must consider all information provided by the

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<sup>40</sup> As the ECtHR clarified in *Tarakhel v Switzerland* the source of the risk is irrelevant to the level of protection guaranteed by human rights law; this is also echoed in Article 19(2) of the Charter. *Tarakhel* clarifies that the orthodox assessment for *non-refoulement* in relation to inhuman or degrading treatment is a “real risk of a serious violation”.

<sup>41</sup> *ECRE Comments on the Commission Proposal for a Regulation of the European Parliament and of the Council for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD)*, January 2021, available at: <https://bit.ly/4cLyIMI>.

<sup>42</sup> CJEU, Judgment of 16 February 2017, *PPU C.K. and others*, Case C-578/16.

<sup>43</sup> CJEU, Judgment of 19 March 2019, *Jawo*, Case C-163/17.

<sup>44</sup> For a detailed discussion, see C. Costello, *The Search for the Outer Edges of Non-Refoulement in Europe: Exceptionality and Flagrant Breaches*, in Bruce Burson and James Cantor (eds), *Human Rights and the Refugee* (Brill 2016), 180-209.

<sup>45</sup> ECtHR, *Ould Barar v Sweden*, Application No 42367/98, Judgment of 19 January 1999. This provision could be relevant to victims and potential victims of trafficking. See ECtHR, *Chowdhury v Greece*, Application No 21884/15, Case Communicated on 9 September 2015.

<sup>46</sup> ECtHR, *Tomic v United Kingdom*, Application No 17387/03, Judgment of 14 October 2003.

<sup>47</sup> ECtHR, *F v United Kingdom*, Application No 17341/03, Judgment of 22 June 2004.

<sup>48</sup> ECtHR, *Z and T v United Kingdom*, Application No 27034/05, Judgment of 28 February 2006. Notably, this case is cited by Advocate-General Bot in Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, Judgment of 5 September 2012, para 71 on the concept of persecution for reasons of religion.

<sup>49</sup> CJEU, Judgment of 29 February 2024, *X. v. Staatssecretaris van Justitie en Veiligheid*, C-392/22, ECLI:EU:C:2024:195, par. 65.

applicant, especially regarding the risk of inhuman or degrading treatment under Article 4 of the Charter, and cooperate in verifying the accuracy of this information.

This brings up the question of the burden of proof with regards to establishing the risks of rights violations. In *Ministero dell'Interno and Others*, the CJEU clarified that the authority is bound to assess the existence of the risk of inhuman and degrading treatment while depending on information that is “objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention”.<sup>50</sup> In *Pál Aranyosi and Robert Căldăraru*, the CJEU specifies that such information sources may include judgments from international courts like the ECtHR, as well as decisions, reports, and documents from bodies affiliated with the Council of Europe or the UN.<sup>51</sup>

Article 16(4) refers to the security checks that should be carried out under the Screening Regulation. If that security check has not been carried out, the first Member State in which the application for international protection is registered shall examine whether there are reasonable grounds to consider the applicant a threat to national security as soon as possible after the registration of the application, and before applying the criteria for determining the Member State responsible. While the security threat definition is aligned with that provided by the Screening Regulation,<sup>52</sup> this still constitutes a further postponement of access to the Member State’s determination process and consequently to effective and swift access to asylum.

If the security check was carried out during the screening, but the first Member State in which the application for international protection was registered still has “justified reasons” to examine whether there are reasonable grounds to consider the applicant a threat to national security, it shall carry out the examination as soon as possible after the registration of the application, before applying the criteria for determining the Member State responsible. Potential issues arising in this context are connected to the extent of the additional security checks. Challenges related to the right to respect for private life laid down in Article 7 of the EU Charter and to the use of digital tools<sup>53</sup> might arise. Moreover, the security check will entail queries with relevant national and EU databases, which in itself raises fundamental rights concerns.<sup>54</sup> If there are reasonable grounds to consider the applicant a danger to national security or public order of the Member State carrying out the security check, that Member State should be the Member State responsible.

Article 16(5), incorporates the provisions of Dublin III stating that Member States “retain the right to send an applicant to a safe third country”, which is consistent with CJEU jurisprudence, and notably the *Mirza* judgment.<sup>55</sup> It should be noted that the concept of safe third country and its use is adapted by the APR.

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<sup>50</sup> CJEU, Judgment of 30 November 2023, *Ministero dell'Interno and Others*, C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21, EU:C:2023:934, paragraph 136 CJEU, Judgment of 5 April 2016, *Joined Cases Pál Aranyosi (C-404/15), Robert Căldăraru (C-659/15 PPU)*, ECLI:EU:C:2016:198, par. 89. See also, CJEU, Case C-163/17 *Jawo*, Judgment of 19 March 2019, ECLI:EU:C:2019:218 par. 90; CJEU, Judgment of 29 February 2024, *X. v. Staatssecretaris van Justitie en Veiligheid*, C-392/22, ECLI:EU:C:2024:195, par. 65.

<sup>51</sup> CJEU, Judgment of 5 April 2016, *Joined Cases Pál Aranyosi (C-404/15), Robert Căldăraru (C-659/15 PPU)*, ECLI:EU:C:2016:198, par. 89.

<sup>52</sup> See ECRE Comments on the Screening Regulation, to be published in May 2024.

<sup>53</sup> ECRE/AIDA, *Digitalisation of asylum procedures: risks and benefits*, January 2022, available at: <https://bit.ly/3PNlpfA>.

<sup>54</sup> See ECRE Comments on the Screening Regulation, to be published in May 2024.

<sup>55</sup> CJEU, Judgment of the Court (Fourth Chamber) of 17 March 2016, *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal*, C-695/15 PPU, ECLI:EU:C:2016:188.

*Article 17: Obligations of the applicant and cooperation with the competent authorities and Article 18: Consequences of non-compliance*

The RAMM introduces or repeats obligations of the applicant and sets out the punitive consequences of non-compliance with these obligations. Article 17 establishes that applicants should make an application in the country of first entry unless they are in possession of a valid resident permit or visa, in which case the application should be made and registered in the issuing country. If they are in possession of an expired permit or visa, they should apply in the country where they are present. The applicant is required to cooperate with national authorities in collecting biometric data in accordance with the Eurodac Regulation and to provide the “elements and information” available to him or her and relevant to determining responsibility, as soon as possible and at the latest during the personal interview regulated by Article 22. Finally, applicants are obliged to be present in the Member State where they have registered during determination of responsibility, and in the responsible Member States thereafter, and to comply with transfer decisions.

The nature of the “elements” and “information” considered relevant is partially clarified by Article 19 on information provision, indicating that the applicant should be informed of the obligations “to disclose, as soon as possible in the procedure, any relevant information that could help to establish any prior residence permits, visas or educational diplomas” (Article 19(h)) and “to submit his or her identity documents where the applicant is in possession of such documents and to cooperate with the competent authorities in collecting the biometric data” (Article 11(j)). However, Article 17(4) does not clearly limit elements and information to the afore-mentioned categories, which would potentially open the door for legal uncertainty and a risk of divergent practice.

In *Ministero dell’Interno*, when assessing the purpose of the personal interview, the CJEU underlined that it is to provide a significant opportunity, if not a guarantee, for the individual to share information with the relevant authority. This information may dissuade the Member State from submitting a take back request to another Member State or, in some cases, prevent the person's transfer altogether. The Court did not specify which elements or information should be considered in the assessment but referred to the obligation to assess evidence provided by the person in order to establish the existence of risk under Article 4 of the Charter.<sup>56</sup>

Evidence to “substantiate” the information can also be provided at a later deadline set by the Member States and respecting the overall deadlines set by Article 39(1), where the applicant is “not in a position” at the time of the interview to supply this evidence.

Article 17(2) limits the scope of the derogations from the obligation to apply in the state of first entry, covering only possession of a valid residence permit or visa, instead of adopting the broader formula of being “legally present”, which was proposed and would have captured a broader number of cases.

Article 18 introduces sanctions for non-compliance. First, the applicant loses the right to reception conditions in any Member State other than the one in which they are required to be present from the moment that they receive notification of a transfer decision, provided they have been informed of the consequences of moving to another Member State without authorisation. This is in line with the provisions of the recast RCD excluding asylum seekers from reception conditions if they are not present in the Member State in which they are required to be present. This is intended for situations of onward movement, to capture cases where an applicant is found to be on the territory of a Member State which is neither the Member State where they are supposed to be present (and usually the Member State which has issued a transfer decision) nor the Member State which has been deemed responsible. The only exclusion to this rule are cases of victims of trafficking in human beings (Article 18(3)). Regardless, Member States will remain bound to ensuring “a standard of living in accordance with Union law, including the Charter, and international obligations.” (Article 18(1)) and to be obliged

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<sup>56</sup> CJEU, Judgment of 30 November 2023, *Ministero dell’Interno*, Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21, ECLI:EU:C:2023:934, paras 105 and 136.

to shall take into account the individual circumstances of the applicant, including any real risk of violations of fundamental rights in the Member State where the applicant is required to be present”, as well as to take measures that are “proportionate” (Article 18(4)). A second consequence of non-compliance is that, if the elements and information are not provided by the set time limits, the Member State shall only take them into account if they are “decisive for the correct application of the regulation” (Article 18(2)).

### Implementation considerations

Both these elements are concerning from a protection perspective. The first does not take into account the multiple and sometimes valid reasons for onward movement, especially in a context where Member States do not comply with other parts of the CEAS. For instance, onward movement might be caused by inter alia the failure of family reunion processes; the impossibility to re-unite with family members who do not fall within the Regulation’s definition (e.g. siblings, adult children, etc); inadequate reception conditions; or violence experienced in accessing the territory or flaws in decision-making in the country to which the applicant should be transferred or in which they are awaiting a transfer.

Allowing Member States to refuse to provide reception conditions creates an increased risk of destitution notwithstanding the “safety clause” referring to the need to “ensure a standard of living” in accordance with the relevant EU and international legal provisions in any case. ECRE’s longstanding position is that automatically removing reception conditions is not compatible with the right to dignity under Article 1 of the EU Charter, and in contradiction with the CJEU’s ruling in *Cimade and Gisti*.<sup>57</sup>

In the case of *Haqbin*,<sup>58</sup> the CJEU clarified the meaning of the verb “ensure” within the context of providing a dignified standard of living. The Court stated that the verb is used to guarantee a dignified standard of living “continuously and without interruption”. In *Ministero dell’Interno*,<sup>59</sup> the CJEU addressed the issue of vulnerability from the perspective of the principle of non-discrimination, setting out that access to dignified living standards, basic needs and protection of dignity shall be provided to “any applicant for international protection and not only to those applicants who are ‘vulnerable persons’ within the meaning of Article 21 of Directive 2013/33”.

The second – procedural – consequence of non-compliance limits the possibility for Member States to take into account information and elements that are provided after the given deadline to cases in which the evidence provided is “decisive” for the application of the Regulation, mentioning in particular evidence regarding cases of unaccompanied minors and family reunification. While this clause should at least ensure that relevant elements and information on these cases is considered even after the deadline, it risks leaving out other relevant elements, such as medical information, which often appears at a later stage because the asylum seeker might not have had access to sufficient medical care before their stay in the Member State in question. Medical information may be necessary in determination of the dependence on a person living in the Member State or of other circumstances relevant to determination of responsibility for an applicant.

Since the proposed Dublin IV reform,<sup>60</sup> ECRE has argued against punitive approaches to onward movement. While international refugee law does not expressly allow asylum seekers to choose the country that will process their application, it offers protection against penalisation of irregular entry in Article 31 of the Refugee Convention, and thus limits the sanctions which can be imposed in case of voluntary movements between states.

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<sup>57</sup> CJEU, Case C-179/11, *CIMADE, GISTI v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, 27 September 2012.

<sup>58</sup> CJEU (Grand Chamber), C-233/18 *Haqbin*, 12 November 2019.

<sup>59</sup> CJEU, Judgment of 1 August 2022, Case of *Ministero dell’Interno*, Case C422/21, ECLI:EU:C:2022:616, par. 46.

<sup>60</sup> ECRE Comments on Dublin IV.

In *Qurbani*,<sup>61</sup> the CJEU indicated that failure to incorporate Article 31 of the Convention into the EU asylum *acquis* represents a gap in the EU's faithful reliance on the Convention as the "cornerstone" of the CEAS.<sup>62</sup> Regardless, Member States remain bound by this provision both under their international obligations and under Article 18 of the Charter. In *Ministero dell'Interno*,<sup>63</sup> the CJEU confirmed that: "As regards the procedural safeguards applicable, in accordance with national law, to a decision to withdraw material reception conditions adopted in respect of an applicant for international protection who engages in seriously violent behaviour, it should be noted that such guarantees, however important they may be, do not make it possible to exclude the risk that the applicant concerned may, as a result of that withdrawal, find himself or herself unable to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, to which the Court referred in paragraph 46 of the judgment of 12 November 2019, Haqbin (C-233/18, EU:C:2019:956)".

#### *Article 19: Right to information*

Article 19 details the information that a Member State must provide to an applicant, which pertain to three main categories: their rights, their obligations, and the consequences of non-compliance. The Article foresees that information should be provided "as soon as possible", specifying that information should be provided "at the latest when an application for international protection is registered", which represents a welcome clarification of the point at which information should be provided to asylum seekers (Article 19(1)). However, it is worrying that it puts information on the applicant's rights on the same level as their obligations. As such, it operates a subtle change in the purpose of information provision, which becomes less of a procedural guarantee to ensure that the applicant has access to their rights and more about ensuring that the applicant is aware of their obligations. Article 19(2) indicates that the applicant will have the possibility to request information regarding the progress of the procedure and the authorities shall inform the applicant about this possibility but does not establish a positive obligation for the authorities to provide such information independently from the applicant's request.

#### *Article 20: Accessibility of information*

The provision of information on the complex content of EU asylum law, including on the rights and obligations of applicants, is essential to delivery of fair processes. The EU, in particularly through the EUAA, has certainly made valid efforts to improve information provision, through the development of tailored materials<sup>64</sup> and dedicated trainings to national officials. Article 20(2) explicitly charges the EUAA with the task of drawing up "common information material", in close cooperation with national authorities and in a manner to enable them to complement the material with "Member State-specific information".

#### Implementation considerations

Despite the paramount importance of provision of clear information, there is a limit to the extent to which this can be legislated for. It should be noted that information provision regarding the procedure on allocation of responsibility remains a significant challenge in several countries.<sup>65</sup> Improvement in

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<sup>61</sup> CJEU, Case C-481/13 *Qurbani*, Judgment of 17 July 2014.

<sup>62</sup> CJEU, Case C-604/12 *H.N. v Minister of Justice, Equality and Law Reform*, Judgment of 8 May 2014, para 27; Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D*, Judgment of 9 November 2010, para 71.

<sup>63</sup> CJEU, Judgment of 1 August 2022, Case of *Ministero dell'Interno*, Case C422/21, ECLI:EU:C:2022:616, par. 45.

<sup>64</sup> See, e.g., EASO, *Information provision in the Dublin procedure*, December 2021, available at: <https://bit.ly/43JtWpA>; EUAA, *Practical Guide on Information Provision – Access to the asylum procedure*, February 2023, available at: <https://bit.ly/3TMNpRC>.

<sup>65</sup> This is due *inter alia* to the lack of legal assistance, the language barrier and the absence of interpreters, the complexity of the rules and the poor quality of information provided in some cases as well as the type of information being provided, which may vary within the same country. Limiting access to information for asylum seekers has also related to deliberate policy choices in certain countries. See: AIDA, Country Reports, available at:

compliance and practice that complies with the spirit as well as the letter of legal provisions is thus key. It is positive that Article 20 includes, as a specific safeguard, that information should be “provided in writing in a concise, transparent, intelligible and easily accessible form, using clear and plain language and in a language that the applicant understands or is reasonably supposed to understand” and, where “necessary for the applicant’s proper understanding, the information shall also be supplied orally”. Considering that several applicants might have a low literacy level, it will be particularly important to individually assess whether providing information orally is a more suitable course of action. The references to the possibility to provide information in a language they are “reasonably supposed to understand” and to use multimedia equipment are worrying, as this might lead to applicants receiving information in a language that is not their mother tongue or their primary language through general information material that is presented in common information session, which would in turn limit the chances to ask individual clarifications in a private space.

If the applicant is a minor, an additional guarantee established is that information should be provided “in a child-friendly manner by appropriately trained staff and in the presence of the applicant’s representative” (Article 20(3)).

#### *Article 21: Right to legal counselling*

Article 21(1) establishes that applicants have the right to consult “a legal adviser or other counsellor, admitted or permitted as such under national law”, on matters related to the application of responsibility criteria at all stages of the procedure set out in RAMM. The applicant “may” request access to free legal counselling. Member States can organise the provision of legal counselling in accordance with their national systems, but have to “lay down specific procedural rules concerning the arrangements for filing and processing requests for the provision of free legal counselling” (Article 21(4)(5)).

Article 21(3) establishes that:

Free legal counselling shall be provided by legal advisers or other counsellors admitted or permitted under national law to counsel, assist or represent applicants or by non-governmental organisations accredited under national law to provide legal services or representation to applicants.

For the purposes of the first subparagraph, effective access to free legal counselling may be assured by entrusting a person with the provision of legal counselling in the administrative stage of the procedure to several applicants at the same time.

#### Implementation considerations

In current practice, access to free legal aid is sometimes granted in law hindered by various practical obstacles.<sup>66</sup> While it is positive that RAMM codifies the obligation for Member States to ensure access to legal counselling – in particular considering the limitations in scope for appeals (see Article 43 on Remedies) –, it will be possible to evaluate its impact only through the operationalisation of this provision. Article 21(8) refers to a possible role for the EUAA in this phase, as Member States can request support in its implementation. It is not clear whether EUAA asylum support teams would be directly requested to provide counselling, but that would largely depend on national rules on the matter.

In particular, given the increased burden put on applicants by certain provisions of the Regulation (such as the previously discussed Articles 17 and 18), it will be of primary importance that impartial legal aid is accessible. It will be key to ensure that civil society organisations are given sufficient

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<https://bit.ly/4cKJiy2>; EPRS, *Dublin Regulation on international protection applications*, February 2020, available at: <https://bit.ly/3J6yD3k>.

<sup>66</sup> See: AIDA, Country Reports, available at: <https://bit.ly/4cKJiy2>; EPRS, *Dublin Regulation on international protection applications*, February 2020, available at: <https://bit.ly/3J6yD3k>.

access to asylum seekers in this phase and have sufficient funding and capacity to properly address the high number of requests. It is concerning that the Article allows Member States to organise legal counselling as provided to several applicants at once, as this would certainly limit its effectiveness. It might in practice become extremely difficult to differentiate legal counselling from collective information sessions, despite the two activities having different objectives.

Paragraph 6 clarifies the scope of legal counselling under the provision, which will cover:

- (a) guidance and explanations regarding the criteria and procedure for determination of responsibility, including information on rights and obligations of the applicant;
- (b) guidance and assistance in providing information that could help establish the Member State responsible; and
- (c) guidance filling the template countries will have to provide to applicants who might have family members in another Member State to provide relevant information.

#### *Article 22: Personal interview*

Article 22(1) provides that the determining Member State shall conduct a personal interview with the applicant in order to facilitate the process of determining the Member State responsible. Positively, the provision includes an obligation on the national authorities to proactively question the applicant about the presence of relatives or family members or about any other elements that could trigger primary responsibility criteria. If there are indications that the applicant may have family members or relatives in a country, the examining Member State will have to provide them with a template, to fill in with information that might be relevant to facilitate the application of Article 39 on take charge requests. The EUAA should prepare the template at the latest 10 months after entry into force of the RAMM. The interview should be scheduled in a timely manner, and in any case will have to take place before a take charge request is sent (Article 22(3)).

As previously mentioned, the applicant will be assisted by a legal adviser or other counsellor in understanding and possibly fill in the template (Article 21(6)(c)), and has the right to receive specific information on the provisions relating to family reunification and the applicable definition of family members and relatives, the right to request and receive the template referred to in Article 22(1), including information on persons and entities that may provide assistance in completing the template, as well as information on national, international or other relevant organisations that may facilitate the identification and tracking of family members (Article 19(1)(f)).

Article 22(2)(a) provides that an interview may be omitted where the applicant has absconded, and (c) when the applicant has already provided the information relevant to determine the Member State responsible by other means. It also established that, where the Member State decides to omit the interview, it has to give the applicant the opportunity to present all relevant information to correctly determine the Member State responsible, “including duly motivated reasons for the authority to consider the need for a personal interview”.

#### Implementation considerations

Despite the safeguard, ECRE considers that establishing as a general rule that asylum seekers should be barred from the possibility of a personal interview where the administration deems the available information to be sufficient to take a decision is incompatible with the right to be heard, enshrined in Article 41 of the Charter and as a general principle of EU law.<sup>67</sup>

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<sup>67</sup> CJEU, Judgment of 22 November 2012, M.M. v Minister for Justice, Equality and Law Reform, Case C-277/11, paras 85-89.

In *Ministero dell'Interno*,<sup>68</sup> the CJEU confirmed that the right to a personal interview may only be omitted in limited circumstances, and underlined that “the personal interview serves to verify that that person understands the information provided to him or her in that leaflet and it represents a privileged opportunity, or even a guarantee, for that person to disclose to the competent authority information which could lead the Member State concerned to refrain from submitting a take back request to another Member State or even, as the case may be, to prevent that person’s transfer.” The fundamental importance of the personal interview was also underlined in *Addis*.<sup>69</sup>

A positive addition in this article is instead paragraph 4, building on Article 5(4) of the Dublin III Regulation, establishing that:

The personal interview shall be conducted in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Interviews of unaccompanied and, where applicable, accompanied minors shall be conducted by a person who has the necessary knowledge of the rights and special needs of minors, in a child-sensitive and context-appropriate manner, taking into consideration the age and maturity of the minor, in the presence of the representative and, where applicable, the minor’s legal adviser. Where necessary, an interpreter who is able to ensure appropriate communication between the applicant and the person conducting the personal interview shall be provided. The presence of a cultural mediator may be provided during the personal interview. Where requested by the applicant and where possible, the person conducting the interview and, where applicable, the interpreter shall be of the sex that the applicant prefers.

Similarly, an addition at Article 22(6) improves the guarantee compared to Dublin III:

The personal interview shall take place under conditions which ensure appropriate confidentiality. It shall be conducted by a person qualified under national law. Applicants who are identified as being in need of special procedural guarantees pursuant to the [Asylum Procedures Regulation], shall be provided with adequate support in order to create the conditions necessary for effectively presenting all elements allowing for the determination of the Member State responsible. Staff interviewing applicants shall also have acquired general knowledge of factors which could adversely affect the applicant’s ability to be interviewed, such as indications that the person has been tortured in the past or has been a victim of trafficking in human beings.

Article 12(5) introduces instead the possibility for Member States, only where “duly justified circumstances” exist, to conduct the personal interview by video conference, while still being obliged to ensure “the necessary arrangements for the appropriate facilities, procedural and technical standards, legal assistance and interpretation taking into account guidance from the Asylum Agency.” Online interviews, while in some cases useful to avoid unnecessary movements for applicants and to ensure a swift completion of the procedure, generate several concerns both in terms of respect for privacy, possible risks for vulnerable applicants and lack of adequate equipment and spaces. These challenges should be tackled before establishing a system for online personal interviews, and the use of this method should remain residual.<sup>70</sup>

While positive that Article 22(7) establishes that the interview should be audio recorded, the applicant will not be able to directly access the recording. Instead, they have to be informed that the recording is being made, of its purpose and receive “as soon as possible after the interview and in any event before the competent authorities take a decision on the Member State responsible” a summary

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<sup>68</sup> CJEU, Judgment of 1 August 2022, Case of *Ministero dell'Interno*, Case C422/21, ECLI:EU:C:2022:616, paras 105 and 122.

<sup>69</sup> CJEU, Judgment of 16 July 2020, *Milkias Addis v Bundesrepublik Deutschland*, Case C-517/17, para. 66.

<sup>70</sup> ECRE/AIDA, *Digitalisation of asylum procedures: risks and benefits*, January 2022, available at: <https://bit.ly/3PNlpfA>.

through a report or another standard form of their declaration. The applicant will have the possibility to make comments or provide clarifications regarding any misunderstandings or factual mistakes, but the audio recording shall prevail in case doubts remain regarding the applicant's statements.

