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Abstract*

The ‘flexible’ interstate solidarity model envisaged by the 2020 ‘New Pact on Migration and Asylum’ (‘the Pact’) allows European Union (EU) member states to choose how to do their share in the distribution of the costs connected to asylum. According to one of the proposals contained in the Pact, member states have the option to contribute to the distribution through return sponsorship, taking measures to facilitate the return of irregular migrants residing in other member states.

In this paper I ask: should EU member states be allowed to discharge their solidarity obligations through return sponsorship as envisaged by the Pact? Scholars of the Common European Asylum System (CEAS) have raised several doubts about this proposal, particularly regarding the feasibility of return sponsorship and the related risks for human rights. Although the proposal is pragmatic in some respects, these problematic aspects pose at least two questions for normative political theorists: first, should member states be allowed to choose their form of contribution in a solidarity scheme? And, if so, should return sponsorship be one of the contributions allowed? Building on normative theories of solidarity in the EU, this article will argue that return sponsorship should be rejected both because it does not further solidarity among member states and because the rights of rejected asylum seekers set a strong presumption against it.

Keywords

Asylum, solidarity, return sponsorship, New Pact on Migration and Asylum.

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Introduction

The 'flexible' interstate solidarity model envisaged by the 2020 'New Pact on Migration and Asylum' ('the Pact') allows European Union (EU) member states to choose how to do their share in the distribution of the costs connected to asylum. According to one of the proposals contained in the Pact, member states have the option to contribute to the distribution through return sponsorship, taking measures to facilitate the return of irregular migrants residing in other member states.

In this article I ask: should EU member states be allowed to discharge their solidarity obligations through return sponsorship as envisaged by the Pact? Research on the Common European Asylum System (CEAS) has raised several doubts about whether the proposed return sponsorship mechanism can be a response to the blatant lack of solidarity among member states. There are also serious concerns as to the risks for human rights that implementing return sponsorship would entail. Although the proposal contained in the Pact is pragmatic in some respects, these problematic aspects pose at least two questions for normative political theorists: first, should member states be allowed to choose their form of contribution in a solidarity scheme? And, if so, should return sponsorship be one of the contributions allowed? Building on normative theories of solidarity in the EU, this article will argue that return sponsorship should be rejected both because it does not further solidarity among member states and because the rights of rejected asylum seekers set a strong presumption against it.

The article is structured as follows. The first section introduces return sponsorship, outlining some of the main feasibility and legal concerns that have been raised in connection to this proposal. In section two, I assess return sponsorship both as a way to discharge solidarity obligations in the EU and as such, with respect to the rights of rejected asylum seekers.

Matching aspiration with action?

The EU's 'New Pact on Migration and Asylum' ('the Pact'), published in September 2020 (COM(2020) 609 final) represents yet another attempt to implement the principle of solidarity in the CEAS. EU member states have committed to this principle in articles 67.2 and 80 of the Treaty on the Functioning of the European Union (TFEU) but have failed to implement it in practice so far. The main manifestation of this failure is represented by the repeated attempts to reform and overcome the Dublin Regulation. This regulation assigns exclusive responsibility for migration management, case adjudication, and integration measures to few, relatively worse-off gateway member states, namely those where asylum seekers first enter EU territory. The failure of interstate solidarity in the EU became tragically apparent amid the 2015 reception crisis, when member states systematically returned to ad hoc and unilateral measures to face the emergency, including the closure of their borders.

The aspiration of the Pact is to remedy this failure by providing a new solidarity mechanism whereby states are no longer penalized on the grounds of their geographical positioning and where all of them contribute to maintaining the CEAS by sharing the costs connected with arrivals in the EU. The Pact contains a commitment to a "human and humane approach" to protection and emphasises that immigration is necessary and positive for Europe (von der Leyen 2020). Some key proposals put forward in the Pact, however, raise questions as to whether this aspiration can realistically "match with action" and lead to normatively desirable outcomes (von der Leyen 2019). More specifically, the proposed Pact presents at least two aspects that deserve more thorough consideration.

The first one is the flexible redistribution key envisaged with respect to each member state's contribution to asylum management. The Pact states that "member States will have the flexibility to decide whether and to what extent to share their effort between persons to be relocated and those to whom return sponsorship would apply" (New Pact on Migration and Asylum 2020, 5). At the same time, according to the Pact, "the current criteria for determining responsibility (regarding the

examination of the asylum applications) will continue to apply" (New Pact on Migration and Asylum 2020, 6). It is striking that, this way, the problems created by the Dublin system remain de facto untouched. The default responsibility for asylum processing stays with the gateway member states, no binding relocation system is foreseen, and no sanctions are envisaged for those that refuse to participate in relocation (ECRE 2020). If there is 'migratory pressure' on one member state, the others are required to step in but the process described in the Pact resembles a complex negotiation rather than an automatic sharing scheme (Maiani 2020). The proposed system, in fact, may not be any more workable or effective than the current one. For this reason, it has been defined as a missed opportunity to reform the Dublin system rather than a step forward in this direction (ECRE 2020).