It is important that the interview does not presume any outcome but seeks to gather as much relevant information as possible – in relation to take charge requests under Article 39 but also those in relation to the discretionary clauses as well as any other factors. Thus, the template to be developed should allow for the necessary range of topics to be covered but also for the requisite level of detail.

### *Article 23: Guarantees for minors*

The provisions on the guarantees for unaccompanied children have also been bolstered compared to Dublin III and incorporate both case law and the evolution of practice in asylum for children. This includes the obligation to appoint a representative (who may be a person or an organisation and can be the same person appointed under the APR Article 25 and the obligation to carry out a best interest assessment before the transfer of a child (Article 23(5)). The best interest assessment will be based on factors listed in Article 23(4), which includes hearing the views of the child, and involves the representative of the child. Nevertheless, the lack of clarity regarding the best interest assessment remains. There is no standard template or procedure across Europe for completing it, and no clear guidance is provided on how to balance various relevant considerations, for example on how to weight the opinion of the child against those of the representative.<sup>71</sup>

### Implementation considerations

Article 24 of the EU Charter establishes that public authorities must take into primary consideration the child's best interest in all their actions, and the importance of the views of the child in the context of a Dublin transfer has been emphasised by the UN Committee on the Rights of the Child: the child's situation has to be assessed separately from that of their parents and the unique consequences that flight trauma might have on children must form part of a diligent assessment of their best interests.<sup>72</sup> The unclarity regarding how to conduct the best interest assessment is particularly worrying when read in conjunction with Article 25 on unaccompanied minors, establishing that decisions are taken "unless it is demonstrated that it is not in the best interests of the minor". Other challenges relate to the proper funding necessary for the guardianship system to function and to the expertise of staff deployed in supporting children in the context of the responsibility determination procedure.<sup>73</sup>

Positively, the provision also establishes that procedures including minors will have to be treated with priority (par. 1), and specific requirements regarding the need for representatives to have sufficient "resources, qualifications, training, expertise and independence to ensure that the best interests of the minor are taken into consideration during the procedures" (par. 2).

Article 23(5) includes additional guarantees for unaccompanied minors, and in particular the obligation for the transferring Member State to notify the Member State responsible or the Member

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<sup>71</sup> However, the EUAA produced several materials meant to provide guidance on this matter and on considerations regarding the best interest of the child. See: <https://bit.ly/3VPn3kC>.

<sup>72</sup> Committee on the Rights of the Child, V.A. v. Switzerland, Communication No. 56/2018, 28 September 2020, paras. 7.3 and 7.4. AG Collins in his recent opinion to the case K, L v Staatssecretaris van Justitie en Veiligheid, underlines that national practice whereby a decision-maker does not take into account, as a primary consideration, the best interests of the child, or weighs up the best interests of the child without first determining, in each procedure, what the best interests of the child are, is incompatible with EU law. CJEU, Opinion of Advocate General Collins of 13 July 2023, K, L v Staatssecretaris van Justitie en Veiligheid. Case C-646/21, ECLI:EU:C:2023:581, par. 74. See also: CJEU, Judgment of 11 March 2021, État belge, C 112/20, EU:C:2021:197, para. 36 CJEU, Judgment of 17 November 2022, Belgische Staat, C 230/21, EU:C:2022:887, para.48; CJEU, Federal Republic of Germany v G.S., Judgment of 15 February 2023 C-484/22, para. 24, 26. However, in M.A., S.A. and A.Z., the CJEU confirmed that not even considerations relating to the best interests of the child can oblige the Member States to exercise the discretionary clause under Article 17 of the Dublin III Regulation. CJEU, Judgment of 23 January 2019, M.A., S.A. and A.Z., C-661/17, par. 72.

<sup>73</sup> See: AIDA, Country Reports, available at: <https://bit.ly/4cKJiy2>.

State of relocation before a transfer, to ensure that all appropriate measures established by Articles 16 and 27 of the recast RCD are in place.

#### **ECRE Recommendations on the use of procedural guarantees**

- MS should ensure that proper interpretation is provided to all, in the applicant's mother tongue or primary language;
- MS should ensure their staff is qualified and properly trained, in particular when treating vulnerable cases;
- Access for CSOs and other organisations providing legal support will be paramount for the proper operationalisation of the provision on legal counselling and to ensure impartiality in the services provided; in particular, it will be necessary to ensure that information on rights and obligations has been fully understood by all applicants, and the sufficient support is provided for those wishing to fill in the template regarding the presence of family members or other relevant connections. Asylum seekers should always have access to impartial legal counselling;
- The Asylum Agency should step up its training efforts on matters related to information provision, interpretation and guarantees for minors in the asylum procedure;
- A common standard for the best interest assessment based on UNHCR and Committee on the Rights of the Child recommendations should be developed;
- Personal interviews are of fundamental importance to determine possible links of an applicant with a specific Member State. National authorities should always, as far as possible, grant that all applicants have the opportunity to be heard. Furthermore, given some of the connected risks, remote interviews should be limited to cases in which they are conducted taking into account the interests of the applicant, rather than efficiency considerations;
- MS should ensure that proper funding is provided for the system of representatives for unaccompanied minors to function, that ensure enforcement is in line with rights of children and decisions are taken according to the best interests of the child.

## Chapter II Criteria for Determining the Member State Responsible

### *Article 24: Hierarchy of criteria*

The criteria for determining responsibility are defined in Chapter II, which consists of Articles 24 to 33 inclusive, and have to be applied in the order set out (Article 24(1)). While the hierarchy is similar to that of Articles 7 to 15 of Dublin III, there are some changes both in terms of order and content of the different provisions.

The order of application of the criteria is as follows:

- Unaccompanied minors (Article 25)
- Family members who legally reside in a Member State (Article 26)
- Family members who are applicants for international protection (Article 27)
- Issue of residence documents or visas (Article 19)
- Diplomas or other qualifications (Article 30)
- Visa waived entry (Article 31)

- Application in an international transit area of an airport (Article 32)
- Entry (Article 33)

Compared to Dublin, one criterion has been added (diplomas or other qualifications), one has been expanded (family members who legally reside, rather than just family members who are beneficiaries of international protection) and two are given priority over entry (visa waived entry and application in an international transit area of an airport).

In Article 24, the Dublin III provision is changed slightly such that the situation to take into account to determine which Member State is responsible has to be evaluated at the moment in which the application is first registered, rather than when it is lodged.

<b>List of criteria for determining responsibility and main positive changes between Dublin and RAMM</b>	
<b>Dublin</b>	<b>RAMM</b>
<i>Minors</i>	<i>Unaccompanied Minors (A25)</i>
<i>Family members beneficiaries of international protection</i>	<p><i>Family members residing legally in a Member State (A26)</i></p> <p>Expanded scope of the definition of family member: includes both families formed in the country of origin and in transit;            Criterion applicable not only to BIP family members but also legally residing based on the Long-term Residence Directive;            Lowered evidential requirements to demonstrate a family connection</p>
<i>Family members asylum seekers</i>	<p><i>Family members asylum seekers (A27)</i></p> <p>Expanded scope of the definition of family member: includes both families formed in the country of origin and in transit;            Lowered evidential requirements to demonstrate a family connection</p>
<i>Family Procedure</i>	<i>Family Procedure</i>
<i>Residence documents or visas</i>	<p><i>Residence documents or visas (A29)</i></p> <p>Scope of the criteria expanded: expired, annulled, revoked or withdrawn residence documents or visas;            Longer period of responsibility: for documents, the issuing Member State remains responsible for the applicant for a period of three years. For a visa, the period is of 18 months.</p>
-	<p><i>Diplomas or other qualifications (A30)</i></p> <p>New criterion introduced by RAMM</p>
<i>Entry and/or stay</i>	<p><i>Visa waived entry (A31)</i></p> <p>Prioritised over entry criterion</p>
<i>Visa waived entry</i>	<i>Transit area of an airport (A32)</i>
<i>Transit area of an airport</i>	<i>Entry (A33)</i>

### *Article 25: Unaccompanied minors*

Article 25, the first criterion in the hierarchy, covers “Unaccompanied Minors”, mostly reproducing rules set by Article 8 of Dublin III. As in the Dublin Regulation, for cases in which the applicant is an unaccompanied minor, “the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present”; “where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present” (par.1). The rule does not apply only if it is demonstrated that it is not in the best interest of the child.

Article 25(3) establishes that, in the absence of family members or siblings legally present in another Member State, the child can be reunited with legally present relatives, after an individual examination aiming at establishing whether they can take care of them has been carried out. Where family members, siblings or relatives are staying in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor (par.4).

According to Article 25(5), when there are no family members or relatives present in a Member State, then the country responsible “shall be that where the application for international protection was first registered, unless it is demonstrated that this is not in the best interests of the minor.”

#### Implementation considerations

This provision, aiming at discouraging unauthorised movements of unaccompanied children, shifts the burden of proof to the child, and notably fails to incorporate the jurisprudence on the issue.

In the *M.A.* judgement,<sup>74</sup> the CJEU maintained that transfers to another country are not in a child’s best interests, and it can be maintained that the Member State responsible should be that in which the child is present, instead of placing on the child the burden of demonstrating that the transfer is not in their best interest. More recently, Advocate General Collins, in his recent opinion on the case *K, L v Staatssecretaris van Justitie en Veiligheid*,<sup>75</sup> underlined that national practice whereby a decision-maker does not take into account, as a primary consideration, the best interests of the child, or weighs up the best interests of the child without first determining, in each procedure, what the best interests of the child are, is incompatible with EU law.

Regarding national practices, it will be particularly important for Member States to improve age assessment procedures, that still result excessively lengthy and not informed to the highest standards in terms of quality in several EU countries,<sup>76</sup> as well ensuring the proper functioning of the guardianship service and that unaccompanied minors have access to legal aid.

### *Article 26: Family members who legally reside in a Member State and Article 27: Family members who are applicants for international protection*

Articles 26 and 27 cover family members. First, unfortunately, the expansion of the definition of family member to include siblings as per the Commission proposal is not in the final text (Article 2(g)). Some improvements compared to current rules were however introduced.

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<sup>74</sup> CJEU, Case C648/11 *M.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013; ECRE, ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 2016, available at: <https://bit.ly/3a6RgC8>.

<sup>75</sup> CJEU, Opinion of Advocate General Collins of 13 July 2023, *K, L v Staatssecretaris van Justitie en Veiligheid*. Case C-646/21, ECLI:EU:C:2023:581, par. 74. See also: CJEU, Judgment of 11 March 2021, *État belge*, C 112/20, EU:C:2021:197, para. 36 CJEU, Judgment of 17 November 2022, *Belgische Staat*, C 230/21, EU:C:2022:887, para.48; CJEU, *Federal Republic of Germany v G.S.*, Judgment of 15 February 2023 C-484/22, para. 24, 26

<sup>76</sup> ECRE, *Age Assessment in Europe: Applying European and international Legal Standards at all Stages of Age Assessment Procedures*, December 2022, available at: <https://bit.ly/3PQ6PUG>.

Recital 52 clarifies that the scope of the definition of family member includes both families formed in the country of origin and in transit – provided they were formed before their arrival on the territory of the Member State.

As well as family members who are beneficiaries of protection, family reunification under RAMM also applies to those who legally reside in a country on the basis of a Long-term Residence Directive (LTRD) permit. Given the challenges emerging from the legal design and implementation of the LTRD,<sup>77</sup> and the deadlock in negotiations on the recast,<sup>78</sup> it is difficult to assess the positive impact of this change.

Article 26(2) further establishes that the Member State having granted citizenship to the family member of an applicant who was previously allowed to reside as a beneficiary of protection “shall be responsible for examining the application, provided that the persons concerned expressed their desire in writing”. In practice, it is unlikely that these changes will lead to a significant increase in the number of asylum seekers being able to benefit from provisions on family unit.

Another positive development is the lowering of evidential requirements to demonstrate a family connection. Recital 54 states that circumstantial evidence should be sufficient where it is “coherent, verifiable and sufficiently detailed to establish responsibility for examining an application for international protection.” It further establishes that Member States should consider “all available information, such as photos, proof of contact and witness statements to make a fair appraisal of the relationship”, a procedure that should be facilitated by the use of the template prepared by the EUAA.

#### Implementation considerations

Notwithstanding these additions, ECRE considering that failing to widen the definition of family members is a missed opportunity for supporting family reunification, safe travel and social inclusion. Not taking into account wider family structures, which are common in many countries, means that fewer people will be reunited with their families. For example, adult children living with their parents and conversely older parents living with their adult children will still be separated, unless dependency clauses apply (Article 34). Applicants also rely on – and can be supported in their path to inclusion in the host Member State – by members of the extended family, such as uncles, aunts, cousins, all of whom are not taken into account in the Regulation. Widening the definition to cover members of the same household would also have allowed the inclusion of same sex partners, which is important in general but also because they may have fled their countries of origin because it was not possible to live together as a same sex couple. In many countries, same sex partners who live together forming a household are not able to officially register as such. The desire to reunite with family will likely remain a reason for onward movement - despite new rules that further penalise this conduct.

Article 27 reproduces the Dublin provision on family members who themselves are applicants for international protection, so that the Member State in which said family member is present becomes responsible provided the person concerned expresses their desire in writing.

Research on the use of family reunification clauses under the Dublin III Regulation shows that there is widespread lack of respect for the hierarchy among the Member States, with an over-reliance on the default criterion, the first country of arrival, which should only be the basis of allocation after the other criteria have been examined and found not to apply.<sup>79</sup> Practice so far has largely demonstrated that family provisions under Dublin III are rarely used in most countries, partly due to high

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<sup>77</sup> ECRE, *The Potential of the EU's Long-Term Residence Directive*, October 2023, available at: <https://bit.ly/4cCE2Nf>.

<sup>78</sup> Agence Europe, EU Council notifies Parliament of end of negotiations on revision of Long Term Residence Directive, March 2024, available at: <https://bit.ly/3J3lgkv>.

<sup>79</sup> F. Maiani, *The Protection of Family Unity in Dublin Procedures*, October 2019, available at: <https://bit.ly/49iln5j>; EPRS, *Dublin Regulation on international protection applications*, February 2020, available at: <https://bit.ly/3J6yD3k>; ECRE/AIDA, *Not there yet: Family reunification for beneficiaries of international protection*, February 2023, available at: <https://bit.ly/4aG0lu5>.

requirements to prove family links set by Member States.<sup>80</sup> Despite being the first in the hierarchy of responsibility criteria, family reasons accounted for only 2% of the total 187,175 outgoing requests sent in 2022 according to Eurostat.<sup>81</sup> The acceptance rate of all requests based on family criteria issued by all Dublin countries has been under 50% from 2019 to 2022, standing at 37% for 2022, compared to a 57% acceptance rate for all transfers requests.<sup>82</sup> As it is often policy decisions and practice that undermine the hierarchy, it will be important for Member States and the European Commission to properly tackle these challenges.

#### *Article 29: Issue of residence documents or visas*

Article 29(1) establishes that, where an applicant “holds” (rather than “is in possession of”, as per Dublin III Regulation, Article 12) a valid residence document or visa, the Member State which issued the document or visa is responsible for their application. If the person holds more than one document or valid visa issued by different Member States, a list of criteria to establish which is responsible is outlined (Paragraph 3).

In the case of expired, annulled, revoked or withdrawn residence documents, the issuing Member State remains responsible for the applicant for a period of three years. In the same cases for a visa, the period is of 18 months (Paragraph 4). The Member State remains responsible under the same rules also when issuing the residency documents or visa based on a false or assumed identity or on submission of forged, counterfeit, or invalid documents, apart for cases in which the Member State can establish that fraud was committed after the document or visa was issued (Paragraph 5).

#### *Article 30: Diplomas or other qualifications*

At Article 30, the wholly new criterion of “Diplomas or other qualifications” is added. If an applicant has a diploma or qualification issued by an educational establishment in a Member State, that Member State becomes responsible, provided that the application is registered less than six years after the diploma or qualification was issued (Paragraph 1). For applicants in possession of one or more diplomas or qualifications, the responsible Member State is that which issued the diploma or qualification following the longest period of study or, if the periods of study are identical, the one that issued it most recently.

The aim of the new criterion is, as mentioned in Recital 55, to “ensure a swift examination of the application in the Member State with which the applicant has meaningful links based on such a diploma”. The definition of “diploma or qualification” provided by Article 2(n) establishes it refers to those “obtained and attested in a Member State after at least a period of one academic year of study on the territory of a Member State in a recognised, state or regional programme of education or vocational training at least equivalent to level 2 of the International Standard Classification of Education [lower middle school], operated by an education establishment pursuant to legislative, regulatory or administrative provisions of that Member State and excluding online training or other forms of distance learning”. Educational establishments are those public, private, or vocational trainings established and recognised in a Member State in accordance with national law or administrative practice on the basis of transparent criteria (Article 2(o)).

The possibilities for application of the diploma criterion will likely be relatively limited, considering it requires the applicant to have previously been present in a Member State, and does not allow to evaluate diplomas obtained through remote learning. However, its introduction consists of an

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<sup>80</sup> See: ECRE/AIDA, *The implementation of the Dublin III Regulation in 2020*, September 2021, available at: <https://bit.ly/3vGpBXO>; ECRE/AIDA, *The implementation of the Dublin III Regulation in 2021*, September 2022, available at: <https://bit.ly/3J5F5Yd>; ECRE/AIDA, *The implementation of the Dublin III Regulation in 2022*, November 2023, available at: <https://bit.ly/3xn3s17>.

<sup>81</sup> Eurostat, Migration and Asylum database, available at: <https://bit.ly/3VGLerX>.

<sup>82</sup> ECRE/AIDA, *The implementation of the Dublin III Regulation in 2022*, November 2023, available at: <https://bit.ly/3xn3s17>, p. 17.

improvement compared to the previous system, recognising education as a meaningful link to a state.

*Article 31: Visa waived entry and Article 32: Application in an international transit area of an airport*

The two articles, already present in the Dublin III Regulation, in RAMM were given priority over the entry criterion. Article 31 establishes that if a third-country national or a stateless person enters into the territory of the Member States through a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection. The country is not considered responsible only if the applicant has been first registered in another country for which the need to have a visa for entry is also waived.

Under Article 32, in case the application was made in the international transit area of an airport of a Member State, that Member State is the one responsible for examining the application.

*Article 33: Entry*

Article 33 maintains and extends the criterion of irregular entry, or “first entry criterion”. For cases in which an applicant has irregularly crossed an external border into a Member State, be it by land, sea or air, the country of entry will be responsible if none of the other criteria apply (or are applied) for 20 months according to the provision (Article 33(1), extended from one year under the current rules), or one year in case the arrival was through disembarkations after SAR operations (Article 33(2)). Responsibility ceases if the application is registered more than 20 or 12 months (depending on the mode of arrival) after the date on which that border crossing took place. The country of first entry is not considered responsible if the applicant was relocated to another country after the irregular border crossing (Article 33(3)).

The possibility for responsibility of the country of first entry to cease if it is established that the applicant has been living for a continuous period of at least five months in a Member State before lodging the application for international protection, foreseen by Article 13(2) of the Dublin III Regulation, has been deleted.

The Article should be read in conjunction with the revised Article on cessation of responsibilities (Article 37 RAMM), where the provision of Dublin III which allows for cessation of responsibility when a person has been absent for three months (current Article 19(2)), has been removed, also in line with the overall objective of the Regulation to introduce additional measures to discourage onward movement.

The mandatory solidarity mechanism set out in Part IV of the Regulation is meant to counter-balance the increase in responsibility for countries at the external borders. However, as will be discussed in Part IV, the number of applicants for which responsibility will shift from countries of first entry to countries that are generally considered as countries of destination (mostly northern states) through relocations and/or responsibility offsets will likely remain limited. In combination with the additional burden imposed on Member States at the external borders by the Screening and Asylum Procedures Regulation, the strengthening of the first entry criterion in RAMM will likely exacerbate the unfairness of the system and the disproportionate responsibility of the countries of first entry.

It can also be highlighted that, in some Member States,<sup>83</sup> access to the asylum procedure can be severely delayed, and months if not years can pass from the moment a person makes their application for international protection and the moment in which it is first registered. The

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<sup>83</sup> IT and ES among others, see: ECRE/AIDA, *Asylum in Europe: the situation of applicants for international protection in 2022*, July 2023, available at: <https://bit.ly/3xfcz3J>.

strengthened responsibility rules could serve as a further negative incentive to these practices. Additionally, it might also bring to an increase in “pushback” practices at the external borders.<sup>84</sup>

### Chapter III - Dependent Persons and Discretionary Clauses

#### *Article 34: Dependent persons*

Article 34 on dependent persons mostly reproduces the current Dublin Article 16, with some positive changes.

The purpose of the article is to ensure that Member States “keep or bring together” dependent people and their family members with carer responsibilities. The article is amended to include families that are formed en route, removing requirement that relationships existed in the country of origin. It is further amended to include “severe psychological trauma” as a ground for dependency, and to specify that serious illness can refer both to “mental or physical” illness. It is also beneficial that it is requested that the person who should take care of the dependent applicant should express their desire in this respect in writing only after “having been informed of this possibility”. This formulation, not present in Dublin III, sets out an obligation for Member States to provide information on the matter.

Sibling relationships are included within the scope of family relationships that are covered as in Dublin III, likely to counter-balance the exclusion of siblings from the general definition of family member provided by Article 2.

Article 34(3) establishes the Commission will be granted the power to adopt delegated acts concerning (a) the elements to be taken into account in order to assess the dependency link; (b) the criteria for establishing the existence of proven family links; (c) the criteria for assessing the capacity of the person concerned to take care of the dependent person; and (d) the elements to be taken into account in order to assess the inability to travel for a significant period of time.

As dependency clauses are used in an extremely limited number of cases in the current practice of Member States,<sup>85</sup> it can be hoped that the adoption of delegated acts will result in an increased use of the clauses and more uniformity regarding their application.

#### *Article 35: Discretionary clauses*

The provisions that currently appear in Article 17 of the Dublin III Regulation - the discretionary clauses -, are incorporated into the RAMM, albeit with some amendments. The first clause, now Article 35(1), allows a Member State to decide to examine an application at any time (the “sovereignty” clause). However, this has been changed to an application “registered” in that Member State rather than “lodged” there. Article 35(2) allows for a take charge request to be issued by the examining or responsible Member State on the basis of family relations or humanitarian grounds, based “in particular” (but not exclusively) on “meaningful links regarding family, social or cultural considerations”, reproducing the Dublin III wording but adding the reference to meaningful links. The clauses whereby responsibility is transferred either to the Member State deciding to examine the application or to the Member State accepting the take charge request have been removed. However, Article 37(1) states that: “When a Member State (...) decides to apply Article 35 (...) that Member State shall become the Member State responsible”.

ECRE strongly supports the use of the discretionary clauses for humanitarian reasons and in order to support fairer sharing of responsibility. Unfortunately, it remains the case that these clauses are

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<sup>84</sup> More than 300,000 pushbacks were counted at Europe's external borders in 2023 by the coalition of International Solidarity 11.11.11, see: 11.11.11, *Illegality without borders – Pushback report 2023*, available at: <https://bit.ly/4d59jbl>.

<sup>85</sup> EPRS, *Dublin Regulation on international protection applications*, February 2020, available at: <https://bit.ly/3J6yD3k>, p.49.

rarely used.<sup>86</sup> According to the EUAA, the sovereignty clause under Article 17(1) “was invoked 4,800 times in 2022, increasing for the first time in 4 years but still well below pre-pandemic levels. It was applied most frequently by Belgium, followed at some distance by France, Germany and the Netherlands.”<sup>87</sup> The use of the humanitarian clause of Article 17(2) appears even more limited, with 709 requests issued in 2022.<sup>88</sup> Nonetheless, there remains great potential for the use of these clauses to ensure a speedier processing of cases, that would allow Member States to go beyond obligations regarding solidarity and their “fair share” set within the Regulation.

**ECRE’s recommendations on the application of the hierarchy of criteria and the use of discretionary clauses**

- Member States should make a wider and more flexible use of family unit criteria. In particular, the evaluation of coherence and completeness of evidentiary requirements presented by asylum applicants trying to prove family ties should not be excessively strict and informed as to the difficulties that applicants might experience in identifying evidence of their connection.
- Given, inter alia, the favourable provisions applicable to unaccompanied minors, it will be of particular importance for Member States to improve age assessment procedures, national guardianship system and access to legal aid for minors.
- The EU Asylum Agency should take an active role in ensuring the correct operationalisation of provisions on responsibility regarding unaccompanied minors and families, in particular by ensuring that information provision and training materials are available and widely used among Member States’ national staff.
- An effective operationalisation of the solidarity mechanism, setting higher annual targets than the minimum prescribed by the Regulation for relocations and ensuring to fulfil the set pledges will be fundamental to ensure that the increased responsibilities for countries at the external borders do not result in increased episodes of violence and widespread denial of access to the EU territory for those in need of protection.
- Beyond the mandatory solidarity mechanism, Member States should be encouraged to go beyond their obligations and make use of discretionary clauses to take charge of applicants where possible, taking in particular into account considerations regarding the existence of specific ties (or, in the language of the Regulation, “meaningful links”) of the applicant to the country, that are however not mandatory criteria for allocation of responsibility.

Chapter IV - Obligations of the Member State Responsible

The articles on obligations and procedures have been amended to meet the objective of avoiding a cessation of responsibility for situations resulting from the actions of the applicant.

As already addressed under Article 33, the effect of the reformed measure will be to significantly increase responsibility for countries of first entry.

*Article 36: Obligations of the Member State responsible*

Article 36 sets out the obligations of the Member State responsible, and expands the scope of the take back procedure to include “resettled or admitted persons” who made an application for international protection or are irregularly staying in a Member State other than the Member State which admitted them under the Union Resettlement Framework Regulation, or which granted

<sup>86</sup> See: ECRE/AIDA, *The implementation of the Dublin III Regulation in 2020*, September 2021, available at: <https://bit.ly/3vGpBXO>; ECRE/AIDA, *The implementation of the Dublin III Regulation in 2021*, September 2022, available at: <https://bit.ly/3J5F5Yd>; ECRE/AIDA, *The implementation of the Dublin III Regulation in 2022*, November 2023, available at: <https://bit.ly/3xn3s17>.

<sup>87</sup> EUAA, *Asylum Report 2023*, available at: <https://bit.ly/3PAIFOb>, p.104.

<sup>88</sup> Eurostat, *migr\_dubri*, available at: <https://bit.ly/3VKyAIm>.

international protection or humanitarian status under a national resettlement scheme (Article 36(1)(c)).

Cases of minors accompanying the applicant and meeting the definition of family members will be treated together with those of their families, even if the minor is not individually an applicant, unless it is demonstrated not to be in their best interest.

#### *Article 37: Cessation of responsibilities*

As mentioned above, Article 37 on cessation of responsibility does not incorporate the provisions currently in Dublin III Article 19(2) whereby responsibility ceases after a person has been absent from the territory for three months. It should be read in conjunction with Article 28(2), which comprises an additional clause on continuation of responsibility, stating that the Member State where the application is first registered should continue the process of determining responsibility even if the applicant “absconds”. The overall aim is to delete the rules allowing for cessation or shift of responsibility based on the behaviour of the applicant – absconding or leaving the territory of the Member States –, on the basis that these could be an incentive for unauthorised movement.

Article 37 regulates the –rarer- cases in which cessation of responsibility occurs:

- when another Member State issues a residence permit, applies discretionary clauses, or considers “that it is not in the best interests of the child to transfer an unaccompanied minor to the Member State responsible”; and
- when the time limits set for transfers are not respected (Article 37(1));
- when the person has left EU territory for at least nine months (Article 37(4), not applicable for asylum seekers in possession of a valid residence document issued by the Member State responsible) or in compliance with a return or removal decision.

In the latter two cases, a new procedure starts in case of a new access to the EU territory (Article 37(4)).

Article 27(2) – reproduced in full below - establishes a further case of cessation of responsibility.

Following an examination of an application in the border procedure pursuant to [the Asylum Procedures Regulation], the obligations laid down in Article 36(1) of this Regulation shall cease 15 months after a decision rejecting an application as inadmissible, unfounded or manifestly unfounded with regard to refugee status or subsidiary protection status or a decision declaring an application as implicitly or explicitly withdrawn has become final. An application registered after the period referred to in the first subparagraph shall be regarded as a new application for the purposes of this Regulation, thereby giving rise to a new procedure for determining the Member State responsible.

For cases that have been examined in a border procedure as regulated by the APR,<sup>89</sup> the obligations of the Member State responsible will cease after fifteen months if national determining authorities issued a rejection decision on the grounds of inadmissibility, unfoundedness or manifestly unfoundedness, or if they issued an act declaring the application to be implicitly withdrawn.

#### Implementation considerations

This new measure provides an incentive for countries to apply border procedures. It seeks to balance the increase in responsibility stemming from Article 33, but risks generating an increase in the number of rejection decisions on the basis of Article 33(2).

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<sup>89</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union*.

It should be noted, however, that Member States often considered as transit countries, such as Romania and Bulgaria,<sup>90</sup> which issue a high number of rejection decisions based on implicit withdrawal due to the applicants leaving their territories would not easily see their responsibility cease based on this clause. The last part of the paragraph clarifies that, if the person applies for international protection in another Member State and a take back procedure has been initiated within the 15-month period and a take back procedure then responsibility does not cease until the procedure is completed or until the time limits for transfer have expired.

ECRE reiterates its concerns regarding stricter rules on responsibility, as they exacerbate unfairness for Member States situated at the external borders and for applicants alike, and will therefore create incentives for irregularity and less compliance. Contrary to the intention to tackle absconding, Article 37 is likely to lead to less compliance in practice. It creates incentives for Member States of first entry to neglect their identification and registration obligations and to avoid investing in reception systems so as to evade responsibility rules, as well as for asylum seekers to resort to irregularity so as to avoid being identified and confined to these countries.

## Chapter V Procedures

### SECTION I START OF THE PROCEDURE

#### *Article 38: Start of the procedure*

Article 38(1) establishes that the Member State in which the application is first registered (instead of lodged, as in Dublin III) starts the process of determining the Member State responsible or, “where applicable”, in the Member State of relocation. This specification is in line with Article 67, that establishes that relocations can be carried out even before the responsibility determination process has been realised. It is problematic that the process for responsibility determination can be delayed until after the relocation has taken place, as this could translate in a number of unnecessary transfers carried out in practice (see below, Article 67). It will then be important that proper coordination among Member States on this matter is ensured, and that unnecessary transfers are avoided where possible.

The Member State remains responsible in case the applicant absconds (Article 38(2)), and is obliged to take back the applicant for whom it is responsible present in another Member State without a residence document of making an application for international protection in said country, unless it can establish that the other Member State issued a residence document for the applicant (Article 38(4)).

Article 38(5) brings applicants who are due to be relocated under the scope of the take back procedure, stating that if a Member State has “confirmed” that they will relocate a person and that person then makes an application in a different Member State before the (relocation) transfer has happened, they will then be taken “back” to the Member State of relocation, unless the Member State of relocation can establish that the applicant obtained a residence document from another EU country.

### SECTION II PROCEDURES FOR TAKE CHARGE REQUESTS

#### *Article 39: Submitting a take charge request and Article 40: Replying to a take charge request*

Shorter time limits were introduced for take charge requests, with the objective of speeding up the determination procedure. In Article 39(1) the procedure for issuing a take charge request remains as per Dublin III, except that the deadline for issuing the request is now two months from the registration of the application, or one month from a Eurodac hit. This is compared to the deadlines in Dublin III of three months from the lodging and two months from the database hit. Moreover, Article

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<sup>90</sup> See AIDA, Country Reports, available at: <https://bit.ly/4cKJiy2>.

39(1) is now aligned with the *Mengesteab* ruling in which the CJEU determined that the time limit starts running from the moment the asylum seeker’s intention to seek international protection is registered, rather than at the later stage of the formalisation of the application.<sup>91</sup>

The Article further indicates that Member States should prioritise requests made on the basis of family and dependency provisions and cases of unaccompanied children. If the request to take charge of an applicant is not made within two months, the Member State in which the application was registered becomes responsible. An exception is made for the cases of unaccompanied children, for which the determining Member State can continue the procedure to determine responsibility beyond the set timelines and at any time before taking a decision on the substance of the case, if it considers it to be in the best interest of the child.

When the application for international protection is registered after a decision to refuse entry or after a return decision, the requesting Member State can submit an urgent reply and the period within which the reply is requested, which shall be of “at least” one week (Article 39(2)). The requested Member State will then have to answer within the period indicated or, “failing that”, within two weeks (Article 40(7)).

<b>Deadlines – Take charge request</b>	<b>Dublin</b>	<b>RAMM</b>
From lodging (Dublin) / registration (RAMM)	Three months	Two months
Eurodac Hit	Two months	One Month
Unaccompanied minors	N/A	At any time before decision on the merits of the case, where in the best interest of the minor

Article 40 gives the requested Member State one month from receipt of a take charge request to check and reply (par. 1), or two weeks in the case of a Eurodac of VIS hit (par. 2), compared to the two months set in Dublin III.

<b>Deadlines – Reply to a take charge request</b>	<b>Dublin</b>	<b>RAMM</b>
Receipt of take charge request	Two months	One month
Eurodac/Vis Hit	Two months	Two weeks

As in Dublin, the Commission is entrusted with establishing and conducting periodical review of two lists indicating the relevant elements of proof and circumstantial evidence to be used by Member States in the procedure (Article 40(4)).

Article 40(1) explicitly mentions that Member States have to prioritise requests made on the basis of Articles 25 to 28 and 34. The requested Member State “may request assistance from national, international or other relevant organisations to verify the relevant elements of proof and circumstantial evidence submitted by the requesting Member State, in particular for identification and tracing of family members”. For requests based on these articles and based on circumstantial evidence – rather than proof –, when the requested Member State does not consider it to be

<sup>91</sup> CJEU, Judgment of 26 July 2017, *Mengesteab*, Case C-670/16.

coherent, verifiable and sufficiently detailed to establish responsibility, it is obliged to justify its reasons in the reply to the requesting Member State (Article 40(6)).

Article 40(8) preserves a similar clause as in Dublin in establishing that, if the requested Member State “does not object” to the request through a reply providing substantiated reasons within one month from receipt of the request or within two weeks in case of requests for urgent replies, responsibility shifts to said Member State.

#### Implementation considerations

The most important change to the two articles compared to Dublin is the shortening of deadlines. While acknowledging the purpose behind this decision is, in principle, to ensure swifter access to the procedure for asylum applicants, ECRE is concerned they might be unrealistic, considering the – usually – relatively high numbers of arrivals in countries making take charge requests,<sup>92</sup> the difficulties in gathering evidence on which to base a take charge request and the political reluctance of Member States to accept take charge requests, the reduced deadlines are likely to hinder the chances of a fair outcome for the applicants.

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

### SECTION III PROCEDURES FOR TAKE BACK NOTIFICATIONS

#### *Article 41: Submitting a take back notification*

The provision on the take back procedure is subjected to significant changes in RAMM. The main one is the shift from take back requests in Dublin to take back *notifications*. The second element is the explicit obligation for the Member State responsible to take back the person.

When a Member State considers that another Member State is responsible based on Article 36(1)(b) (an applicant, third country national or stateless person with a Eurodac hit in that Member State), or (c)(resettled or admitted in another Member State), they are obliged to make a take back notification “without delay and in any event within two weeks” of receiving the Eurodac hit. The notified Member State then has just two weeks to “confirm” receipt (unless they claim cessation of responsibility under Article 37 or the take back notification is based on an incorrect indication in Eurodac). Crucially, similarly to take charge requests, as per Article 41(4): “Failure to act within the two-week period set out in paragraph 3 shall be tantamount to confirming the receipt of the notification.”

#### Implementation considerations

While the declared objective of this changes is to ensure a faster procedure for responsibility determination, the measure was likely introduced to introduce further elements aimed at discouraging countries of first entry from allowing secondary movement. A first concern is that “notification” implies an almost unilateral relationship rather than the mutual contractual process of request and acceptance. It is no longer an agreement but a decision derived from the determining process in the Member State where the applicant is. The Member State receiving the notification is allowed only to “confirm” it, unless the notified Member State can demonstrate that its responsibility has ceased and, in case they failed to respond, would in any case be considered as responsible.

Political and humanitarian concerns also arise. One of the objectives of the Regulation is to create “mutual trust” between the Member States whereas this provision has great potential to generate

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<sup>92</sup> See ECRE/AIDA, *The implementation of the Dublin III Regulation in 2022*, November 2023, available at: <https://bit.ly/3xn3s17>; AIDA, Country Reports, available at: <https://bit.ly/4cKJiy2>.

conflict instead. The form of a notification rather than a request suggests that Member States where the persons is will be able to impose their decisions. There is then a notable asymmetry when it comes to take charge and take back requests. The former remain mutual, while the latter are unilateral and subject to shorter deadlines. As a result, it can be expected that the tension between Member States at the external borders and those without external borders, and between the northern Member States and southern Member States will be exacerbated. The limited option (when cessation of responsibilities took place) to challenge the notification – in the context of flawed asylum systems and politicised decision-making – means that conflicts are likely to escalate.

Under Article 55, conciliation mechanisms are envisaged but remain very general (see below), and some legal objections can be considered; first, regarding the status of a confirmation of receipt. The article implies that it is an agreement but a confirmation of receipt is not a legally equivalent action to an agreement. A Member State could confirm receipt of the notification while objecting to the determination of responsibility on any number of grounds and thus confirm receipt but not agree to take back the applicant. Only a limited option to challenge the decision on responsibility, within an extremely short deadline (two weeks) is provided for in the article. Given the weaknesses in many Member States' asylum systems, including chronic under-resourcing and failures in decision-making (demonstrated by the number of decisions on all aspects of asylum processes over-turned by the courts), and the efforts by most Member States to deflect responsibility to other countries, there are reasons to doubt the robustness of the processes for determining responsibility. Finally, the deadline of two weeks to respond is unrealistic when compared to the amount of evidence that may need to be gathered, as well as the internal decision-making processes that would be required to investigate and potentially decide to challenge the decision behind the notification.

Procedural safeguards related to transfers are discussed below, however, the likely consequences include applicants left in limbo due to conflicts between Member States on responsibility. In particular, the notified state may simply refuse to accept back the person – explicitly or through passive resistance (e.g. delays in putting in place necessary arrangements or in replying to correspondence from the notifying Member State). In this situation, responsibility transfers, including obligations towards the applicant, however the applicant will not have been transferred, creating the risk that people are left in limbo. Another likely consequence is that conditions for applicants in certain countries will remain low when it comes to procedures and particularly to reception. The Commission and the Asylum Agency will have to ensure proper monitoring of compliance with existing standards regarding asylum and reception are respected in countries of first arrival, to ensure that the new system does not create even more incentives to deliberately avoid compliance with standards set for asylum procedure and on reception conditions, in order to avoid having to comply with their take back obligations due to courts blocking transfers.

## SECTION IV - PROCEDURAL SAFEGUARDS

### *Article 42: Notification of a transfer decision*

At the latest within two weeks of the acceptance or confirmation of, respectively, a take charge request or take back notification, the determining Member State has to take a transfer decision. When the take charge or take back is accepted, the transferring Member State notifies the person – or their legal advisor or other counsellor (Article 42(3)) - concerned “in writing, in plain language and without delay” of the transfer decision, the time limits for the transfer and their obligation to comply with the decision (Article 42(1)).

The decision also has to include information on available remedies, including the right to apply for suspensive effect, applicable time limits for accessing said remedies. Member States are also obliged to communicate to the person concerned, in case they were not previously informed, information on persons or entities that may provide legal assistance to the person concerned (Article 42(4)).

From the moment the decision is communicated, as per Article 18 RAMM (see above), the applicant loses the right to reception conditions in any Member State other than the one in which they are required to be present from the moment that they receive notification of a transfer decision.

#### *Article 43: Remedies*

Article 43 then sets out the remedies available to applicants wishing to challenge a transfer decision. It establishes that an applicant, third country national or stateless person with a Eurodac hit in another Member State or resettled or admitted in another Member State is granted the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision before a court or tribunal. The remedy is however limited in scope and can only assess (a) whether the transfer would result in a risk for the applicant to be subjected to inhuman and degrading treatment, as per the definition of Article 4 of the EU Charter or (aa) if decisive circumstances for the correct application of the Regulation emerge after the transfer decision. Regarding take charge cases, remedies are limited to (b), cases in which Articles 25 to 28 and 34 of RAMM have been infringed.

The person concerned will be granted a period of minimum one week and maximum three to exercise his or her right to an effective remedy after the notification of the transfer decision (Article 43(2)). Within this time limit, they will have the right to request a court or tribunal to suspend the implementation of the transfer decision pending the outcome of the appeal or review. The appeal then loses its automatic suspensive effect, and it is left to the Member States' discretion whether to provide in national law that the request to suspend the implementation of the transfer decision should be lodged together with the appeal. Where suspensive effect is granted, "the court or tribunal shall endeavour to decide on the substance of the appeal or review within one month of the decision to grant suspensive effect" (Article 43(3)). It can be noted that this timeframe is extremely short, as few courts would be able to examine a case in such a short period of time.

Free legal assistance and representation in the appeal have to be granted if the person cannot afford its costs. Even where the person cannot afford the costs, however, Member States are given the possibility to deny access to free legal assistance and representation if the appeal or review is considered, either by asylum authorities or by a court or tribunal, "no tangible prospect" of success (Article 43(5)). In case a decision in this sense is taken, the applicant will have the right to appeal against it. Article 33(5) also clarifies that legal assistance includes, as a minimum, the preparation of the required procedural documents, while legal representation includes "at least the representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide legal assistance and representation".

#### Implementation considerations

Various concerns arise regarding the scope and time limits for appeals, the (lack of) suspensive effect, and the provision of legal assistance.

##### ➤ Scope of the appeal

First of all, for persons with a Eurodac hit or that were resettled or admitted in another Member State, the scope of the appeal is limited to cases in which it can be assessed that the person would be subjected to violations amounting to inhuman and degrading treatment upon return or if "decisive circumstances" for the correct application of the Regulation emerge after the transfer decision.

There is no set definition of decisive circumstances, but some interpretation can be drawn from CJEU case-law regarding the right to an effective legal remedy in case decisive circumstances emerge for the correct application of the Regulation. In the H. A. case, H.A. sought to annul the transfer decision, claiming that as his brother arrived in Belgium shortly after the decision was taken in his case, their respective applications should be examined together to ensure the fairness of the procedure. In Case C-360/16, Hasan, the Court referred to the circumstances indicated in Article 19 (2) of the Dublin regulation when the person concerned has, after that transfer, left the territory of the Member

States for a period of at least three months before making a new application for international protection in another Member State (para. 39). In the case, the Advocate General identifies that the expiry of the six-month time limit referred to in Article 29(1) and (2) of the Dublin III Regulation are to be considered as decisive circumstances and the national court or tribunal hearing an appeal against a transfer decision is required to take into account in order to ensure that the applicant has effective judicial protection (para. 70). In the same case, the Advocate General expressed the opinion that the scope of the review of transfer decisions “covers both the factual and legal circumstances surrounding the decision” (para. 50). The Advocate General Opinion underlines that the applicant must be able to challenge the decision if “a circumstance arising after the adoption of a transfer decision is objectively capable of affecting the determination of the Member State responsible for examining the application for international protection” (para. 58). According to Advocate General Opinion, considering non-decisive circumstances after a transfer decision may exceed the six-month limit set by Article 29(1) and (2) of the Dublin III Regulation, compromising the goal of promptly processing international protection applications (para. 61).

The issue of procedural safeguards in transfer decisions was tackled by the CJEU in *H.A. v État Belge*, where the Court, invoking its prior judgments in *Shiri* and *Hasan*, affirmed that an applicant for international protection should be granted an effective and rapid remedy allowing them to invoke post-transfer decision circumstances crucial for the accurate implementation of the Dublin III Regulation.<sup>93</sup> Furthermore, the Court determined that it is the responsibility of each Member State to establish procedural regulations for legal proceedings ensuring the right to an effective remedy under the Regulation, as long as these regulations adhere to the principles of equivalence and effectiveness in EU law.

Remedies against transfers decisions that follow take charge requests are treated separately with the scope of appeal limited to infringement of Articles 25 to 28 and 34 of RAMM.

While this represents a welcome clarification of appeal rights in case of take charge requests, two concerns arise: first the scope of the right to an effective remedy should not be limited but, in line with the rulings in *Ghezelbash* and *Karim* should include any misapplication of the criteria. Second, no remedy is provided for cases in which a take charge request is rejected by the requested Member State. A large body of work shows that a factor in the failure of family reunification and the inadequate care for unaccompanied children is the rejection of take charge requests, i.e. cases when no transfer decision is taken.<sup>94</sup> The issue of wrongful information in take back forms is also not addressed. In some cases, information is left out of the notification form, or it may be written incorrectly, and thus the Member State bases its “accept” response on wrongful information. In similar cases, the applicant would have no access to any remedy.

The right to an effective remedy should be secured in the context of a rejection of take charge requests in order to avoid a gap of law and situations that directly contravene the EU principle of effective judicial protection enshrined in Article 47 of the EU Charter. Restricting the scope of appeals appears to be contrary to the CJEU decision in *I, S v Staatssecretaris van Justitie en Veiligheid* (Case C19/21), which upheld the Court's stance outlined in *Ghezelbash*. This decision highlighted that provisions of the Dublin III Regulation require Member States not only to inform asylum seekers about the criteria used to determine responsibility but also to provide them with an opportunity to submit relevant information, “conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process.”<sup>95</sup>

In *H. and C.*, the Court underlined the importance of strong procedural safeguards and rights-compliant state conduct from the very start of the Dublin procedure, confirming that take charge

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<sup>93</sup> CJEU, judgment of 15 April 2021, *H.A. v État Belge*, Case C-194/19, ECLI:EU:C:2021:270, para. 35

<sup>94</sup> See AIDA, Country Reports, available at: <https://bit.ly/4cKJiy2>.

<sup>95</sup> CJEU, judgment of 1 August 2022 (GC), *I, S v Staatssecretaris van Justitie en Veiligheid*, Case C19/21, ECLI:EU:C:2022:605, para. 37.

procedures differ from take back procedures, which are governed by separate provisions. The Court's stance on take charge requests received additional affirmation from the Grand Chamber in *I, S v Staatssecretaris van Justitie en Veiligheid*, which determined that Article 27(1) of the Dublin Regulation, in conjunction with Articles 7, 24, and 47 of the Charter, mandates that a Member State, upon receiving a take charge request, must provide an unaccompanied minor seeking international protection with the right to judicial remedy against its decision to refuse the request.<sup>96</sup> The Court underlined that the relevant provision of the Dublin III Regulation should be read in the view of “its objectives, its general scheme and its context, and in particular its evolution in connection with the system of which it forms part”.<sup>97</sup>

#### ➤ Time limits

Member States are given the possibility to establish a period between one and three weeks after communication of the transfer decision for applicants to lodge an appeal. Especially at its minimum, the deadline is extremely short, to the point it could be considered unreasonable within the meaning of Article 47 of the Charter, especially considering that a large range of rights are potentially engaged by a transfer decision.

The concept of reasonableness in relation to time limits was one of the issues examined by the CJEU in *Diouf*,<sup>98</sup> albeit in the context of accelerated procedures. The Court considered the discretion left to Member States under the Asylum Procedures Directive to apply an accelerated procedure if specific grounds justified this.<sup>99</sup> It found that a 15-day time-limit for appealing a decision in an accelerated procedure “appears reasonable and proportionate in relation to the rights and interests involved”. The Court reiterated its position in JP (Case C-651/19) with regards to a 10-day time limit to lodge an appeal against a decision declaring a subsequent asylum application as inadmissible. The CJEU determined that if the applicant's address is unavailable, the notification sent to the head office of the determining authority is permissible under the recast APD, Article 46, as long as the applicant is informed of this, access to the head office isn't overly challenging, the applicant can avail themselves of procedural safeguards, and the principle of equivalence is upheld.<sup>100</sup>

However, the reasonableness and proportionality of appeal time limits must be balanced against the effectiveness of the substantive rules and procedural guarantees provided to the applicant. In LH (C 564/18) the Court confirmed that MS are authorised to set time limits and procedural rules in line with the principles of procedural autonomy, effectiveness and equivalence.<sup>101</sup> According to the Court, in certain circumstances, the 8-day time limit may not ensure this effectiveness under EU law, leading to an obligation for the concerned court to disapply national legislation imposing such a time limit as imperative.<sup>102</sup>

Similarly, in the recent *Y.N. v Slovenian Republic judgment* (Case C-58/23), the Court ruled that imposing a three-day appeal deadline, including holidays and non-working days, for challenging decisions on international protection applications, particularly those made through accelerated procedures, violates the right to effective legal remedy. The Court emphasized that a short appeal period can hinder an applicant's access to essential services such as the services of an interpreter to present arguments, legal assistance and representation, and access to file information. This

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<sup>96</sup> CJEU, judgment of 1 August 2022 (GC), *I, S v Staatssecretaris van Justitie en Veiligheid*, Case C19/21, ECLI:EU:C:2022:605, para. 32.

<sup>97</sup> *Ibid.*, para. 35.

<sup>98</sup> CJEU, Judgment of 28 July 2011, *Samba Diouf*, Case C-69/10.

<sup>99</sup> CJEU, *Diouf*, para 31.

<sup>100</sup> CJEU, Judgment of 9 September 2020, *JP v Commissaire général aux réfugiés et aux apatrides*, Case C-651/19, ECLI:EU:C:2020:681, par. 47.

<sup>101</sup> CJEU, Judgment of 19 March 2020, *LH v Bevándorlási és Menekültügyi Hivatal*, Case C-564/18, ECLI:EU:C:2020:218, Par. 63.

<sup>102</sup> *Ibid.*, par. 75.

jeopardizes effective legal remedy as guaranteed by Directive 2013/32 and Article 47 of the Charter.<sup>103</sup>

➤ Suspensive effect

In all cases, the appeal does not have automatic suspensive effect, but the person concerned has the right to request the suspension of the transfer decision pending the outcome of the appeal or review. The Member States should however stop the transfer while the request for a suspension is before the court, with the decision to suspend to be taken within one month. If the decisions on the request to suspend the transfer are negative, reasons must be provided. If suspensive effect is granted, i.e. if the transfer is stayed, then the court shall “endeavour” to decide on the appeal in one month. The Article is silent concerning the delivery of an appeal decision in the case that the transfer decision is not suspended and the person should have been transferred but was not in practice.

In the *AHY v Minister for Justice* (Case C 359/22), the Advocate General Pikamäe confirmed that “in order for a remedy to be effective it must, in exceptional cases, be granted suspensive effect.”<sup>104</sup> It is clear from the Courts case-law that exceptional cases were that automatic suspensive effect is granted mostly refer to situations where there are serious reasons to believe that the removal of a third-country national could infringe the right not to be subjected to inhuman or degrading treatment.<sup>105</sup> It was previously confirmed by the Court that the transfer of an applicant under the Dublin Regulation may also lead to the situation where an applicant may suffer irreparable harm due to the inhuman or degrading treatment.<sup>106</sup> In the aforementioned case of *AHY v Minister for Justice*, the Advocate General underlines that “that the enforcement of a transfer decision may entail, exceptionally, harm of that kind, and that the effectiveness of an appeal against such a decision may therefore require it to have suspensive effect”.<sup>107</sup>

In the *C.K. and Others* ruling (C-578/16 PPU), the Court concluded that the transfer of an asylum seeker with severe health conditions might pose a genuine risk of inhuman or degrading treatment under Article 4 of the EU Charter, regardless of the quality of reception and care in the responsible Member State.<sup>108</sup> The Court imposed on national authorities the duty to prevent situations where removal leads to treatment contrary to Article 4 of the EU Charter, requiring them to take necessary precautions, including suspending transfers if health concerns arise, to ensure the protection of the individual's health.<sup>109</sup>

Considering this article, the matter also arises in cases where no request for suspensive effect was made (thus, reviewing the decision won't halt the transfer), yet from the appeal of the transfer decision, it becomes evident that the transfer could lead to treatment contradicting Article 4 of the Charter. In *B. v Centre public d'action sociale de Liège* (Case C-233/19) the Court underlined, that although the national court lacks jurisdiction, according to Belgian law, to decide on the annulment and suspension of the return decision in the main case, this doesn't prevent it from directly applying EU law rules concerning the potential automatic suspension effect of the annulment and suspension action filed before another court, under Article 13(1) of Directive 2008/115, in light of Articles 19 and

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<sup>103</sup> CJEU, Judgment of 27 September 2023, *Y.N. v Republika Slovenija*, Case C-58/23, ECLI:EU:C:2023:748, para. 33-34. See also, LH (C 564/18), par. 70.

<sup>104</sup> CJEU, Opinion of the Advocate General of *AHY v Minister for Justice*, Case C-359/22, Par. 92.

<sup>105</sup> CJEU Case C-562/13 *Abdida* [2014] ECLI:EU:C:2014:2453, paras 50 and 63; CJEU Case C 239/14 *Tall* [2015] ECLI:EU:C:2015:824, para 58. See also CJEU Case C 180/17 *X and Y* [2018] ECLI:EU:C:2018:775, para 28 and CJEU Case C-181/16 *Gnandi* [2018] ECLI:EU:C:2018:465, para 56.

<sup>106</sup> CJEU Joined Cases C-411/10 and C-493/10 *N.S.* [2011], para 106

<sup>107</sup> CJEU, Opinion of the Advocate General Judgment of *AHY v Minister for Justice*, Case C-359/22,

<sup>108</sup> CJEU, Judgment of 16 February 2017, *C. K., H. F., A. S. v Republika Slovenija*, C-578/16 PPU, ECLI:EU:C:2017:127, par. 73.

<sup>109</sup> CJEU, Judgment of 16 February 2017, *C. K., H. F., A. S. v Republika Slovenija*, C-578/16 PPU, ECLI:EU:C:2017:127, par. 96.

47 of the Charter.<sup>110</sup> Regarding the assessment of the situation leading to application of automatic suspensive effect the Court clarified that a national authority doesn't need to decide if enforcing the return decision poses an actual risk to the individual; instead, it should determine if there's a possibility of such a risk. If it did otherwise, it would blur the lines between the conditions for automatic suspension and the success of the appeal, neglecting the preventive aspect of the appeal's suspension and requiring authorities to conduct a review typically done by the court handling the legality of the return decision.<sup>111</sup> Therefore, the authority should only assess if the appeal argues that enforcing the decision would pose a serious risk of severe and irreversible harm, and if so, it must automatically suspend the return decision.<sup>112</sup>

The issue of effective remedies also emerges when considering the denial of suspensive effect to a transfer decision, which led to adverse consequences for the individual in the light of Article 4 of the EU Charter. In the case of *Čonka v. Belgium*, the ECtHR emphasized that if a national authority erroneously denies a request to suspend a removal, and it is later established that the removal breached Article 3 of the ECHR, such remedy cannot be deemed effective under Article 13 ECHR. Hence, thorough, impartial, and rigorous scrutiny is essential when assessing a request for a stay of a Dublin transfer during appeal proceedings.<sup>113</sup>

Another potential question arising in the context of application of suspensive effect to the transfer decision is whether it should be applicable on the second level of jurisdiction, meaning during the appeal proceedings to the denial of transfer. In its judgment in *X and Y (C-180/17)*, the CJEU stated that the right to an effective remedy and the principle of *non-refoulement* require providing international protection applicants with the right to a remedy that automatically suspends the decision, before at least one judicial body.<sup>114</sup> However, in the same ruling, the Court emphasized that while procedural rules regarding the suspensive effect of second level of jurisdiction are within the jurisdiction of Member States' domestic legal systems under their procedural autonomy, they must nonetheless adhere to the principles of equivalence and effectiveness.<sup>115</sup>

#### ➤ Legal assistance

The provisions on legal assistance also present certain issues. While Member States have to provide free legal assistance, Article 43(5) establishes that the treatment must not be more favourable than that accorded to nationals “in matters pertaining to legal assistance and representation”. The wording is sufficiently vague as to be interpreted in a way that restricts access to legal assistance. More problematically, Member States can deny free legal assistance and representation in case the appeal is considered not to have tangible prospects of success, within the limits of not being allowed to “arbitrarily” restrict access to legal assistance and representation. The application of the “merits test” might result in hindering asylum applicants from accessing an essential procedural guarantee.

Another immediate concern is that a “competent authority” is not an impartial body – the appeal will be against the decision of this authority so it has a strong interest in the outcome which is in turn highly likely to be influenced by the availability or otherwise of legal assistance or representation. Although the article explicitly indicates that Member States should not arbitrarily restrict access to legal assistance, to give the competent authority a role in judging the prospects of the appeal and

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<sup>110</sup> CJEU, Judgment of 30 September 2020, *B. v Centre public d'action sociale de Liège*, Case C-233/19, ECLI:EU:C:2020:757, par. 59.

<sup>111</sup> CJEU, Judgment of 30 September 2020, *B. v Centre public d'action sociale de Liège*, Case C-233/19, ECLI:EU:C:2020:757, par. 65.

<sup>112</sup> *Ibid.*, par. 66.

<sup>113</sup> ECtHR, Judgment of 5 February 2002, *Čonka v. Belgium*, no. 51564/99, §82. See also: M. Łysienia, *A Comparative Analysis of the Jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union on Seeking Asylum, sui generis*, Zürich 2022, p. 445.

<sup>114</sup> CJEU, Judgment of 26 September 2018, *X and Y v Staatssecretaris van Veiligheid en Justitie*, Case C-180/17, ECLI:EU:C:2018:775, par. 29.

<sup>115</sup> *Ibid.* See also: CJEU, Judgment of 19 June 2018, *Sadikou Gnandi v État belge*, C-181/16, EU:C:2018:465, par. 56, 58 and 61; CJEU, Order of 5 July 2018, *C and Others*, C-269/18 PPU, EU:C:2018:544, par. 50.

then denying legal assistance on that basis, opens up the prospect of arbitrary denial of legal assistance, not to mention blanket or biased denial. There is a possibility for the applicant to present an appeal against the decision of the determining authority not to grant free legal assistance, but it is unclear how they would be able to do so without having had the possibility to access it in the first place. This would mean that, in practice, civil society organizations would be requested to close this gap, but it is unclear how much access they would have to applicants in this phase – especially those detained, and the additional administrative burden this would imply.

The content of the legal assistance is set as “at least the preparation of the required documents and representation before a court or tribunal”, but assistance could be “restricted to legal advisors or counsellors specifically designated by national law” to provide assistance. Although this is a “may” clause, it opens the option for Member States to further remove access to independent legal assistance.<sup>116</sup> Legal assistance should be independent because it is designed to support the applicant to access their rights vis-à-vis the state. If national law designates who provides assistance, there is again the risk that the state designs national law to provide advice that is lower quality or not truly independent. In the most extreme cases, states already restrict advice provision to a pool of advisors employed by the state’s authorities.

The CJEU has ruled that access to legal aid is an important component of the general principle of effective judicial protection in EU law.<sup>117</sup> The CJEU has further provided some guidance on the nexus between access to legal aid and the right to an effective remedy as enshrined in Article 47 of the Charter of Fundamental Rights.<sup>118</sup> Accordingly, when assessing whether the grant of legal aid is necessary or not, national courts must ensure compliance with the principle of effective judicial protection and take several criteria into account. Thus, effective access to legal aid is deemed necessary to comply with the rights under the Charter, including Articles 18, 19 and 47.<sup>119</sup>

This was further confirmed in the recent case of *Y.N. v Republika Slovenija*, where the Court stated that in order to allow applicants to exercise their right to an effective remedy before a tribunal, the Procedures Directive ensures applicants' access to legal assistance and representation at all stages of the procedure, including after a negative decision, with potential eligibility for free legal assistance.<sup>120</sup>

In the case of *M.S.S. v. Belgium and Greece*, the ECtHR has also highlighted that the lack of legal assistance and representation can undermine the effectiveness of the remedy under Article 13 ECHR to the point that it becomes inaccessible.<sup>121</sup> In *Feilazoo v. Malta*, the ECtHR has affirmed that a legal representative's competence includes understanding both procedural formalities and legal issues. Errors in this regard, when crucial to a person's access to court and not rectified by authorities or courts, may lead to ineffective representation, thereby holding the State liable under the Convention.<sup>122</sup> The ECtHR also emphasized that under Article 6, when legal aid is provided by domestic law, the State must ensure genuine and effective access to rights. This requires a robust institutional framework for effective legal representation and protection of interests, with instances where the State must take proactive measures to address issues raised regarding legal representation.<sup>123</sup>

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<sup>116</sup> See AIDA, Country Reports, available at: <https://bit.ly/4cKJiy2>.

<sup>117</sup> CJEU, Case C-63/01, *Evans and the Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau*, judgment of 4 December 2003, para. 77.

<sup>118</sup> Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, judgment of 22 December 2010, para. 42.

<sup>119</sup> ECRE/ELENA, *Access to legal aid in Europe*, November 2017, available at: <https://bit.ly/2z1ZeAU>.

<sup>120</sup> CJEU, Judgment of 27 September 2023, *Y.N. v Republika Slovenija*, Case C-58/23, ECLI:EU:C:2023:748, para. 30.

<sup>121</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgment of 21 January 2011, para 319.

<sup>122</sup> ECtHR, *Feilazoo v. Malta*, App No. 6865/19, Judgment of 11 March 2021, par. 126.

<sup>123</sup> *Ibid.*, par. 125.

## **ECRE's Recommendations on access to remedies in responsibility determination procedures**

- Member States must ensure the implementation of the right to an effective remedy by avoiding restrictions on appeal scopes, providing robust procedural safeguards, and ensuring compliant state conduct from the outset of the Dublin procedure. This includes guaranteeing access to effective remedies in the context of both take charge and transfer decisions and within reasonable and proportionate time limits, along with effective access to legal assistance and representation in line with EU law principles of equivalence and effectiveness.
- Member States should ensure access to independent legal counsellors and to relevant civil society organisations providing legal aid, especially for applicants that are detained in the context of a transfer procedure under RAMM.

## **SECTION V DETENTION FOR THE PURPOSES OF TRANSFER**

### *Article 44: Detention and Article 45: Time limits for detained applicants*

Article 44(1) clearly states that a person cannot be detained solely for the purposes of the Regulation. Thus, it is not possible to detain a person solely in order to realise a transfer under the RAMM; there have to be additional grounds for detention. Where there is a risk of absconding or for reasons of national security or public order, Member States “may” detain the person, but have to carry out an individual assessment “of the person’s circumstances”, assess the measure’s proportionality and evaluate whether alternatives to detention can be applied (Article 44(2)).

Similar guarantees are provided for in the latest recast of the Reception Conditions Directive, stating that an applicant cannot be detained for the sole reason that they are an applicant (Article 10(1) rRCD) and further states that detention cannot be punitive. The conditions for the use of detention are maintained, establishing specifically that it must be necessary, an individual assessment must take place, and it can only be used when other less coercive alternatives are not available (Article 10(2) rRCD). The rules of the Reception Conditions Directive and the extensive jurisprudence on grounds for detention thus apply,<sup>124</sup> as do the guarantees on detention conditions, as Article 44(4) states explicitly. Additionally, Article 34(3) establishes that “Detention shall be as short as possible and for no longer than the time reasonably necessary to complete the required administrative procedures with due diligence until the transfer under this Regulation is carried out.”

Detention has to be ordered in writing by administrative or judicial authorities. If ordered by administrative authorities, the Member State is obliged to provide for a “speedy judicial review of the lawfulness of detention”, that can be carried out either ex officio or upon request from the applicant (Article 44(5)).

Article 45 introduces different time periods and deadlines for Member State action on take charge requests and take back notifications that are different from those specified in Articles 29 and 31. Where an applicant is detained as part of a take back or take charge procedure, the Member State has to submit the request or notification within a period of two weeks from registration or from receiving an Eurodac hit if the person is immediately detained, or one week from the date on which detention started if they were detained at a later stage (Article 45(1)). For take charge procedures, the requested Member state shall reply within one week – instead of one month as per Article 40 – from the receipt of the request (Article 45(2)). If the applicant is detained, for both procedures, the transfer must occur within five weeks of (a) the date on which the request was accepted or the notification was confirmed or, (b) in case an appeal was lodged or a review requested, from the date the review or appeal no longer have suspensive effect (Article 45(3)). After that deadline, the person will be released from detention. It can also be mentioned that as per Article 46(2), in cases of detained applicants, deadlines for the realisation of transfers are extended up to one year.

<sup>124</sup> European Parliament - Policy Department for Citizens' Rights and Constitutional Affairs, *Reception Conditions across the EU*, November 2023, available at: <https://bit.ly/43NmkCT>, Annex V.

The provisions on time limits can be regarded as an improvement, as their aim is to minimise the time of detention and they remove the ambiguities of the current law in this respect. On the other hand, the very ground for detention raises concerns. Article 44(2) of the proposal lowers the threshold of the risk of absconding which justifies detention. While under the current rules, detention could be applied if there is a significant risk of absconding, Article 44(2) removes the word “significant”.

Article 2(p) of the Regulation defines “absconding” as the action by which an applicant does not remain available to the competent administrative or judicial authorities, for example by leaving the territory of the Member State without authorisation from the competent authorities for reasons which are not beyond the applicant’s control, the failure to notify their absence from an accommodation centre or assigned area of residence, or failure to present him or herself to the authorities. While it is positive that a definition of absconding is now provided in EU law, the definition is broad compared to the CJEU’s interpretation given in the *Jawo* ruling.<sup>125</sup> In particular, it does not concern “deliberate evasion” to prevent transfer but is extended to the failure to remain available to the competent authorities. This broad language may capture a considerable proportion of people subject to transfer and hence lead to systematic detention. Regarding how to establish whether a risk of absconding exists, Article 2(n) indicates that the specific reasons and circumstances must be based on objective criteria defined in national law. This does not, however, significantly restrict the number of cases in which detention can be applied, considering that, in the practice of Member States, a wide range of criteria to justify detention is codified in national law.<sup>126</sup>

### Implementation considerations

ECRE argues that asylum seekers should not be detained purely for reasons of immigration policy under Article 6 of the Charter and that detention during the determination of responsibility or when awaiting a transfer is not permissible under the Charter (in the absence of other factors). Further, Article 44 rightly states that it must be proportionate, other less coercive methods cannot be applied, and it must be based on an individual assessment which considers inter alia the vulnerability of the applicant. In *FMS*, relying on a similar wording of detention provisions of the Return Directive, the CJEU required examination of the necessity and proportionality prior to imposition of detention.<sup>127</sup> It is currently the case that Member States widely use detention in circumstances that are unlawful, including during the determination of responsibility and while awaiting transfer after acceptance of the decision, which likely continue without adequate clarity in the legal framework.

ECRE further recalls that children and unaccompanied children should never be detained. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention, but practices of detention of children, whether in Dublin, return or transit zone/border proceedings, have been reported in several Member States despite general provisions in most countries calling for the use of detention of children only as a measure of last resort.<sup>128</sup> The latest recast of the RCD Article 11(2) additional protection for children, establishing that, as a rule, minors should not be detained (Article 13(2) rRCD). The article allows for detention only in exceptional circumstances, when it is a measure of last resort and no alternatives are available, and after it has been shown to be in the best interests of the child. There is a further specification that for children with family members it can

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<sup>125</sup> CJEU, Judgment of 19 March 2019, *Jawo*, Case C-163/17.

<sup>126</sup> ECRE/AIDA, *The implementation of the Dublin III Regulation in 2018*, March 2019, available at: <https://bit.ly/3vCJ63s>, pp. 14-17.

<sup>127</sup> CJEU, Judgement of 14 May 2020, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C924/19 PPU, C925/19 PPU, para. 302(7).

<sup>128</sup> EUAA, *Asylum Report 2023*, available at: <https://bit.ly/3PAIFOb>, European Parliament - Policy Department for Citizens’ Rights and Constitutional Affairs, *Reception Conditions across the EU*, November 2023, available at: <https://bit.ly/43NmKct>.

only be used when the primary caregiver is detained and for unaccompanied children, when detention serves to safeguard them.

A significant amount of European Courts' decisions focus on the necessity to apply detention for the cases of minors only as a measure of last resort, always subjected to considerations regarding the child best interest. In *TQ*<sup>129</sup>, CJEU ruled that in cases affecting children Member States must carry out in-depth assessments of the situation of the minor concerned, taking into account the best interests of the child. In *Haqbin*, the CJEU reiterated that, "Member States must in particular take due account of factors such as the minor's well-being and social development, taking into particular consideration the minor's background such as safety and security considerations."<sup>130</sup> In *HA and others v. Greece*, the ECtHR made reference to national law which provided that authorities should avoid the detention of minors and that unaccompanied minors should only be detained as a measure of last resort for the shortest appropriate period of time.<sup>131</sup> In *Rahimi v. Greece*, ECtHR placed significance on the facts that the Contracting State in question had not considered the best interests of the minor concerned or whether the applicant's detention was a measure of last resort.<sup>132</sup> This reasoning was upheld in *Housein v. Greece*, where it was held that an unaccompanied minor's detention in an adult detention facility was not lawful under the Convention.<sup>133</sup> In contested age situations, like age assessment procedures, the presumption of minority should apply, treating the individual as a child to ensure they receive appropriate rights and protection as confirmed by the ECtHR in *Darboe and Camara v. Italy*.<sup>134</sup> The Court also clarified that parental accompaniment during detention does not absolve authorities from their duty to protect children under Article 3 of the Convention.<sup>135</sup>

It is then of particular importance for Member States to respect their obligations regarding the need to ensure an individual assessment is carried out in all cases, and to make available a wide range of alternatives to detention, which are currently under-used in practice.<sup>136</sup>

#### **ECRE's Recommendations on the use of detention in Dublin procedures**

- Where detention is used, the EUMS should respect the procedural guarantees, which are long established in EU and international law.
- Member States should ensure that detention for children should be used only as a measure of last resort.
- More broadly, the use of alternatives to detention should be expanded, and a proper and individualised analysis regarding the application of detention measures in the individual case should always be carried out. The EUAA, in liaison with the European Commission should develop guidance on alternatives to detention and encourage their use by EUMS.

## SECTION VI - TRANSFERS

### *Article 46: Detailed rules and time limits and Article 47: Costs of transfer*

Transfers will have to be carried out within six months of the acceptance of the request, confirmation of the notification or from the final decision on appeal and review where there is suspensive effect, with priority given to requests made on the basis of Articles 25 to 28 and Article 34. When the purpose

<sup>129</sup> CJEU, Judgment of 14 January 2021, TQ C-441/19, ECLI:EU:C:2021:9, paras 46, 60.

<sup>130</sup> CJEU Judgment of 12 November 2019, Zubair Haqbin C-233/18, ECLI:EU:C:2019:956, para 54.

<sup>131</sup> HA and others v. Greece, App No. 19951/16, (28 February 2019), para 205.

<sup>132</sup> ECtHR, Rahimi v. Greece, para 108-110.

<sup>133</sup> Housein v. Greece, App No. 71825/11, (24 October 2013), paras 76-78. See also: R.M. and Others v. France, 2016, para. 71; S.F. and Others v. Bulgaria, 2017, para. 79; R.R. and Others v. Hungary, 2021, para. 49.

<sup>134</sup> Darboe and Camara v. Italy, App No. 5797/17, (21 July 2022), paras 153-154.

<sup>135</sup> See: R.M. and Others v. France, 2016, § 71; M.H. and Others v. Croatia, 2021, § 192; R.R. and Others v. Hungary, 2021, § 59.

<sup>136</sup> EMN, Detention and alternatives to detention in international protection and return procedures, May 2022, available at: <https://bit.ly/49liT7b>; European Parliament - Policy Department for Citizens' Rights and Constitutional Affairs, Reception Conditions across the EU, November 2023, available at: <https://bit.ly/43NmKct>.

of the transfer is relocation, it will have to be carried out within four weeks from confirmation of the contributing Member State or a final decision on appeal and review (see below, Article 67).

Article 46(2) presents two possible situations in which this time limit can be extended. If the person concerned is imprisoned, the time for transfer can be extended up to a maximum of one year. It can be prolonged or up to three years if the “person concerned, or a family member to be transferred together with the person concerned, has absconded, is physically resisting the transfer, is intentionally making himself or herself unfit for the transfer, or is not complying with medical requirements for the transfer”, provided that the transferring Member State informed the Member State responsible of the situation.

Responsibility shifts to the transferring Member State if time limits for the transfer are not respected. In cases of absconding, when the person becomes once more available to the authorities and the time remaining for the transfer is less than three months, the Member State has three months to carry out the transfer. The Commission is entrusted with establishing uniform methods for the consultation and exchange of information between Member States regarding transfers.

Compared with the Dublin Regulation, the time limit to carry out transfers is extended from eighteen months to three years for cases of applicants absconding, and introduces the same extension of the deadline for transfer for cases in which the applicant is physically resisting the transfer, making him or herself unfit for transfer or not complying with medical requirements. The deadline is instead slightly shortened (from six to five weeks) if the applicant is detained for the purpose of the Regulation.

<b>Deadlines for transfers</b>	<b>Dublin</b>	<b>RAMM</b>
Standard rules	6 months	6 months
Relocations	N/A	4 weeks
Detained applicants (for the purposes of the Regulation)	6 weeks	5 weeks
Detained applicants (not for the purposes of the Regulation)	1 year	1 year
Applicants absconding	18 months	3 years
Applicants resisting the transfer, making themselves unfit for transfer or not complying with medical requirements	N/A	3 years

As mentioned, while as a rule transfers have to be carried out within six months as in Dublin, the time limits can be extended to one year for detained applicants, and up to three years for cases in which the applicant resists the transfer through various means, first of all by absconding. Once more, this provision is directed at discouraging and sanctioning onward movement, considering the lengthy extension of deadlines for cases in which the applicant is not available to the authorities of the transferring Member State due to their behaviour. Added to the introduction of take back notifications, the shortening of deadlines for sending take charge requests and the more restrictive provisions regarding the ‘entry’ criterion, it appears clear that, as previously mention, the reform will lead to an increase in the number of applicants for whom countries at the external borders will be responsible. It is also worth mentioning that a further legal basis for the extension of transfer deadlines to one year is provided by Article 12(4) of the Crisis Regulation, for situations of ‘mass arrivals’.<sup>137</sup>

<sup>137</sup> ECRE Comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum.

In addition, Article 47 partially changes the Dublin provision according to which the transferring Member State bore the transfer costs. Under the new rules instead, for take back procedures will be paid to the transferring Member State through the Asylum and Migration Fund, according to Article 20 of the AMIF Regulation.<sup>138</sup> Article 81 RAMM amends the latter and establishes that the Member state covering the cost of transfers will receive “a contribution of EUR 500 for each applicant for international protection (...) transferred to another Member State”. Only the transfer was erroneous or if the transfer decisions is overturned on appeal or review that the transferring Member State becomes responsible for the costs of transferring the person back to its own territory (Article 47(2)). The reasoning behind this change appears clear: Member States of ‘destination’ should not be made to pay the full costs of the transfers of applicants that should not have, in principle, reached their territory. However, this and other attempts at discouraging countries at the external borders from allowing onward movement are unlikely to have the hoped-for effect. On one hand, individuals will continue to move, as they will be channelled in a system that is unlikely to take into account their preferences and necessities; on the other, countries at the external borders will have even more reasons to either avoid registrations, increase the number of violations at the borders, or render their asylum and reception systems as unappealing as possible. To effectively counter these – likely – negative effects, the operationalisation of the solidarity mechanism will be key (see below, Part IV).

## Chapter VII - Conciliation

### *Article 55: Conciliation*

Article 55 introduces several changes to the conciliation mechanism already present in the Dublin Regulation but never activated, with the objective of facilitating its operationalisation and use.

The mechanism is meant as an additional instrument to use in case of non-compliance with the rules set out in the Regulation, which can be activated without prejudice to the Commission’s oversight powers and to the possibility of the affected Member States to submit their complaints to the Court of Justice (Article 55(3)).

In case of difficulties in the application of the Regulation or in cooperation between Member States to this end, upon request of one or more of the concerned countries, Member States will hold consultations “without delay” to find appropriate solutions, in line with the principle of sincere cooperation.<sup>139</sup> Member States may then share relevant information on “the difficulties encountered and the solution found” with the Commission and the Committee that will assist the Commission in the tasks it is entrusted under the Regulation – as per Article 77 RAMM - , composed of Member States that are part of the Committee (Article 55(1)). If no solution is found, the Member State(s) concerned can ask the Commission to hold consultations with the other Member State(s) concerned, with the objective of finding adequate solutions. In this context, the Commission can indicate appropriate measures and deadlines to the Member States concerned in the form of recommendations.

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<sup>138</sup> Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, available at: <https://bit.ly/4amWoju>.

<sup>139</sup> In Joined Cases C-582/17 and C-583/17, the CJEU underlined that “a Member State cannot, in accordance with the principle of sincere cooperation, properly make a take back request, in a situation covered by Article 20(5) of the regulation, when the person concerned has provided the competent authority with information clearly establishing that that Member State must be regarded as the Member State responsible for examining the application pursuant to those criteria for determining responsibility. In such a situation, it is, on the contrary, for that Member State to accept its own responsibility.” See: CJEU Judgment of 2 April 2019, Joined cases C-582/17 & 583/17, H. and R., ECLI:EU:C:2019:280, para. 83. The Court also referred to the principle of sincere cooperation in the context of the need of prompt determination of the Member State responsible for the examination of an asylum application. The Court stated that the “State is to endeavour to reply within two weeks” and that “the aim of that provision is to encourage the requested Member State to engage in sincere cooperation with the requesting Member State”. See: CJEU, Judgment of 13 November 2018, Joined cases C-47/17 and C-48/17 X & X, Par. 77.

Given the potential for conflicts to arise, an attempt to operationalise the conciliation procedure is welcome and the mechanism may prove useful for particular caseloads and possibly for the operationalisation of the solidarity mechanism, It will though have limited relevance for individual cases because Article 55(2) clearly states that the conciliation procedure will not affect the time limits set out in the Regulation.

### Implementation considerations

Overall, ECRE considers that the enhanced role reserved to the Commission within the mechanism constitutes an improvement compared to the current situation, as it will provide the Commission with a “softer” instrument (compared to infringement proceedings) to provide relevant recommendations on key aspects of compliance. In order for the mechanism to work, however, it will be important that the Commission operates in an impartial way, focusing on compliance with legal standards, and that it acts as an honest broker, taking into account the requests and challenges highlighted by all Member States. More broadly, the Commission should also not withdraw from its oversight obligations, including being ready to launch infringement procedures where appropriate for cases of non-compliance with the asylum *acquis* in general, and the rules on responsibility and solidarity in particular.<sup>140</sup>

## Part IV - Solidarity

### **General considerations on solidarity**

The fourth part of the Regulation sets out the solidarity rules, introducing a mandatory but “flexible” solidarity mechanism in EU law, intended to adjust the outcomes of the responsibility rules set out in Chapter III. It covers Articles 56 to 71, divided into three chapters:

Chapter I Solidarity Mechanism

Chapter II Procedural Requirements

Chapter III Financial Support Provided by the Union

The European Commission had initially proposed to introduce corrective solidarity mechanisms for two situations: disembarkation following Search and Rescue (SAR) and migratory pressure. Both the Council and Parliament in their negotiations deleted the separate SAR mechanism. The question of SAR is integrated to a limited extent into the remaining solidarity mechanism as situations of pressure may result inter alia from disembarkations after SAR.

In the final text, the solidarity mechanism – a “solidarity pool” of different solidarity measures – is used in situations of migratory pressure, with the possibility for Member States under benefiting from solidarity measures in the pool. Member States under pressure or facing a “migratory situation” may also request a partial or full deduction of the solidarity contributions that they are supposed to add to the solidarity pool. The concept of migratory pressure can be applied extensively and, given the role of the Commission in the assessment, much will be left to its discretion

Solidarity becomes “flexible”, in the sense that Member States can choose between two main alternatives (relocations and financial contributions) or, upon the consent of the benefitting Member State, can offer support through “alternative measures” (covering capacity building, services, staff support, etc.). The only requirement set in the Regulation is the minimum annual target for solidarity pledges of 30,000 relocations and 600 million in financial contributions, to which Member States

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<sup>140</sup> On the topic of the use of infringement procedures, see, e.g.: Open Society Foundations, *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*, September 2017, available at: <https://bit.ly/3VQzUDn>; Schmälter, J. (2018). A European response to non-compliance: the Commission’s enforcement efforts and the Common European Asylum System. *West European Politics*, 41(6), 1330–1353, available at: <https://bit.ly/3xpfEOZ>; Politico, *The curious case of the EU’s disappearing infringements*, January 2022, available at: <https://bit.ly/4aDxBYk>.

have to contribute up to their “fair share”, calculated based on a distribution key based on GDP and population. Where solidarity pledges do not reach this minimum, “responsibility offsets”<sup>141</sup> would require contributing Member States to assume responsibility for a certain number of applicants for whom a benefitting Member State is responsible. The intention behind this new concept is to ensure that Member States realise the mandated amount of relocation pledges per year.

The solidarity mechanism will also apply in the special regimes set out in the Regulation on Crisis and Force Majeure, however the solidarity rules are adapted in each case. Thus, it can be considered that one standard and three exceptional regimes exist under the reformed system, which can be in force at the same time:

- **Standard regime** - Basic rules on determination of responsibility (Part III RAMM) apply, with a solidarity mechanism, which will likely support between 3 and 6 Member States at one time.
- **Exceptional regimes**
  - *Crisis or ‘mass arrivals’*: Adapted basic rules on determination of responsibility, allowing derogations, and adapted solidarity mechanisms. Likely to be operating in at least one Member State at any time with obligations on other Member States.
  - *Force Majeure*: Adapted rules allowing derogations in a Member State invoking force majeure, with implications related, inter alia, to responsibility rules under RAMM and implications for other Member States.
  - *Instrumentalisation*: Adapted rules allowing derogations in a Member State the situation of instrumentalisation, with limited obligations and implications for other Member States.

The crisis regime is analysed in ECRE’s comments on the Crisis Regulation, and the solidarity mechanism used in the standard regime is analysed here. The rules and mechanisms for solidarity are complex, so ECRE focuses here on untangling the rules, presenting its analysis, and suggesting recommendations for implementation that create the fairest possible outcomes for applicants, rather than re-proposing arguments related to the solidarity debates ongoing in the Union in the last decades.

In short, ECRE’s longstanding position has been to propose a deeper overhaul of the criteria on sharing of responsibility as the only solution to address the system’s dysfunctions. The reform does not provide this necessary change. A related consideration is the international context, with increasing levels of global displacement. Despite the EU-nature of Article 80 TFEU, the fair share of solidarity and responsibility should be considered also towards third countries, that host much larger numbers of refugees compared to EU Member States. To this end, while responsibility sharing at the international level remains voluntary, the adoption of the Global Resettlement Framework together with files from the Pact on Asylum and Migration should be seen as an occasion to step up efforts to ensure fair re-distribution of protection seekers beyond EU borders. The Framework can be considered as a significant milestone in addressing global resettlement and humanitarian admission needs, aiming to strengthen the Union’s cooperation with third countries. The objective is to demonstrate solidarity with regions hosting a large number of displaced persons in need of international protection, thereby relieving pressure on these countries.<sup>142</sup>

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<sup>141</sup> Council of the European Union, Balance between solidarity and responsibility under the Pact on Migration and Asylum - Discussion paper, April 2023, available at: <https://bit.ly/4aow5tw>.

<sup>142</sup> ECRE, *Seven Priorities to Expand Resettlement and Safe Pathways to Europe*, September 2023, available at: <https://bit.ly/3vuLNUJ>.

### **The solidarity mechanism: a summary**

The solidarity mechanism consists in a complex set of rules and processes which can be summarised as follows:

- The mechanism gathers solidarity contributions from all Member States which are to be distributed to support Member States facing situations of migratory pressure.
- The solidarity contributions are pledged into a “Solidarity Pool” which brings together all the solidarity contributions from across the Member States.
- The solidarity contributions that make up the solidarity pool can take four forms: relocation of people; financial contributions; “alternative measures” (mainly forms of capacity support); and “responsibility offsets” (assumption of responsibility for applicants sur place).
- The first three are considered as “first level” solidarity measures. Responsibility offsets are intended as a “secondary level” form of solidarity.
- Making solidarity contributions is mandatory and each Member State’s “fair share” of the contributions that form the Solidarity Pool is determined by GDP and population size.
- Initially, Member States may choose the forms of solidarity contributions they wish to provide to make up their fair share from relocations, financial contributions, and alternative measures.
- If relocation pledges reach a certain level, Member States may choose responsibility offsets as a form of solidarity (i.e. they may assume responsibility for applicants sur place rather than relocating applicants from other Member States).
- If relocation pledges are below a certain level, mandatory responsibility offsets will be applied (i.e. mandatory assumption of responsibility for applicants present in their country).
- During the year of implementation, if relocation pledges are not met, then mandatory responsibility offsets (mandatory assumption of responsibility) will again be applied.
- Member States experiencing migratory pressure (benefitting Member States) will benefit from the Solidarity Pool, receiving solidarity contributions in proportion to need.
- Solidarity entitlements for benefitting Member States can be adjusted based on a range of factors, including their compliance or lack thereof with the CEAS rules as a whole. An example is that a benefitting Member State might be excluded from accessing the Solidarity Pool if it is not accepting back transferees.
- Benefitting Member States may not have to provide the solidarity contributions that have been allocated to them through the distribution key – they may have a waiver as they are under migratory pressure and thus need to benefit rather than contribute. They should request a full or partial reduction of solidarity contributions.
- Member States recognised as “facing a significant migratory situation” or “at risk of migratory pressure”, while not considered as benefitting Member States, might also obtain a partial or full reduction of their required solidarity contributions.
- The assessment as to which Member States are under migratory pressure and thus are benefitting Member States is made by the Commission at the initiative of either the Commission or the Member State itself. It is confirmed in a Council Decision.
- The decisions on the size of the solidarity pool, the fair share and nature of solidarity contributions, and on which Member States are experiencing migratory pressure and what benefits they may receive, are taken by October of the preceding year, although adjustments can be made.

## Chapter I - Solidarity Mechanism

### *Article 56: Solidarity Pool*

Article 56 sets out the rules for the creation of a “Solidarity Pool”, established by a Council implementing act (Article 57) that will include the solidarity contributions pledged by Member States in the meeting of the High-Level EU Solidarity Forum. The composition and functions of the Forum are defined in Article 13.

The Solidarity Pool contains all the solidarity contributions from the Member States which are supposed to be provided the Member States under migratory pressure, the benefitting Member States.

There are three main forms of solidarity:

- a) Relocations
- b) Financial contributions
- c) Alternative solidarity measures

Responsibility offsets are a fourth form of solidarity, although they have a different role in the solidarity mechanism. The term “responsibility offset” refers to the assumption of responsibility for an applicant sur place by the Member State where the person is present, even though, according to the rules the responsibility lies with another Member State. Thus, rather than seeking to transfer back the applicant to the responsible Member State, the Member State assumes responsibility for the person, a form of solidarity. It may be voluntary or mandatory and is described in more detail below.

### **Analysis of the forms of solidarity**

Relocations will mainly involve applicants for international protection. Beneficiaries of international protection may also be relocated but only if there is an agreement with the benefitting Member State, and provided that, first, they were granted protection less than three years prior the Council implementing act and, second, they consent to the relocation. Financial contributions are mainly intended to support actions in the benefitting Member States, in different areas, and in particular “migration, reception, asylum, pre-departure reintegration border management and operational support”. Such contributions will consist of financial transfers to the Union budget (see Article 64(1)), and will in particular contribute to the AMIF (Article 57(2)) and BMVI programmes (Article 9(1) of the Return Border Procedure Regulation).

The financial contributions are, however, not limited to internal EU actions. The Article goes on to extend their scope to projects in or “in relation to” third countries, which “might have a direct impact on the migratory flows at the external borders of Member States or improve the asylum, reception and migration system of the third country concerned, including assisted voluntary return and reintegration programmes (...).”

Some safeguards are added, in particular that such actions will have to be implemented by the benefitting Member State in accordance with the scope and objective of RAMM and of the AMIF Regulation (Article 56(2)), and that the projects financed in third countries should focus on (a) enhancing asylum and reception capacity; (b) promoting legal migration and “well-managed mobility”; (c) supporting assisted voluntary return and reintegration programmes; (d) reduction of vulnerabilities caused by human trafficking and smuggling; and (e) support to “effective and human rights based migration policies” (Article 56(3)).

Alternative solidarity measures go beyond the “capacity building measures” foreseen in the original proposal to cover support in different areas but in particular: “migration, reception, asylum, return

and reintegration and border management, focusing on operational support, capacity building, services, staff support, facilities and technical equipment (...)” (Article 56(2)).

It should be noted that return sponsorship, a form of solidarity included in the Commission’s proposal, was deleted from the list of possible solidarity contributions.

### Implementation considerations

The forms of solidarity and their interaction require a more in-depth analysis. First, relocations are expanded to the relocation of beneficiaries of protection in specific situations. As relocation in these cases can only be carried out with the person’s consent (see below, Article 67), the fact that the cases of recently recognised beneficiaries of protection are also considered for relocation is a positive development. It is a way to respond to the increasing numbers of recognised beneficiaries moving onwards after receiving permits, often due to the limited opportunities for inclusion, in terms of labour market, housing and other social rights in the country of asylum.<sup>143</sup>

Financial contributions will be drawn from both the AMIF and BMVI funds, as can be inferred reading the RAMM provisions in conjunction with the Return Border Procedure Regulation (Recital 16 and Article 9). Financial contributions in third countries can be provided only within the framework and objectives of the AMIF Regulation (Recital 17). Regarding the monitoring and evaluation of AMIF spending “with, in or in relation to third countries”, the AMIF Regulation also prescribes that the Commission should pay particular attention to the evaluation of such actions (Article 34(4), AMIF Regulation). This requirement was applicable to the AMIF Regulation for the period 2014 – 2020, however, the Commission did not provide public information on spending in third countries,<sup>144</sup> which raises concerns the effectiveness and risks attached to this funding.

Overall, considering the trend towards “externalisation” of responsibilities to other countries, it is concerning that contributions to third countries can be considered as a form of intra-EU solidarity. Although restricted to the objectives set out in AMIF, it is possible that contributions will support or result in restrictive measures that aim to prevent arrivals in Europe, given that this is a priority for states and for the EU institutions in some cases. For example, the scope of AMIF funding is sufficiently wide as to allow financing the construction of detention centres at the external borders but on the territory of third countries, monitoring the conditions there will be difficult. Another possibility is that Member States will continue to prioritise the use of AMIF outside the EU to effect returns to third countries, as was already the case during the 2014 – 2020 MFF,<sup>145</sup> rather than using funding to build up their own asylum systems or to support inclusion, which are also among the objectives of AMIF.

ECRE argues that measures aimed at preventing onward movement from third countries and those implemented in third countries involve significant risks of human rights violations, often occurring outside Europe where accountability is more challenging and may further undermine the principle of *non-refoulement*. Instead, funding should be directed at internal objectives. In particular, given the general increase of activities at the border that will result from the implementation of the Pact, the AMIF Regulation also offers opportunities to strengthen procedural guarantees (i.e. legal assistance), improve reception conditions, including by increasing accommodation capacity and living conditions, and support alternatives to detention.

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<sup>143</sup> See ECRE/AIDA, *Asylum in Europe: the situation of applicants for international protection in 2022*, July 2023, available at: <https://bit.ly/3xfcz3J>; EUAA, *Asylum Report 2023*, available at: <https://bit.ly/3PAIFOb>.

<sup>144</sup> See ECRE *Comments on the Commission Proposal for a Regulation of the European Parliament and of the Council for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD)*, January 2021, available at: <https://bit.ly/4cLyIMl>.

<sup>145</sup> European Parliament - Policy Department for Citizens’ Rights and Constitutional Affairs, *EU migration and asylum funds for third countries*, December 2022, available at: <https://bit.ly/4ai97UT>, p. 23.

Some concerns also emerge regarding the number of policy areas for which it will be possible to provide alternative solidarity measures, namely migration, reception, asylum, return and reintegration and border management, focusing on operational support, capacity building, services, staff support, facilities and technical equipment which mainly corresponds to those covered by the BMVI Regulation. In practice, their use could have both positive and negative impact from a protection perspective. On one hand, alternative solidarity measures could serve to provide, for example, containers for reception purposes from one country to the other, which would allow the benefitting Member State to readily meet some material needs. In case of an increase in the number of disembarkations, contributing Member States can also support to expand the benefitting MS capacity to provide assistance to persons in distress at sea, support to search and rescue operations, in line with the BMVI objectives. On the other hand, there is a risk that alternative measures would not be provided homogeneously on all fields, and contributing Member States would instead prioritise support in certain areas, such as border control, equipment and technology measures for the purpose of discouraging irregular crossings and increasing deterrence at the border. Contributing countries may consider this beneficial as additional capacity in terms of border surveillance would likely also translate to fewer asylum seekers reaching countries of destination.

Another challenge is that capacity building and operational support, are useful only insofar as they respond to the needs in and identified by the country supposed to benefit. As such, it will be relevant to evaluate whether personnel deployed to this scope has sufficient expertise, also related to the benefitting country, to provide support in this sense. It would be relevant to explore whether it would be possible for asylum support teams of the Asylum Agency to be deployed in a benefitting Member State to provide their services, through support provided by a contributing one where a EUAA operation is present. This would ensure that certain standards, for example regarding training followed, are respected.

Actions supported by financial contributions should also be implemented in compliance with the horizontal enabling conditions related to the Charter of fundamental rights (Recital 18), in line with Article 15 of the Common Provisions Regulation. This is an important safeguard that already applies to AMIF, BMVI and ISF funding implemented under shared management. It requires that Member States have in place specific arrangements to ensure the application of the Charter of fundamental rights in EU-funded programmes and operations, and it gives the power to the Commission to withdraw or suspend funding in case of breaches of fundamental rights.<sup>146</sup>

#### *Article 57: Council implementing act establishing the Solidarity Pool*

Article 57 stipulates that the Solidarity Pool is established through a Council implementing act,<sup>147</sup> adopted by a Qualified Majority Vote (QMV), on the basis of a Commission Proposal (Article 12) and

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<sup>146</sup> UNHCR/ECRE, *Follow the Money IV*, November 2022, available at: <https://bit.ly/3VLS88J>, p. 24.

<sup>147</sup> Some relevant considerations can be made regarding the nature of the act. The procedure to be applied for the adoption of implementing acts is selected for each legislative act separately in which the EU legislature must consider the extent to which it wishes to assist and to oversee the Commission's non-legislative rule-making powers (Recital 10 and Article 2(1)–(3) Regulation 182/2011). The text provides for 1) Commission implementing decision; 2) Commission implementing acts with the reference to art. 67 (the use of the examination procedure); 3) Council implementing acts on the proposal of the Commission. 1) Commission implementing decision on determining Member States under migratory pressure (art. 7ba). The article does not explicitly refer to the examination procedure referred to in the art. 67, however indicates that the Commission shall consult the MS concerned and may set the time limit for consultations. It's not specified whether it is the advisory procedure (in which case the Commission decides on its own whether to adopt the act and must take the account of the opinion of the committee which is adopted by simple majority) or by the examination procedure (in which case the implementing act shall supported by the qualified majority of the committee). 2) Other articles that refer to the Commission implementing act (5a, 13, 15, 30, etc.) include the reference to art. 67 (2) which in turn refers to the Comitology Regulation and assigns the examination procedure. In case of the positive decision of the committee the Commission shall adopt the implementing act. However, if the committee gives an unfavourable opinion, the Commission may submit the draft act to an appeal committee to see whether the examination of the measure should continue, or to amend the text. If the appeal committee rules against the Commission's proposed implementing acts, the Commission cannot adopt the draft implementing act. At the same time, under art. 11 of the Comitology Regulation, the EP and the

of the results of the pledging exercise carried out at the High-Level EU Solidarity Forum (Article 13). The act will include the minimum numbers of required relocations and financial contributions from all Member States, as well as the pledges from each Member State for each type of solidarity contribution, based on fair share calculations. It will be adopted each year, before the end of the calendar year, by the Council acting by qualified majority. The Council can adopt the Commission proposal or choose to amend it where necessary, also through QMV.

### **Overall numbers of solidarity contributions in the solidarity pool**

The High-Level Solidarity Forum is the venue for Member States to define an annual target for each form of solidarity, “based on the Commission proposal”. Member States are not bound to reproduce the same target numbers for solidarity contributions presented by the Commission, but where overall pledges do not reach the minimum set by Article 12(2) or individual pledges for each Member State are below 60% of the reference number used to define their “fair share”, Member States will be obliged to complement their pledges through “responsibility offsets” (see below, Article 63). Solidarity pledges are based on the mandatory “fair share” calculation for each country’s contribution to the Solidarity Pool, based on a reference key factoring in GDP and population (see below, Article 66).

The implementing act can set out, where necessary, the indicative percentage of the Solidarity Pool that “may” be made available to Member States which are under migratory pressure specifically due to a large number of arrivals derived from recurring disembarkations following SAR activities (Article 57(2)). For these situations, Member States will be left a choice as to which solidarity measure to provide.

*Article 58: Information regarding the intention to use the Solidarity Pool by a Member State identified in the Commission Decision as being under migratory pressure*

Once a Member State is found to be under migratory pressure by the Commission implementing decision as per Article 7ba, it will inform the Commission of its intention to use the Solidarity Pool, but only after the adoption of the Council implementing act.

The Member State has to inform the Council of the implementing decision, while the Commission informs the European Parliament (Article 58(1)). For countries under migratory pressure, access to the Solidarity Pool is not subject to further evaluation, and will be automatic after the Commission receives the request, and within 10 days from receipt the EU Solidarity Coordinator is responsible for convening the Technical Level Solidarity Forum (Article 58(3)).

In the request, the Member State will have the possibility to request specific solidarity measures and to indicate the level of support it requires, and if it indicates the need to receive financial support, it will also identify the relevant EU spending programme(s) (Article 58(2)).

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Council can oppose (but can’t block) the implementing act if either of them believes that the Commission exceeds the implementing powers. The power of scrutiny can be used if the proposal went against the objectives of the basic legislative act, if it went against the principles of proportionality or subsidiarity, or if it exceeded the Commission’s powers. In this case the EC can amend, withdraw or decide to maintain the text. 3) The question on the possibility for the Council to adopt the implementing act on the proposal of the Commission and to amend the text of the proposal. Normally, the EC is the institution that is empowered to adopt the implementing acts. The exclusions are only the implementing acts under the CFSP which are adopted by the Council. However, the Council can also adopt the implementing acts beyond the CFSP, but only ‘in duly justified specific cases’, subject to judicial review. The justification is subject to the obligation to state reasons (Article 296 TFEU) and the ‘Council must properly explain, in the light of the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that it is the Commission that, in the normal course of events, is responsible for exercising that power’ (CaseC-440/14P National Iranian Oil Company). Despite Article 291 TFEU remaining silent on that matter, the ECJ considers that agencies and bodies of the Union can also be vested with implementing powers, as is the case with delegated acts (CaseC-270/12 UK v Parliament and Council).

*Article 59: Notification of the need to use the Solidarity Pool by a Member State that consider itself under migratory pressure*

Member States not under migratory pressure are not automatically excluded from accessing solidarity measures. If a Member State considers itself under migratory pressure at any point, it can notify the Commission and inform the Council, while the European Parliament is informed by the Commission. The Commission can then request support from relevant Agencies (EUAA, Frontex and FRA) for its assessment of migratory pressure in the country. Following the Commission assessment, a decision is transmitted to the Member State concerned, the Council and the European Parliament, whereby it is found to be under migratory pressure or not.

The notification from the Member State claiming migratory pressure must take a particular form, and in particular should include a “substantiated reasoning” regarding the existence and extent of the situation and how access to the Solidarity Pool would resolve the situation; the type and level of solidarity measures required to face it; and how the country intends to address the potential shortcomings that could affect the functioning of the national system as regards its preparedness to face situations of pressure and its compliance with its responsibility obligations (Article 59(2)).

While conducting this new assessment, the Commission will take into account different factors, and in particular information previously gathered for the Annual Asylum and Migration Report on the migratory situation, considering in particular whether the Member State concerned was previously considered as being at risk of migratory pressure, the overall migratory situation in the Union, and developments in the Member State in the previous year (Article 59(4)).

Where it is recognised that the Member State is under migratory pressure, as a general rule the country is then able to make use of the Solidarity Pool. Within two weeks of the transmission of the decision the Solidarity Coordinator convenes the Technical Level Solidarity Forum to “operationalise the solidarity measures”. This would not apply, however, in two cases: if there is insufficient capacity in the Pool or if there are “objective reasons” for denying access (Article 59(6)). Both possibilities are assessed by the Commission and Council. When the Council considers the capacity in the Solidarity Pool to be insufficient, the obligation to re-convene the High-level EU Solidarity Forum as per Article 13(4) is triggered. Within one week from the Commission decision, Member States are then called to renew and increase their solidarity pledges. Even when the country receives a negative response, it retains the right to submit a new notification providing additional information (Article 59(7)).

*Article 60: Operationalisation and coordination of solidarity contributions*

Article 60 covers the overall functioning of the solidarity mechanism and the implementation of solidarity contributions.

First, it provides information on the main actors within the mechanism. The so-called “operationalisation” of solidarity contributions will be the responsibility of the Technical-Level EU Solidarity Forum. The Forum will be chaired by the EU Solidarity Coordinator, and is intended as a platform where Member States can coordinate among themselves and with the Commission to ensure the functioning of the solidarity mechanism.

The EU Solidarity Coordinator ensures that solidarity contributions are distributed in a balanced way among benefitting Member States (Article 60(1)(2)). In addition, the Commission and Member States will be entitled to request support on the implementation of the solidarity mechanism to relevant union bodies, offices and agencies acting in the field of asylum, border and migration management. These stakeholders will be requested to support in three main forms: analysis, expertise and operational support (Article 60(5)). Particularly relevant will be the support provided in the operationalisation of solidarity contributions by relevant agencies, including the EUAA – which will likely play a prominent role relocation – and Frontex – likely to be involved in in the operationalisation of financial contributions or alternative solidarity measures falling under the BMVI’s objectives. Each

January, starting from the first year from entry into application of the Regulation (i.e. from January 2027), Member States will be requested to “confirm” to the EU Solidarity Coordinator the levels to which each solidarity measure was implemented in the previous year (Article 60(6)).

Member States will be requested to implement their relocation pledges before the end of the given year, but will be required to continue relocation processes that were undergoing before the end of the year even after this deadline. Alternative solidarity measures should also be provided within the same timeframe. However, those that were in course of implementation at the end of a given year would still have to be provided afterwards. Financial contributions are not bound to be provided within this timeframe. The Article further indicates that Member States contributing to solidarity will be requested to implement their pledges in proportion to their overall pledge for the Solidarity Pool for that year before the end of the year (Article 60(3)).

Article 60(3) introduces an important exemption from solidarity obligations. Member States under migratory pressure or facing a significant migratory situation and which have been granted a full deduction of their pledged contributions (see Articles 44f and 44fa) and Member States benefitting from solidarity (having access to the Solidarity Pool) based on a Commission decision establishing they are under migratory pressure, will not be required to implement their pledged solidarity contributions for the year.

The Article includes an important provision aimed at ensuring compliance with the RAMM as a whole. If the Commission finds “systemic shortcomings” regarding implementation of the responsibility rules in the Member State under migratory pressure then it loses its solidarity entitlements. Specifically, if there are systemic shortcomings concerns the rules in Part III of RAMM, above, then contributing Member States are no longer obliged to fulfil their solidarity pledges towards that country, nor are they bound to apply rules on responsibility offsets (see Article 44h) if insufficient relocations have taken place. This provision is intended as a punitive measure to be used when Member States under migratory pressure are not complying with the responsibility rules. In practice it may lead to a continuation of the complex and paradoxical situation whereby a Member State under migratory pressure is simultaneously receiving back – potentially significant – numbers of transferees while benefitting from solidarity including transferring another cohort of applicants to other Member States. It is not yet clear what the definition for “systemic shortcomings” will be, and specifically what will be the threshold beyond which a Member State is judged to be in a situation of “systemic” shortcomings. The jurisprudence of the CJEU is likely to be the point of reference.

Both the contributing and benefitting Member State, whose cooperation in this respect will be facilitated by the EU Solidarity Coordinator, can express “reasonable preferences” for the profiles of relocation candidates, while still giving primary consideration to the relocation of vulnerable individuals (Article 60(4)).

#### *Article 61: Deduction of solidarity contributions in situations of migratory pressure*

Member States under migratory pressure can request to be partially or fully exempted from implementing their pledged solidarity contributions. According to Article 61, a Member State found to be under migratory pressure or that claims to be, can request a partial or full deduction of its solidarity contributions (previously set out in the form of pledges in the Council implementing act). After presenting the request, it will also be required to inform the Council (Article 61(1)). The Commission has four weeks to share its assessment with the Council, and should then inform the European Parliament (Article 61(4)). The Council will then adopt an implementing act to determine whether the Member State is authorised to derogate from the previous Council implementing act establishing the Solidarity Pool and the set of solidarity contributions corresponding to that specific country (Article 61(5)).

When a Member State considers itself as under migratory pressure but has not (yet) been found to be, it will have to include additional information in its request, namely a description of how the

deduction would help stabilise the situation; whether their contribution could be replaced by another type of solidarity contribution; how the country will address shortcomings in compliance with responsibility rules, preparedness and resilience; and a reasoning of the extent of migratory pressure in the Member State (Article 61(2)).

#### *Article 62: Deduction of solidarity contributions in significant migratory situations*

Member States found to be facing “a significant migratory situation” or which claims to face such a situation can also request a partial or full deduction of their pledged contributions, following the same procedure detailed in Article 62 for countries under migratory pressure.

If the Member State is identified in the Commission Decision as per Article 11 as facing a significant migratory situation, it will be required to include in its request a description of how the deduction would help stabilise the situation, and evaluation of whether their pledge could be replaced by another solidarity contribution, information on how the country is planning to address shortcomings regarding compliance with responsibility rules, preparedness and resilience and a “substantiated reasoning” regarding the affected areas of its asylum, reception and migration system, and how the situation affects its capacity to fulfil its pledges (Article 62(2)).

If the Member State is found to be facing a significant migratory situation in the Commission decision, it shall also include in its request its assessment as to why the situation in the country should be considered as such (Article 62(3)).

#### *Article 63: Responsibility offsets*

The concept of “responsibility offsets” was not included in the original Commission proposal on the Regulation. It was introduced by the 2022 Czech Presidency of the Council as “an essential element that would help to increase the predictability and robustness of the solidarity component and to balance out increased responsibilities resulting from the overall system”,<sup>148</sup> and later approved and included in the final text by the European co-legislators.

Responsibility offsets are the assumption of responsibility for an applicant sur place. The Member State where the applicant is present which assumes responsibility would not otherwise be responsible for examining the application. It operates as a form of solidarity as the Member States contributing to the Solidarity Pool take responsibility for examining the international protection application of a person for whom a benefitting Member State has been determined as responsible.

According to Recital 33, responsibility offsets are mainly intended as a “secondary level solidarity measure and will constitute an additional reason for shifting of responsibility for certain applicants among Member States”. In a first stage, Member States can choose to use this form of solidarity when a high number of relocations have been pledged, i.e. sufficient numbers of relocations have been assured so therefore if a Member State prefers, it can use responsibility offsets, essentially deciding to assume responsibility for certain applicants present in its territory rather than relocating other applicants.

In a second stage, when the relocation pledges are low or when pledges are not delivered, responsibility offsets become mandatory. Thus, when relocation pledges are not up to a requisite level set by the Regulation it becomes mandatory for Member States to assume responsibility for applicants present who they would otherwise have the right to transfer to benefitting Member States. The overall aim is to ensure sufficient predictability on the functioning of the solidarity mechanism, and to introduce guarantees for benefitting Member States.

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<sup>148</sup> Council of the European Union, Balance between solidarity and responsibility under the Pact on Migration and Asylum - Discussion paper, April 2023, available at: <https://bit.ly/4aow5tw>, p. 7.

Article 63 details the rules applicable in these two different scenarios: when “offsets” are activated voluntarily and when their activation becomes mandatory.

➤ Voluntary solidarity contributions through responsibility offsets

Voluntary offsets can either be requested by the benefitting Member State or offered by the contributing one.

When relocation pledges indicated in the Council Implementing act are equal to or above 50% of the number indicated in the initial Commission proposal (under Article 12), a benefitting Member State can request a contributing one to take responsibility for a number of applicants for whom they are responsible, as an alternative to relocations (Article 63(1)).

A contributing Member State may offer to responsibility offsets (to take responsibility for applicants sur place) either when 50% of relocations have been pledged, as above, or when 50% or more of its mandatory fair share of solidarity pledges is constituted of relocations. For the offsets to be used in this case, the benefitting Member State has to accept the offer, after which the contributing Member State applies the same procedure as for applicants after relocation (Article 63(2)).

➤ Mandatory solidarity contributions through responsibility offsets

In the second scenario, responsibility offsets are made mandatory when insufficient relocations have been pledged. That is the case if, following the discussion among Member States in the High-Level Solidarity Forum, the relocation pledges indicated in the Council Implementing act are: (a) below 30,000 or (b) below 60% of an individual Member State's mandatory fair share for relocation (see below, Article 66). The contributing Member State will then have to take responsibility “for applications for international protection for which the benefitting Member State has been determined as responsible up to the higher of the two numbers referred to in points (a) or (b)” (Article 63(3)).

### Implementation considerations

To ensure a sufficient number of relocations is realised in a given year, Article 63(4) establishes that contributing Member States will be requested to apply offsets even if the target number of relocations – either EU-wide or for a specific Member State - has not been met due to certain Member States being granted full or partial reductions to solidarity contributions, or are identified as under migratory pressure, and are thus exempted to implement their pledges for the given year. Article 63(5) continues by establishing that a contributing Member State which has not implemented its pledges or accepted relocations equal to its pledged relocations by the end of the year will be obliged, if the benefitting Member State so requires, to take responsibility for applications for international protection up to the number of relocations pledged “as soon as possible after the end of the given year”. Article 63(7) sets a limit to the number of offsets contributing Member States should accept, indicating they will become responsible for the number of applicants necessary to reach the 30,000 target based on their fair share, calculated through the distribution key set out in Article 66. Recital 33 further clarifies that “contributions to solidarity through responsibility offsets should be counted as part of the mandatory fair share of the contributing Member State.”

The corrective mechanism through offsets is activated at the beginning of a given year only if pledges do not reach this minimum number, and the number of offsets is calculated based on the number missing from the initial pledges. At the end of the year, it is assessed whether, despite existing pledges, an insufficient number of relocations has been conducted, in which case offsets are also activated.

The contributing Member State will be given the possibility to select the individual applications for which it takes responsibility, and has to inform the benefitting Member State of the choice (Article 63(6)), but not all applicants fall under the “offsets” scope. The article cannot be applied to several categories of applicants: unaccompanied minors; in cases in which the benefitting Member State

was considered responsible under the criteria set out by Articles 25 to 28 RAMM; if the time limits for transfers have expired; if the applicant has absconded from the contributing Member State; to cases of beneficiaries of international protection; and resettled and admitted persons. It can instead apply to applicants who have been finally rejected in the benefitting Member State, who would then become subsequent applicants in the contributing country (Article 63(8)). Overall, despite the questionable naming choice – given the difficulty in identifying, at first glance, the fact it refers to individual applicants -, the introduction of the provision responsibility offsets is possibly the only one in RAMM recognising a certain degree of agency to protection seekers in the choice of country in which to apply for asylum.

In practice, applicants that could be considered as “offsets” would be those who have presented their application in one of the contributing Member States despite one of the benefitting one being responsible, who would otherwise have to be transferred back to the benefitting Member State. The concept was envisioned as a sanction for Member States refusing to comply with their solidarity obligations, as it would leave them less discretion than relocations in the selection of preferred profiles. Despite this, the introduction of offsets can be considered as a positive development, as in practice it will allow some applicants to remain in the country of their choice. Given this consideration, a problem arising is that applicants falling under the scope of family provisions or beneficiaries of protection – that can instead be relocated, with some limits – are not considered under their scope. There can be reasons for a person to wish to move to another Member State despite having presented proof of having family members in another country, such as could be the case for a woman victim of domestic violence wishing to abandon the country in which her husband or partner is present. While applicants in a similar situation would in principle have to be protected from transfers that does not appear to be the practice in several Member States.<sup>149</sup>

Beyond these considerations, some concerns emerge regarding the transparency of the process to select applicants that would be considered as offsets, as the Article only mentions that the contributing Member State is given the possibility to choose the applicants it will take responsibility for. As for relocations, it would be important to have clarity regarding the criteria used for the selection process, both for the applicants themselves and for their representatives or organisations providing information and legal aid. Additionally, while not explicitly indicated in the Regulation, in countries of EUAA operations it would be useful to envision a role for the Agency in the selection process.

#### *Article 64: Financial contributions*

The Article establishes the practical rules for the provision of solidarity in the form of financial contributions, indicating that they will consist of “financial transfers of amounts from the contributing Member States to the Union budget and shall constitute external assigned revenues in accordance with Article 21(5) of Regulation (EU, Euratom) 2018/1046131” (Article 64(1)). External assigned revenues are additional financial contributions from Member States, private or public donors, including, for instance, foundations or third countries, to specific items of expenditure determined by a basic act, as set out by Article 21 of the Financial Regulation.

The possibility to use external assigned revenues to increase AMIF resources was already granted in 2022, through the amendments to the AMIF Regulation aimed at expanding MS support for people fleeing Ukraine.<sup>150</sup> The Return Border Procedure Regulation (Article 9) introduces amendments to the BMVI Regulation which will also enable Member States and other public or private donors to

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<sup>149</sup> ECRE, Policy Note, A Gender Sensitive Approach to Combat Human Trafficking and Support Survivors in the EU”, to be published in April 2024.

<sup>150</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 514/2014 laying down general provisions on the Asylum, Migration and Integration Fund amending Regulation (EU) 514/2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and amending Regulation (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund and amending Regulation (EU) 2021/1147 establishing the Asylum, Migration and Integration Fund, available at: <https://bit.ly/3VK00Ym>.

contribute to the fund, in line with Article 21(5) of the Financial Regulation. This creates the possibility to increase the budget available to finance border management on the initiative of any public or private entity.

Benefitting Member States have the possibility to identify actions which may be funded by the financial contributions, and present them to the Technical Level Solidarity Forum, while the Solidarity Coordinator has the task of maintaining an inventory of these actions.

The Commission has to ensure that these actions correspond to the objectives set out in the RAMM covering financial contributions and alternative solidarity measures (as per Article 56(2)(b)(c) and (3)). According to Article 64(3), the Commission will establish rules on the operationalisation of financial contributions through an implementing act, which will be adopted following the positive opinion of a committee composed of Member States (through the examination procedure as referred to by Article 77(2)). In case the amount is not fully allocated at the end of the year, the Commission has the possibility to allocate the remaining amount to the AMIF thematic facility (Article 64(4)). Other options are not specified in the Regulation, however it is reasonable to assume that the Commission may still decide to allocate the unspent amount to the Member States' programmes in following year, for example. The Commission Annual Asylum and Migration Report will include information on the implementation of actions financed through the solidarity contributions (Article 64(6)).

#### *Article 65: Alternative solidarity measures*

While described as a third form of primary solidarity contributions in Article 56, the alternative solidarity measures can also be understood as a sub-category of financial contributions because they are counted as a form of financial solidarity through quantification. These measures have to be based on the specific request of the benefitting Member State. Their value is jointly established by the contributing and the benefitting Member State(s), and communicated to the EU Solidarity Coordinator before the contributions are implemented. Alternative solidarity measures can only be provided if they do not duplicate measures provided by operations of EU agencies or by EU funding..

Recital 19 clarifies that these contributions “should have practical and operational value. (...) Contributing Member States should be able to pledge such contributions, even if they are not identified in the Commission proposal for a Council implementing act, and these should be counted as financial solidarity and their financial value should be assessed and applied in a realistic manner. In case these contributions are not requested by the benefitting Member State in a given year, they should be converted into financial contributions, at the end of the year.”

#### *Article 66: Reference key*

Article 66 establishes the reference key to calculate the “fair share” of solidarity to be provided by each Member State. It is based on a formula – detailed in Annex I to the Regulation – weighting the size of the population and the total GDP of each country, using the latest available Eurostat data.

#### Implementation considerations

##### **Estimations applying the reference key**

In the sections below, ECRE has prepared estimates of solidarity contributions by applying the reference key to current data.

Financial contributions, relocations and alternative solidarity measures are all primary forms of solidarity. This entails that Member States will be allowed to choose between these forms of solidarity. In particular, during the High-Level Solidarity Forum Member States will be called to make pledges of solidarity contributions to meet their “fair share” – with the possibility to go above – for either relocations and financial contributions – or alternative solidarity contributions, which will be counted as financial solidarity, or a mix of these measures.

After the pledging exercise, it will be assessed whether pledged relocations reach the 30,000-minimum target. If not, or if the numbers are below 60% the reference number if this number is higher than 30,000, the difference will have to be covered through responsibility offsets.

It should be noted that even Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation, are obliged to present the pledges of their solidarity contributions during the Solidarity Forum. It is only later, through the Council implementing decision, that they may be exempted from then actually providing the contributions.

The tables below illustrate the functioning of the reference key based on 2023 statistics, indicating each country's fair share in two hypothetical scenarios. In practice, noting that some countries could be temporarily excluded (fully or partially) from contributing to solidarity, while others could be excluded from accessing the Solidarity Pool due to "systemic shortcomings" (Article 60(3)), at least 3-4 countries would have access to the Pool each year, and would likely each benefit from a number of relocations (or offsets) going from 5,000 to 10,000 per year. This is still significantly higher than the number reached through the voluntary solidarity mechanism established in 2022, that only led to the relocation of around 4,000 applicants.<sup>151</sup>

### Solidarity projections – fair share calculation

Based on the formula:  $\text{Share}_{\text{PSi}} = 50\% \cdot \text{Population effects}_{\text{PSi}} + 50\% \cdot \text{GDP effects}_{\text{PSi}}$   
(Article 66 and Annex I)

$$- \text{Population effects}_{\text{PSi}} = \frac{\text{population}_{\text{PSi}}}{\sum_{i=1}^n \text{population}_{\text{PSi}}}$$

$$- \text{GDP effects}_{\text{PSi}} = \frac{\text{GDP}_{\text{PSi}}}{\sum_{i=1}^n \text{GDP}_{\text{PSi}}}$$

Where 'n' is the number of Member States and 'i' the individual Member State

EU data for 2023 (all MS bound to the Regulation)

$$\begin{aligned} \sum_{i=1}^n \text{populations}_{\text{PSi}} &= 442,647.19 \text{ (thousands)} \\ \text{and} \\ \sum_{i=1}^n \text{GDP}_{\text{PSi}} &= 15,526,570.9 \text{ (M€)}, \end{aligned}$$

e.g. Calculation of the fair share for IT:

$$\text{Populations effects}_{\text{PS IT}} = \frac{58,941.6}{442,647.19} = 13.32\%$$

$$\text{GDP effects}_{\text{PS IT}} = \frac{1,946,479.1}{15,526,570.9} = 12.54\%$$

$$\rightarrow \text{Share}_{\text{PS IT}} = 0.5 \cdot 13.32\% + 0.5 \cdot 12.54\% = 12.93\%$$

<sup>151</sup> European Commission, 4000 asylum seekers relocated to other European countries under the Voluntary Solidarity Mechanism, February 2024, available at: <https://bit.ly/4cMUASL>.

**Example 1. Fair share per Member State based on a target of 30,000 relocations and 600 million € in financial contributions**

Proposal for a Council Implementing Act identifies:

- 30.000 relocations
- EUR 600 million financial contributions.

Hypothetically, in the implementing decision as per Article 11, the Commission establishes that IT, GR, CY are under migratory pressure; ES and AT are facing a significant migratory situation; and BG is at risk of migratory pressure.

The following table represents the fair share for each Member State based on the formula

<b>MS</b>	<b>GDP 2023 (M€)</b>	<b>Population (Thousands)</b>	<b>Fair Share</b>	<b>30,000 Relocations</b>	<b>600 Financial Contributions (Million €)</b>
Belgium	582,582.60	11,742.80	3.10%	931.00	18.60
Bulgaria	93,948.00	6,447.71	1.01%	302.00	6.00
Czechia	305,490.20	10,827.53	2.10%	629.00	12.60
Germany	4,121,160.00	84,358.85	21.95%	6,585.00	131.70
Estonia	37,682.40	1,365.88	0.27%	80.00	1.60
Ireland	504,619.70	5,271.40	2.21%	662.00	13.20
Greece	220,302.60	10,413.98	1.86%	558.00	11.20
Spain	1,462,070.00	48,085.36	9.71%	2,914.00	58.30
France	2,803,100.00	68,172.98	16.23%	4,870.00	97.40
Croatia	75,855.40	3,850.89	0.66%	198.00	4.00
Italy	2,085,375.60	58,997.20	12.93%	3,878.00	77.60
Cyprus	29,757.10	920.70	0.19%	58.00	1.20
Latvia	40,309.70	1,883.01	0.34%	101.00	2.00
Lithuania	72,047.80	2,857.28	0.54%	161.00	3.20
Luxembourg	79,309.60	660.81	0.32%	97.00	1.90
Hungary	196,526.80	9,599.74	1.64%	491.00	9.80
Malta	19,381.90	542.05	0.12%	35.00	0.70
Netherlands	1,032,841.00	17,811.29	5.09%	1,526.00	30.50
Austria	477,248.80	9,104.77	2.46%	739.00	14.80
Poland	747,747.50	36,753.74	6.38%	1,914.00	38.30
Portugal	265,741.90	10,467.37	1.94%	583.00	11.70
Romania	323,160.20	19,054.55	3.07%	922.00	18.40
Slovenia	63,089.60	2,116.97	0.42%	127.00	2.50
Slovakia	122,156.20	5,428.79	0.97%	292.00	5.80
Finland	277,833.00	5,563.97	1.49%	448.00	9.00
Sweden	548,373.20	10,521.56	3.00%	899.00	18.00

MS present their pledges in the High-Level Solidarity Forum, the Council implementing decision establishes the Solidarity Pool with relevant pledges, indicating as reference numbers 30,000 relocations and 600 million in financial contributions.

Every Member State can select between alternative forms of solidarity. In the following table, by a way of example, BE and RO offer half in relocations half in financial contributions, while other countries choose to either pledge their fair share in relocations and financial contributions.

<b>MS</b>	<b>GDP 2023 (M€)</b>	<b>Population 2023 (Thousands)</b>	<b>Fair Share</b>	<b>30,000 Relocations</b>	<b>600 Financial Contributions (Million €)</b>
Belgium	582,582.60	11,742.80	3.10%	465	9.3
Bulgaria	93,948.00	6,447.71	1.01%	302	
Czechia	305,490.20	10,827.53	2.10%		12.6
Germany	4,121,160.00	84,358.85	21.95%	6,585	
Estonia	37,682.40	1,365.88	0.27%	80	
Ireland	504,619.70	5,271.40	2.21%	662	
Greece	220,302.60	10,413.98	1.86%	558	
Spain	1,462,070.00	48,085.36	9.71%	2,914	
France	2,803,100.00	68,172.98	16.23%	4,870	
Croatia	75,855.40	3,850.89	0.66%		4
Italy	2,085,375.60	58,997.20	12.93%	3,878	
Cyprus	29,757.10	920.70	0.19%	58	
Latvia	40,309.70	1,883.01	0.34%		2
Lithuania	72,047.80	2,857.28	0.54%		3.2
Luxembourg	79,309.60	660.81	0.32%	97	
Hungary	196,526.80	9,599.74	1.64%		9.8
Malta	19,381.90	542.05	0.12%	37	
Netherlands	1,032,841.00	17,811.29	5.09%		30.5
Austria	477,248.80	9,104.77	2.46%		14.8
Poland	747,747.50	36,753.74	6.38%		38.3
Portugal	265,741.90	10,467.37	1.94%	583	
Romania	323,160.20	19,054.55	3.07%	461	9.2
Slovenia	63,089.60	2,116.97	0.42%	127	
Slovakia	122,156.20	5,428.79	0.97%		5.8
Finland	277,833.00	5,563.97	1.49%		9
Sweden	548,373.20	10,521.56	3.00%		18
<b>TOTAL</b>				<b>21,677</b>	<b>166.5</b>

If no additional pledges are made, relocations are below the 30,000 target set by Article 12 and mandatory responsibility offsets are activated. These will correspond to 8,323 to reach the minimum target of 30,000 relocations. These will have to be divided among contributing Member States according to Article 63(3).

Hypothetically, IT, CY and GR request access to the Solidarity Pool as they are able to do, given that they are found to be under migratory pressure. ES requests and obtains a full reduction of solidarity contributions.

<b>MS</b>	<b>GDP 2023 (M€)</b>	<b>Population 2023 (Thousands)</b>	<b>Fair Share</b>	<b>30,000 Relocations</b>	<b>1,000 Financial Contributions (Million €)</b>
Belgium	582,582.60	11,742.80	3.10%	465	9.3
Bulgaria	93,948.00	6,447.71	1.01%	302	
Czechia	305,490.20	10,827.53	2.10%		12.6
Germany	4,121,160.00	84,358.85	21.95%	6,585	
Estonia	37,682.40	1,365.88	0.27%	80	
Ireland	504,619.70	5,271.40	2.21%	662	
Greece	220,302.60	10,413.98	1.86%		
Spain	1,462,070.00	48,085.36	9.71%		
France	2,803,100.00	68,172.98	16.23%	4,870	
Croatia	75,855.40	3,850.89	0.66%		4
Italy	2,085,375.60	58,997.20	12.93%		
Cyprus	29,757.10	920.70	0.19%		
Latvia	40,309.70	1,883.01	0.34%		2
Lithuania	72,047.80	2,857.28	0.54%		3.2
Luxembourg	79,309.60	660.81	0.32%	97	
Hungary	196,526.80	9,599.74	1.64%		9.8
Malta	19,381.90	542.05	0.12%	37	
Netherlands	1,032,841.00	17,811.29	5.09%		30.5
Austria	477,248.80	9,104.77	2.46%		14.8
Poland	747,747.50	36,753.74	6.38%		38.3
Portugal	265,741.90	10,467.37	1.94%	583	
Romania	323,160.20	19,054.55	3.07%	461	9.2
Slovenia	63,089.60	2,116.97	0.42%	127	
Slovakia	122,156.20	5,428.79	0.97%		5.8
Finland	277,833.00	5,563.97	1.49%		9
Sweden	548,373.20	10,521.56	3.00%		18
<b>TOTAL</b>				<b>14,269</b>	<b>166.5</b>

Three MS (CY, GR, IT) access the Solidarity Pool from the beginning of the year, and benefit from 14,269 relocations and 8,323 responsibility offsets, and from 166.5 million in financial contributions.

Assuming a higher share is granted to Greece and Italy, this could be the resulting solidarity measures each country would be entitled to:

<b>MS</b>	<b>Share</b>	<b>Relocations (outgoing)</b>	<b>Responsibility offsets</b>	<b>Financial Contributions (Million €)</b>
Greece	40%	5,708	3,329	66.6
Italy	40%	5,708	3,329	66.6
Cyprus	20%	2,854	1,665	33.3
<b>TOTAL</b>	<b>100%</b>	<b>14,269</b>	<b>8,323</b>	<b>166.5</b>

As the target number would not yet be reached due to some countries being excluded in view of being benefitting Member States or having obtained a reduction in solidarity contributions, at the end of the year the 30,000 target number for relocations would still not have been reached. The difference (7,408) would then have to be covered at the end of the given year through additional contributions in the form of offsets, as per Article 63(4).

**Example 2. Fair share based on a target of 50,000 relocations and 1000 million € in financial contributions**

Proposal for a Council Implementing Act identifies a higher than minimum need for solidarity due to the assessment in the Annual Report. For example:

- 50.000 relocations
- EUR 1000 million financial contributions.

Hypothetically, in the implementing decision as per Article 11, the Commission establishes that CY, GR, IT and ES are under migratory pressure, while BG and AT are facing a significant migratory situation.

The fair share calculated based on these target numbers would then be the following:

<b>MS</b>	<b>GDP 2023 (M€)</b>	<b>Population 2023 (Thousands)</b>	<b>Fair Share</b>	<b>50,000 Relocations</b>	<b>1,000 Financial Contributions (Million €)</b>
Belgium	582,582.60	11,742.80	3.10%	1,552	31.0
Bulgaria	93,948.00	6,447.71	1.01%	503	10.1
Czechia	305,490.20	10,827.53	2.10%	1,048	21.0
Germany	4,121,160.00	84,358.85	21.95%	10,975	219.5
Estonia	37,682.40	1,365.88	0.27%	133	2.7
Ireland	504,619.70	5,271.40	2.21%	1,104	22.1
Greece	220,302.60	10,413.98	1.86%	930	18.6
Spain	1,462,070.00	48,085.36	9.71%	4,857	97.1
France	2,803,100.00	68,172.98	16.23%	8,116	162.3
Croatia	75,855.40	3,850.89	0.66%	330	6.6
Italy	2,085,375.60	58,997.20	12.93%	6,463	129.3
Cyprus	29,757.10	920.70	0.19%	96	1.9
Latvia	40,309.70	1,883.01	0.34%	169	3.4
Lithuania	72,047.80	2,857.28	0.54%	268	5.4
Luxembourg	79,309.60	660.81	0.32%	162	3.2
Hungary	196,526.80	9,599.74	1.64%	819	16.4
Malta	19,381.90	542.05	0.12%	58	1.2
Netherlands	1,032,841.00	17,811.29	5.09%	2,543	50.9
Austria	477,248.80	9,104.77	2.46%	1,231	24.6
Poland	747,747.50	36,753.74	6.38%	3,190	63.8
Portugal	265,741.90	10,467.37	1.94%	972	19.4
Romania	323,160.20	19,054.55	3.07%	1,536	30.7
Slovenia	63,089.60	2,116.97	0.42%	211	4.2
Slovakia	122,156.20	5,428.79	0.97%	487	9.7
Finland	277,833.00	5,563.97	1.49%	746	14.9
Sweden	548,373.20	10,521.56	3.00%	1,499	30.0

The MS in the High Level Solidarity Forum set pledges for their contributions to the Solidarity Pool choosing between relocations, financial contributions and alternative measures - that will be counted as financial contributions. In its implementing act following the Commission proposal, the Council also identifies as reference numbers for solidarity contributions 50,000 relocations and 1 billion financial contributions, and pledges are made on this basis.

In the example below, in the context of the pledging exercise, DE and offers half in relocations half in financial contributions, other countries choose between relocations and financial contributions.

<b>MS</b>	<b>GDP 2023 (M€)</b>	<b>Population 2023 (Thousands)</b>	<b>Fair Share</b>	<b>50,000 Relocations</b>	<b>1,000 Financial Contributions (Million €)</b>
Belgium	582,582.60	11,742.80	3.10%	1,552	
Bulgaria	93,948.00	6,447.71	1.01%	503	
Czechia	305,490.20	10,827.53	2.10%		21
Germany	4,121,160.00	84,358.85	21.95%	5,487	109.75
Estonia	37,682.40	1,365.88	0.27%	133	
Ireland	504,619.70	5,271.40	2.21%	1,104	
Greece	220,302.60	10,413.98	1.86%		18.6
Spain	1,462,070.00	48,085.36	9.71%	4875	
France	2,803,100.00	68,172.98	16.23%	8,116	
Croatia	75,855.40	3,850.89	0.66%		6.6
Italy	2,085,375.60	58,997.20	12.93%	6,463	
Cyprus	29,757.10	920.70	0.19%	96	
Latvia	40,309.70	1,883.01	0.34%		3.4
Lithuania	72,047.80	2,857.28	0.54%		3.4
Luxembourg	79,309.60	660.81	0.32%	162	
Hungary	196,526.80	9,599.74	1.64%		16.4
Malta	19,381.90	542.05	0.12%	58	
Netherlands	1,032,841.00	17,811.29	5.09%		50.9
Austria	477,248.80	9,104.77	2.46%		24.6
Poland	747,747.50	36,753.74	6.38%		63.8
Portugal	265,741.90	10,467.37	1.94%	972	
Romania	323,160.20	19,054.55	3.07%	1,536	
Slovenia	63,089.60	2,116.97	0.42%	211	
Slovakia	122,156.20	5,428.79	0.97%		9.7
Finland	277,833.00	5,563.97	1.49%	746	
Sweden	548,373.20	10,521.56	3.00%	1,499	
<b>TOTAL</b>				<b>33,513</b>	<b>284.95</b>

The number of pledged relocations is above the minimum reference number of 30,000. As such, mandatory responsibility offsets are not directly activated.

IT, ES, GR and CY inform of the will to use the Solidarity Pool and are granted access, while AT and BG are granted exemption from their solidarity contributions for the year.

<b>MS</b>	<b>GDP 2023 (M€)</b>	<b>Population 2023 (Thousands)</b>	<b>Fair Share</b>	<b>50,000 Relocations</b>	<b>1,000 Financial Contributions (Million €)</b>
Belgium	582,582.60	11,742.80	3.10%	1,552	
Bulgaria	93,948.00	6,447.71	1.01%		
Czechia	305,490.20	10,827.53	2.10%		21
Germany	4,121,160.00	84,358.85	21.95%	5,487	109.75
Estonia	37,682.40	1,365.88	0.27%	133	
Ireland	504,619.70	5,271.40	2.21%	1,104	
Greece	220,302.60	10,413.98	1.86%		
Spain	1,462,070.00	48,085.36	9.71%		
France	2,803,100.00	68,172.98	16.23%	8,116	
Croatia	75,855.40	3,850.89	0.66%		6.6
Italy	2,085,375.60	58,997.20	12.93%		
Cyprus	29,757.10	920.70	0.19%		
Latvia	40,309.70	1,883.01	0.34%		3.4
Lithuania	72,047.80	2,857.28	0.54%		3.4
Luxembourg	79,309.60	660.81	0.32%	162	
Hungary	196,526.80	9,599.74	1.64%		16.4
Malta	19,381.90	542.05	0.12%	58	
Netherlands	1,032,841.00	17,811.29	5.09%		50.9
Austria	477,248.80	9,104.77	2.46%		
Poland	747,747.50	36,753.74	6.38%		63.8
Portugal	265,741.90	10,467.37	1.94%	972	
Romania	323,160.20	19,054.55	3.07%	1,536	
Slovenia	63,089.60	2,116.97	0.42%	211	
Slovakia	122,156.20	5,428.79	0.97%		9.7
Finland	277,833.00	5,563.97	1.49%	746	
Sweden	548,373.20	10,521.56	3.00%	1,499	
<b>TOTAL</b>				<b>21,576</b>	<b>284.95</b>

Four MS (CY, GR, IT and ES) access the Solidarity Pool, and benefit from 21,576 relocations and 284.95 million in financial contributions.

Assuming a higher share is granted to Greece and Italy, this could be the resulting solidarity measures each country would be entitled to throughout the given year:

<b>MS</b>	<b>Share</b>	<b>Relocations (outgoing)</b>	<b>Financial Contributions (Million €)</b>
Greece	30%	6,473	85.48
Italy	30%	6,473	85.48
Spain	20%	4,315	56.99
Cyprus	20%	4,315	56.99
<b>TOTAL</b>	<b>100%</b>	<b>21,576</b>	<b>284.95</b>

If no additional solidarity contributions in the form of relocations are offered, according to Article 63(4), at the end of the year contributing Member States will have to divide responsibility for the remaining number of applicants to reach the 30,000 target (in this case, 8,424 individuals) also on the basis of the calculation of their fair share.

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### Implementation considerations

Additional observations can be made on the solidarity mechanism.

First, it is important that a mandatory solidarity mechanism is part of the system. If it functions, it will also be the case that the number of relocations will be higher than previously reached through voluntary solidarity mechanisms.<sup>152</sup> The introduction of responsibility offsets (assumptions of responsibility for applicants sur place) is welcome, as it allows applicants to be recognised in their country of destination (which, it should be recalled, is a choice often dictated by the poor conditions offered by asylum and reception system in countries of first entry as well as by family and other factors). However, it will only involve a small number of applicants per year, and they will be selected based on criteria that may lack transparency, using a tool which will be ultimately left to the discretion of national asylum authorities. Additionally, Member States which refuse to conduct relocations are also less likely to contribute to the “offsets” system because fewer applicants move onwards to these countries. This means that the same Member States will be requested to provide more in terms of this form of solidarity, which could lead to further imbalances and potential conflicts.

Based on recent experience, certain countries (up to four or six at any one time) will probably never offer solidarity in the form of relocations, while many others will remain reluctant to contribute above their “fair share”. Finally, even if 30,000 relocations are in fact carried out during a year that may be little compared to needs, considering that in 2023 registered asylum applications reached 1.14 million,<sup>153</sup> and 380,000 irregular border crossings<sup>154</sup> were registered in EU countries. On the other

<sup>152</sup> ECRE, *Relying on relocation*, January 2019, available at: <https://bit.ly/3GXDDnx>; ECRE, *Solidarity: The Eternal Problem*, January 2023, available at: <https://bit.ly/3xvstad>.

<sup>153</sup> EUAA, EU received over 1.1 million asylum applications in 2023, February 2024, available at: <https://bit.ly/4ajrjgQ>.

<sup>154</sup> Frontex, Significant rise in irregular border crossings in 2023, highest since 2016, January 2024, available at: <https://bit.ly/3xv0sQ8>.

hand, by accepting “flexible” solidarity, Member States at the external borders which will be the most likely to face situations defined as of “migratory pressure” willingly abandoned their requests for compulsory relocations, likely in exchange for a higher degree of discretion in applying the asylum *acquis* through the derogations provided in the Crisis and Force Majeure Regulation.

Overall, it is still unlikely that the solidarity mechanism will offer a fair counter-balance to the increased responsibilities of countries at the borders deriving both from Part III of RAMM and – even more so – from the combined effects of the APR, Screening, and Eurodac Regulations.

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

Additionally, the mechanism is highly complex and bureaucratic. It will require a high degree of coordination and effort, both from EU countries, the Commission and relevant Agencies to operationalise and is likely to create additional disputes among Member States. In the implementation phase of the process, it will be necessary to structure a functional mechanism for the exchange of relevant information, possibly building on already existing structures and preparing to address the challenges that already emerged in relation to the voluntary solidarity mechanism created as part of the “General approach” first sponsored by the French Presidency of the Council in 2022.<sup>155</sup>

Another relevant aspect concerns the flexibility of the solidarity mechanism, and in particular the use of relocations. There would be advantages if all Member States offered solidarity in the form of relocation (or offsets). Given that one of the objectives of solidarity is to mitigate the unfairness of the rules on allocation of responsibility for examination of applications, then solidarity should logically involve assumption of responsibility for people (in the absence of the preferred reform of the rules on allocation).

Nonetheless, there are legal and ethical considerations that make mandatory relocation controversial (regardless of political opposition to it which creates practical obstacles). When certain Member States’ treatment of applicants and beneficiaries of international protection consistently demonstrates systemic deficiencies, such that violations of EU and international law are regular occurrences, it is not possible to support relocation to these same countries. If Dublin transfers to countries are unlawful for reasons of deficiencies in the asylum system then, by the same logic, relocation should not be taking place. Practice shows that, in the recent years, official national positions preventing Dublin transfers to certain Member States have been adopted, for example towards Greece and Hungary, due to the situation in these countries.<sup>156</sup>

In this sense, it is positive that alternatives to relocation are provided in the form of financial contributions and alternative solidarity measures. Both positive and negative elements can be highlighted regarding financial contributions and alternative measures. On one hand, these may prove to be a more workable form of solidarity which improves reception conditions or legal aid provision of a benefitting country. They could even be used to increase the Member States capacity to perform SAR activities in line with their obligations. On the other, challenges may emerge in the implementation of these measures. For instance, contributing Member States might use them primarily to offer support to further reinforce infrastructure or to fund technical equipment that

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<sup>155</sup> European Commission, Solidarity Platform ‘Pact’ Thursday, 1 December 2022 Operational Conclusions, available at: <https://bit.ly/3U37550>.

<sup>156</sup> See: ECRE/AIDA, *The implementation of the Dublin III Regulation in 2020*, September 2021, available at: <https://bit.ly/3vGpBXO>; ECRE/AIDA, *The implementation of the Dublin III Regulation in 2021*, September 2022, available at: <https://bit.ly/3J5F5Yd>; ECRE/AIDA, *The implementation of the Dublin III Regulation in 2022*, November 2023, available at: <https://bit.ly/3xn3s17>.

strengthens border control without the same level of consideration for measures aimed at supporting access to rights and protection of people at the borders.

From the perspective of rights and protection, there are both opportunities and risks in the solidarity mechanism; everything will depend on how these articles are used and on the weight given to the different elements in the assessment, and then on the process for identifying needs, and finally on the solidarity offered by the Member States. For example, an assessment triggered by either the Member State or the Commission could find that a Member State is facing migratory pressure because it is processing a relatively high number of asylum applications. The Commission could identify measures that country should implement to improve its asylum system and that other Member States should implement to offer solidarity, and indicate in its annual proposal a significant target number for relocations. Other Member States could then accept to provide solidarity in this form and fulfil their pledges, so that pressure on the national asylum system of the Member State benefitting from solidarity could effectively be reduced. In this sense, the mechanism could have a positive effect, and provide balance to the whole system.

Alternatively, the same articles could produce a report that concludes migratory pressure based on future potential arrivals, and recommends shoring up border infrastructure and increasing return capacity, without properly addressing asylum and reception capacity. Solidarity pledges in the form of relocations would remain low, or would not be completely fulfilled, while financial contributions could be mostly directed at border management, in view of preventing arrivals. Each year, one or more Member States at the external border could request – and obtain – to be declared under one of the extraordinary regimes foreseen by the Crisi Regulation in view of the various derogations to the existing *acquis* it would give them the possibility to apply.

While acknowledging the political challenges faced in the creation of the solidarity mechanism, ECRE considers that there are risks connected both in terms of respect to the rights of international protection applicants, and as it might undermine cooperation among Member States and generate disillusion regarding the actual potential of the system, thus leading to further non-compliance with the *acquis*, despite its reformed rules. To avoid falling into this scenario, ECRE highlights some of its recommendations on the operationalisation of the solidarity mechanism.

#### **ECRE's recommendations on the use of the solidarity mechanism**

- The European Commission should act as a fair and impartial arbiter while establishing solidarity needs, aiming at high solidarity targets to ensure that a certain level of balance to the system is ensured.
- The additional resources provided by the Solidarity Pool should prioritise access to rights of people at the borders and in EU member states, e.g. by providing financing improving reception conditions, assistance of people with vulnerabilities and access to legal aid.
- MS should work in partnership with the others, in view of the goal of strengthening fair and efficient asylum and reception systems in Europe.
- Member States should ensure transparency in the selection process for applicants both in case of relocations and of solidarity contributions through offsets.
- The EUAA and other agencies should have a high level of involvement in the solidarity mechanism, in particular regarding the operationalisation of alternative solidarity measures, for example in the form of capacity building.

## Chapter II - Procedural Requirements

### *Article 67: Procedure before relocation*

Article 67 sets out the procedural steps to be followed before carrying out relocations.

Before the start of the procedure, the benefitting Member States (i.e. the Member States from which applicant will be relocated) are responsible for assessing whether there are grounds to consider the person concerned poses a threat to internal security, including but not limited to the grounds set out in Article 15 of the Screening Regulation. If the person is considered a threat, they will be excluded from any relocation or transfer to any other Member State.

If no relevant grounds to consider the person a security threat emerge from the assessment, the benefitting Member State has the right to identify the people who could be relocated. To this end, it can request support from the EUAA in the process of identification and matching of the people to be relocated.

In the process, the Member State should take into account the “existence of meaningful links such as those based on family or cultural considerations, between the person concerned and the Member State of relocation”. The person concerned is given the opportunity to present relevant information and documentation, but this does not have the right to choose the Member State of relocation (Article 67(3)). Those who have no clear links with any of the contributing Member States will be “fairly” distributed among them (Article 57(4)). If the benefitting Member State is deemed responsible for the applicants based on Articles 25 to 28 and 34 of the Regulation (cases of unaccompanied minors, family provisions and dependency clauses), they will not be considered eligible for relocation but should instead be transferred under the respective provisions of the Regulation. The latter does not apply to unaccompanied minors that have no family members, siblings or other relatives in any Member State (as per Article 25(5)): as such, these minors will be eligible for the relocation procedure. Family members will be relocated to the same Member State (Article 67(6)).

Once it is established that relocation is to be applied, the benefitting Member State informs the person of the relevant procedure, and of the consequences of non-compliance in case they were to leave the Member State of relocation (Article 67(5)).

Both in case of a positive or negative result of the assessment as to whether the person constitutes a security threat, the benefitting Member State has to transmit “as quickly as possible” all relevant information on the person concerned to the contributing Member State, which also carries out an assessment of the possible security threat posed by the person. To verify the information provided, the contributing Member State to which they would be relocated may carry out a personal interview, of which the person should be duly informed (Article 67(8)).

If there are no reasonable grounds to consider the person as a threat to internal security, the contributing Member State has one week to confirm the receipt of the relevant information from the benefitting Member State. Within one week from receipt of relevant information, the contributing Member State has to confirm receipt of the information or inform the benefitting Member State of having found grounds to consider the person as a threat to national security. In the latter case, the relocation does not take place. Only for exceptional cases, in which the particular complexity of the case can be demonstrated, the deadline can be extended to two weeks. Failure to act by the set deadlines will lead to an obligation to relocate the person (Article 67(9)).

Within one week from the confirmation from the Member State of relocation, the benefitting Member State has to take a transfer decision. It then notifies in writing the person to be relocated, “without delay” and at the latest two days before the transfer if it involves an applicant and one week for beneficiaries of protection (Article 67(10)). Applicants are obliged to comply with the relocation decision or face consequences as set out in Article 18, as they will be classed as not being present in the Member State responsible for examining their case, which constitutes a breach of their

obligations. No similar obligation is set for beneficiaries of protection, who also have to give their consent in writing to the relocation, as per Article 56.

Rules on remedies, detention, transfers deadlines and procedure for transfers “apply mutatis mutandis to the relocation procedure” (Article 67(13)).

### Implementation considerations

This article represents an attempt to codify and expand on some of the practice on relocation that has developed in recent years. Some general remarks can be presented.

First, it is very positive that “meaningful links” are explicitly mentioned among the elements to take into account while selecting applicants for relocations. It will be fundamental for Member States and the EUAA to develop an effective methodology ensuring that proper “matching” is ensured, taking into account the existing wide literature and results of existing projects.<sup>157</sup> The continued absence of an obligation to take into account the preferences of the applicant may continue to generate additional secondary movements. Since preferences are often based on meaningful links (such as the presence of family or community), it will be important to full use this element.

Second, Article 67 includes ample provisions on security checks, perhaps intended to reassure relocating Member States. Both the benefiting and the relocating Member States check that there are no reasonable grounds to consider the person “poses a threat to national security”. This might become an obstacle in practice given that, as ECRE previously identified, one of the challenges that emerged during the implementation of the Relocation Programmes of 2015/2016 was the use of specious national security grounds for rejection of relocation candidates.<sup>158</sup> The text now states that when a Member State decides to reject a proposal, it is requested to provide information on “the nature of and underlying elements for an alert from any relevant database” (Article 67(9)), which constitutes a welcome attempt to make sure that rejections are justified. Without any means of redress, however, it is still possible that Member States misuse these grounds for rejection. The timelines for decisions on relocation requests are short (one week with the possible extension to two weeks in exceptional circumstances). This is important given the need to relocate rapidly to ensure access to the procedure.

### *Article 68: Procedure after relocation*

After the relocation has been carried out, the Member State of relocation informs the sending Member State, the EUAA and the EU Solidarity Coordinator of the safe arrival of the person. If the procedure for responsibility determination was not carried out prior to relocation, according to Article 68(2), “that Member State shall apply the procedures set out in Part III, with the exception of Article 16(2), Article 17(1) and (2), Article 25(5), Article 29, Article 30 and Article 33(1) and (2).”

Thus, for some people, a partial form of responsibility determination will take place after relocation, where the criteria will be considered except for all the provisions on country of first entry or

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<sup>157</sup> There is a large literature on the topic. See, e.g.: The International Refugee Match: A System that Respects Refugees’ Preferences and the Priorities of States. Refugee Survey Quarterly; Jones, Will and Alexander Teytelboym, 2016; P. Bendel, H. Schammann, C. Heimann, & J. Stürner, *A Local Turn for European Refugee Politics: Recommendations for Strengthening Municipalities and Local Communities in Refugee and Asylum Policy of the EU*. Heinrich Boell Foundation, Chapter 3.3, 2023, available at: <https://bit.ly/3VGqfiz>; Z. Al Shmaly, *Europa wir schaffen das: using matching theory to allocate refugees across the EU*, European University Institute, 2022, available at: <https://bit.ly/4cCRzUJ>; Smith, C. Damian, E. Ugolini, *Why Matching Matters: Improving outcomes in refugee sponsorship and complementary pathways*, Migration Policy Institute Europe, 2023, available at: <https://bit.ly/4ajsQU8>; L. Salgado, H. Beirens, *What Role Could Digital Technologies Play in the New EU Pact on Migration and Asylum?*, Migration Policy Institute Europe, Chapter 2A, 2023, available at: <https://bit.ly/3POGMxg>; D. Freund, T. Lykouris, E. Paulson, B. Sturt, & W. Wenig, Group fairness in dynamic refugee assignment, 2023, available at: <https://bit.ly/3U4m9iT>. The recently developed project Re:Match has piloted relocating protection seekers to German municipalities via a matching algorithm, see: <https://rematch-eu.org/>.

<sup>158</sup> ECRE, *Relying on relocation*, January 2019, available at: <https://bit.ly/3GXDDnx>; ECRE, *Solidarity: The Eternal Problem*, January 2023, available at: <https://bit.ly/3xvstad>.

registration (Article 16(2), Article 17(1), Article 25(5), Article 33); possession of a visa or residence permit from another Member State (Articles 17(2) and 29); or on possession of a diploma (Article 30). It appears unclear why the diploma criterion is included within the list, given it would be unreasonable to exclude its application and deprive an applicant of the possibility of seeing their case examined in a country from which they hold a valid diploma, that would likely give them more opportunities in terms of access to social and economic rights.

A general concern is the fact that carrying out responsibility determination procedures after relocation means that certain applicants could be unnecessarily subjected to more than one transfer. Contrary to the objective of ensuring fast access to the procedure, that would lead to a significant delay for the applicants involved. ECRE is concerned about “backloading” in the asylum system and reproduces here its arguments made in relation to the analogous provisions for backloading in Dublin IV.

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

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

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

From ECRE’s [Comments on the Commission proposal for a Dublin IV Regulation](#).

For cases in which responsibility of the benefitting Member State was already established, responsibility is transferred to the contributing Member State (Article 68(3)). When beneficiaries of protection are relocated, the contributing Member State will automatically grant the same protection status as previously recognised (Article 68(4)).

Finally, according to the amendment to Article 20 of the AMIF Regulation introduced by Article 81 RAMM, Member States conducting relocations will be entitled to 10,000 EUR in addition to the allocations to their national programmes. While this does not constitute a change compared to the previous rules under AMIF, it is worth of notice as under the previous system relocations were fully voluntary, while under the current one, despite its flexibility, a certain number has to be carried out mandatorily each year. The amount will be raised to 12,000 EUR in case the relocation involved an unaccompanied minor (Article 81(3)).

*Article 69: Procedure for Responsibility Offsets under Article 63(1) and (2)*

For cases in which a benefitting Member State requests that another Member State provides solidarity in the form of responsibility offsets (assumption of responsibility for applicants sur place), it will transmit the request to the contributing Member State and “include the number of applications

for international protection to be taken responsibility for instead of relocations” (Article 69(1)). Within 30 days from receipt of the request, the contributing Member State has to give its response.

Even if the answer is positive, the contributing Member State can specify a lower number of offsets than the request.

#### *Article 70: Other obligations*

Article 70 sets out a general obligation for Member States to keep the Commission, and in particular the EU Solidarity Coordinator, informed on the implementation of solidarity measures, including regarding cooperation with third countries.

#### **ECRE’s recommendations on the relocation procedure**

- ECRE strongly urges Member States to use responsibility offsets in Article 63 as this will allow them to assume responsibility for applicants present on the territory rather than requiring additional transfers of applicants.
- Member States should ensure the involvement of a variety of actors both in the procedures before and after relocation. In particular, it will be important that Member States request support from the EUAA in the identification and matching process, and that civil society and local administrations are sufficiently involved in order to ensure smooth coordination after relocation, especially when it involves beneficiaries of international protection.
- The EUAA should develop a clear methodology and strengthen training provided to its staff, asylum support teams and, where applicable, staff of national asylum authorities regarding the procedures for the identification and matching of applicants in the relocation process.
- Where possible, Member States should ensure that responsibility determination procedures take place before departure, to avoid subjecting applicants to unnecessary transfers.
- Member States should consider all available elements provided by the applicant to establish whether “meaningful links” can be established and should take into account the applicant’s preferences as to the Member State of relocation, even though not mandated to do so by the Regulation. This will ensure better chances of societal inclusion for those found to have protection needs.

### Chapter III – Financial Support Provided by the Union

#### *Article 71: Financial support*

Article 71 establishes that funding support following relocation will be implemented in accordance with Article 20 of the AMIF Regulation which establishes rules on resources for the transfer of applicants for international protection or of beneficiaries of international protection, as amended by Article 81 RAMM (see below).

## Part V – General Provisions

### *Article 78: Exercise of the delegation*

The Regulation entrusts the Commission with the power to adopt delegated acts in accordance with Article 290 TFEU on a range of issues covered by the Regulation. These include the identification of family members or relatives of an unaccompanied minor and the criteria for establishing the existence of proven family links and assessing a dependency link (Articles 25(6) and 34(3)), which will be reviewed five years from the date of entry into force of the Regulation, and is tacitly extended for periods of the same duration unless the European Parliament or Council. Before adopting delegated acts, the Commission is requested to consult experts designated by each Member State. The European Parliament and Council retain the right to withdraw the Commission power to adopt delegated acts based on Articles 25(6) and 34(3) at any time.

### *Article 79 - Monitoring and evaluation*

Starting from [the first day of the forty-third month following the entry into force] and from then on annually, the Commission will review the functioning of solidarity measures defined in Part IV of the Regulation, and will produce a report on the implementation of all measures under the Regulation that will be communicated to the European Parliament and the Council.

The minimum targets of 30,000 relocations and 600 million in financial contributions per year will be reviewed “on a regular basis and as a minimum every three years” by the Commission, together with the overall functioning of responsibility rules set out in Part III of the Regulation, including on the definition of family members and time limits for procedures and transfers. While implicit that the review could lead to proposed amendments to the Regulation if deemed necessary, it does not go as far as to become a review clause as the one included in Article 79 APR on the safe third country concept.<sup>159</sup> Regardless, it is welcome that an explicit mention of responsibility rules was included as a priority in the Commission review, as it is the most likely to generate further issues within the system. It is not completely excluded, however, that possible amendments would lead to a further tightening of responsibility rules.

At the latest five years after the date of application (which could be, as mentioned below, by 2031), and every five years afterwards, the Commission has to carry out an evaluation of the Regulation, focusing in particular on the principle of solidarity and fair sharing of responsibility. After the evaluation, the Commission will present a report with its main findings to the European Parliament, the Council and the European Economic and Social Committee.

## Part VI - Amendments to Other Union Acts

### *Article 81: Amendments to Regulation (EU) No 2021/1147 [= AMIF Regulation]*

Article 81 amends the AMIF Regulation to allowing financial support for the operationalisation of the Solidarity Pool. First, it introduces a new paragraph 6a in Article 15, indicating “the contribution from the Union budget may be increased to 100% of the total eligible expenditure for solidarity actions.”

As previously mentioned, financial contributions will consist of money transfers from contributing Member States to the Union budget (both AMIF and BMVI) to be used for solidarity actions that are identified by the benefitting Member States and set out in their national programmes (Articles 64 and 58). The amendment allows the solidarity actions to be fully covered by the Union budget, meaning that the benefitting Member States are not required to add a matching financial contribution to implement such actions. This expands the list of actions that can already be fully supported by Union

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<sup>159</sup> See ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union.

budget without a matching contribution as laid down by Article 15 of the AMIF Regulation (i.e. operating support, Emergency assistance, Technical assistance).

An amendment then replaces Article 20. The new version of the Article provides rules on contributions through AMIF for Member States of relocation. It establishes that, in addition to the allocations already assigned in the national programmes, Member States will receive 10,000 euros for each applicant or beneficiary of protection relocated under Articles 67 and 68 RAMM. These amounts will be increased to 12,000 euros when the person relocated is an unaccompanied child (new Article 20(1) AMIF Regulation). Under the previous Article 20, Member States already received a lump-sum of 10,000 euros for relocations, however the amount was established as a form of incentive to encourage Member States to relocate – people under the previous voluntary system.

As mentioned in Article 46 on transfers, the amended article also establishes that Member States covering the cost of transfers under RAMM will receive a EUR 500 contribution, with no substantial changes to the previous system.

These amounts will be allocated to the Member State's AMIF programme, and should not be used for other actions under the country's programme except in duly justified circumstances through amending the national programmes (which needs to be approved by the Commission).

Point (ha) is added to Article 35(2) of the AMIF Regulation, on information that annual performance reports have to include, indicating these will have to provide information on “the implementation of solidarity actions, including a breakdown of the financial contributions by action and a description of the main results achieved as a result of the funding”. Member States have to submit their annual performance reports to the Commission every year by 15 February. However, the Commission has an obligation to publish only the summaries by the annual performance reports, which usually contain very general information on the points covered in the actual reports.<sup>160</sup>

#### *Article 82: Amendments to Regulation (EU)2021/1060 [= CPR Regulation]*

Article 82 includes some amendments to the Common Provisions Regulation, the overarching Regulation covering the rules related to the shared management of eight funds, including the AMIF and BMVI programmes, both of which are amended..

First, by amending Article 36 CPR, it is no longer possible that solidarity actions under AMIF and BMVI are financed by Technical Assistance, a form of financial support used on the initiative of the Commission to alleviate the administrative burden of Member States in implementing the programmes. This is consistent with the approach that solidarity actions should be, in practice, financed by financial contributions offered by contributing Member States.

Another change concerns the eligibility of expenditure (Article 63(6)). The amendments introduce a derogation which allows solidarity actions to cover operations even when “they have been physically completed or fully implemented before the application for funding under the programme is submitted, irrespective of whether all related payments have been made” (Article 63(6) of the CPR). The amended Article 63(7) sets out that at the moment of modifying the programmes to introduce financial support to solidarity actions, Member States have the possibility (“may”) to specify that the eligibility of expenditure starts from date of entry into force of this amending Regulation. This means that the solidarity actions will in practice be able to reimburse projects that have already been completed, including before the date of entry into force of this amending Regulation (on the twentieth day following publication in the Official Journal of the European Union).

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<sup>160</sup> The summaries of Annual Performance Reports submitted in 2023 are available at: <https://bit.ly/3Jaxckc>.

## Part VII - Transitional Provisions and Final Provisions

Transitional and final provisions of the Regulation are analysed here given their relevance to understanding how the implementation phase of the asylum reform will roll out.

### *Article 83: Repeal of Regulation (EU) No 604/2013*

The Dublin Regulation is repealed with effect from the date of application (rather than entry into force) of the RAMM, as set in Article 85.

### *Article 84: Transitional measures*

Given that between entry into force and application of the Regulation two years will pass (see Article 85), Article 84 sets out transitional measures.

First, the responsibility rules of the Dublin III Regulation will still apply to asylum applications registered before the date of application of the RAMM (Article 84(1) and (2)) (likely to be in June 2026).

The Article establishes that, for asylum applications registered after the date of application of the Regulation, events that are relevant to determining the responsibility of a Member State will be taken into account even if they precede the date of application of the Regulation (for instance, this could be the case for families formed in transit).

Particularly relevant is the following part of the provision, establishing clear rules and time lines for the implementation phase. Article 84(2) establishes that, at the latest three months after the entry into force of the RAMM, the Commission has the task of presenting a common implementation plan for the Regulation, which will be prepared “in close cooperation with the relevant Union agencies and Member States”. The objective of the implementation plan is to assess gaps and necessary operational steps relevant to the areas covered by the Regulation. After finalising the plan, the Commission informs the European Parliament.

Based on the common plan, Member States will be requested to develop their own implementation plans (with support from the Commission and relevant Union agencies), that will have to be established within six months from entry into force, and fully implemented by the time of application of the Regulation. In practice, the Commission aims at having a common implementation plan for both RAMM and APR<sup>161</sup> by the end of June 2024. Member States will have to establish their national plans by January 2024.

To develop national plans and during the implementation phase, Member States are entitled to use support from relevant Union agencies and Union Funds. The Commission is charged with monitoring the progress of the implementation phase, and is requested to include information on the state of play on implementation in the first two European Annual Asylum and Migration Reports (as per Article 7a) prepared after entry into force of the Regulation. The European Parliament and Council have to be informed on the state of play on implementation both of the common and national plans every six months.

ECRE has defined several priorities for the implementation phase of the whole asylum reform, are outlined elsewhere.<sup>162</sup>

### *Article 85: Entry into force and applicability*

Article 85 establishes that RAMM will enter into force on the twentieth day following publication in the Official Journal of the European Union (June 2024). The date of application will be two years

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<sup>161</sup> The APR also foresees that a common plan and national plans should be developed.

<sup>162</sup> ECRE, *Priorities for Implementation of the EU asylum reform*, to be published in May 2024.

later, from the first day of the twenty-fifth month following its entry into force. In practical terms, this will mean that the new rules on responsibility and solidarity will only apply from the late spring or summer of 2026, and at that point the Dublin III Regulation will be repealed.

## Annex I – Comparison between RAMM and Dublin provisions

RAMM	Dublin
Article 1: Subject matter	Article 1: Subject matter
Article 2: Definitions	Article 2: Definitions
Article 3: Comprehensive approach to asylum and migration management	/
Article 4: Internal components of the Comprehensive Approach	/
Article 5: External components of the Comprehensive Approach	/
Article 6: Principle of solidarity and fair sharing of responsibility	/
Article 7: Strategic approach to managing asylum and migration at national level	/
Article 8: A long-term European Asylum and Migration Management Strategy	/
Article 9: The European Annual Asylum and Migration Report	/
Article 10: Information for assessing the overall migratory situation, migratory pressure, risk of migratory pressure or significant migratory situation	/
Article 11: Commission implementing decision on determining Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation	/
Article 12: Commission proposal for a Council implementing act establishing the Solidarity Pool	/
Article 13: The High-Level EU Solidarity Forum	/
Article 14: The Technical-Level EU Solidarity Forum	/
Article 15: The EU Solidarity Coordinator	/
Article 16: Access to the procedure for examining an application for international protection	Article 3: Access to the procedure for examining an application for international protection
Article 17: Obligations of the applicant and cooperation with the competent authorities	/
Article 18: Consequences of non-compliance	/
Article 19: Right to information	Article 4: Right to information
Article 20: Accessibility of information	/
Article 21: Right to legal counselling	/
Article 22: Personal interview	Article 5: Personal interview
Article 23: Guarantees for minors	Article 6: Guarantees for minors
Article 24: Hierarchy of criteria	Article 7: Hierarchy of criteria
Article 25: Unaccompanied minors	Article 8: Minors
Article 26: Family members who legally reside in a Member State	Article 9: Family members who are beneficiaries of international protection
Article 27: Family members who are applicants for international protection	Article 10: Family members who are applicants for international protection
Article 28: Family procedure	Article 11: Family procedure

Article 29: Issue of residence documents or visas	Article 12: Issue of residence documents or visas
Article 30: Diplomas or other qualifications	/
Article 31: Visa waived entry	Article 14: Visa waived entry
Article 32: Application in an international transit area of an airport	Article 15: Application in an international transit area of an airport
Article 33: Entry	Article 13: Entry and/or stay
Article 34: Dependent persons	Article 16: Dependent persons
Article 35: Discretionary clauses	Article 17: Discretionary clauses
Article 36: Obligations of the Member State responsible	Article 18: Obligations of the Member State responsible
Article 37: Cessation of responsibilities	Article 19: Cessation of responsibilities
Article 38: Start of the procedure	Article 20: Start of the procedure
Article 39: Submitting a take charge request	Article 21: Submitting a take charge request
Article 40: Replying to a take charge request	Article 22: Replying to a take charge request
Article 41: Submitting a take back notification	Article 23: Submitting a take back request when a new application has been lodged in the requesting Member State / Article 24: Submitting a take back request when no new application has been lodged in the requesting Member State / Article 25: Replying to a take back request
Article 42: Notification of a transfer decision	Article 26: Notification of a transfer decision
Article 43: Remedies	Article 27: Remedies
Article 44: Detention	Article 28: Detention
Article 45: Time limits for detained applicants	/
Article 46: Detailed rules and time limits	Article 29: Modalities and time limits
Article 47: Costs of transfer	Article 30: Costs of transfer
Article 48: Exchange of relevant information before a transfer is carried out	Article 31: Exchange of relevant information before a transfer is carried out
Article 49: Exchange of security-relevant information before a transfer is carried out	/
Article 50: Exchange of health data before a transfer is carried out	Article 32: Exchange of health data before a transfer is carried out
Article 51: Information sharing	Article 34: Information sharing
Article 52: Competent authorities and resources	Article 35: Competent authorities and resources
Article 53: Administrative arrangements	Article 36: Administrative arrangements
Article 54: Network of responsible units	/
Article 55: Conciliation	Article 37: Conciliation
Article 56: Solidarity Pool	/
Article 57: Council implementing act establishing the Solidarity Pool	/
Article 58: Information regarding the intention to use the Solidarity Pool by a Member State identified in the Commission Decision as being under migratory pressure	/
Article 59: Notification of the need to use the Solidarity Pool by a Member State that consider itself under migratory pressure	/
Article 60: Operationalisation and coordination of solidarity contributions	/
Article 61: Deduction of solidarity contributions in situations of migratory pressure	/

Article 62: Deduction of solidarity contributions in significant migratory situations	/
Article 63: Responsibility offsets	/
Article 64: Financial contributions	/
Article 65: Alternative solidarity measures	/
Article 66: Reference key	/
Article 67: Procedure before relocation	/
Article 68: Procedure after relocation	/
Article 69: Procedure for Responsibility Offsets under Article 63(1) and (2)	/
Article 70: Other obligations	/
Article 71: Financial support	/
Article 72: Data security and data protection	Article 38: Data security and data protection
Article 73: Confidentiality	Article 39: Confidentiality
Article 74: Penalties	Article 40: Penalties
Article 75: Calculation of time limits	Article 42: Calculation of time limits
Article 76: Territorial scope	Article 43: Territorial scope
Article 77: Committee procedure	Article 44: Committee
Article 78: Exercise of the delegation	Article 45: Exercise of the delegation
Article 79 - Monitoring and evaluation	Article 46: Monitoring and evaluation
Article 81: Amendments to Regulation (EU) No 2021/1147 [= AMIF Regulation]	/
Article 82: Amendments to Regulation (EU)2021/1060 [= CPR Regulation]	/
Article 83: Repeal of Regulation (EU) No 604/2013	/
Article 84: Transitional measures	Article 41: Transitional measures
Article 85: Entry into force and applicability	Article 49: Entry into force and applicability



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