The second aspect that we ought to consider is return sponsorship as an alternative to relocation. Under the system envisaged in the Pact, "a Member State may commit to support a [benefiting] Member State to return illegally staying third-country nationals by means of return sponsorship" (European Commission 2020, art. 55 para. 1) introducing flexibility in the proposed solidarity system. A member state that is unwilling to relocate asylum seekers could opt to arrange returns of rejected asylum seekers or people who do not have a right to stay in the EU, in cooperation with and to the benefit of overburdened frontline member states. The sponsoring state would carry out voluntary returns or deportations through bilateral agreements with third countries. It would also take responsibility for returns if these are not carried out within a given period. If the sponsor does not complete the return within eight months (or within a longer period in exceptional circumstances) the returnee is relocated from the benefitting state to the sponsoring state to continue the return procedure there (European Commission 2020).

The Pact puts forward "new forms of solidarity" and champions a "return at any costs" policy to win the approval of as many member states as possible (European Commission 2020; Vosyliūtė 2021). But this compromise has raised significant concerns regarding the feasibility of the new system (Sundberg Diez and Trauner 2021, 16). Firstly, the proposal is based on the assumption that states like the Visegrad group would sponsor the return of irregular migrants, or that they would be willing to take them in should returns fail. However, this seems little more than wishful thinking and certainly not an evidence-based strategy if we consider that the same states have refused to relocate migrants to their territory in the past (Vosyliūtė 2021).

Secondly, it has also been noted that prospective sponsoring states lack partners among third countries and are not deemed reliable when it comes to readmissions and returns (Vosyliūtė 2021). This makes it unlikely that readmission agreements will be concluded in the near future (Vosyliūtė 2021). Thirdly, the proposed system leaves plenty of room for the mishandling of returns by sponsoring countries. This is because it foresees lower procedural safeguards and guarantees to ensure that returns happen in respect of EU and international law. In relation to this, the proposed reform would make it increasingly difficult to track down responsibility and hold sponsoring states accountable for human rights violations along the process (Vosyliūtė 2021).

These legal and feasibility issues are substantial, but the normative political theory literature on solidarity in the EU and on deportations suggests that there are also other normative issues that we ought to consider to fully assess this proposal. The first issue is related to the meaning of the commitment to solidarity: is flexibility of the kind envisaged in the Pact compatible with the demands of solidarity? The other issue that I will examine regards returns: should we consider returns as a contribution to the asylum system in the relevant sense? And is the proposal acceptable from the point of view of the obligations owed by states to irregular migrants and deportees?

Asymmetric solidarity and sponsored returns: a normative assessment

States are deemed to have a first order responsibility not to cause displacement, a second order obligation to open borders and assist those whose human rights cannot be protected otherwise, and

a tertiary responsibility to share the related costs (Miller 2016). The question is how exactly perfect protection duties should be assigned to states in virtue of thhis (imperfect) collective responsibility.[1] To address this question, I will also discuss what obligations states owe asylum seekers, refugees, and migrants in general, including irregular migrants subject to return orders. The distribution of costs among states depends precisely on the level of protection that claimants are entitled to.

A first answer to the problem of allocation of perfect protection duties is offered by the preamble of the 1951 United Nations Convention on the Status of Refugees (the Refugee Convention). The Refugee Convention acknowledges the need to share responsibility among states considering that "the grant of protection may place unduly heavy burdens on certain countries." The principle of non-refoulement, a peremptory rule of international law (or *jus cogens*), establishes that admission and protection duties apply to the protection seeker's state of first arrival (UNHCR 2007, 8). As in the case of the Dublin Regulation, which incorporates this principle into EU law, this poses a disproportionate burden on neighbouring and frontline states solely on the basis of their geographical positioning.

The question of how we should attribute perfect duties to states and curb inequalities deriving from this positional criterion has been addressed by proposed quota schemes. These schemes consider the relative capacity of states as accounted for by their GDP, population volume, and unemployment rates (Thielemann, Williams, and Boswell 2010; Carens 2013; Gibney 2015). It has also been argued that relocation should be taken into account, both for pragmatic and morally-grounded reasons, and the preferences of asylum seekers (Rapoport and Fernández-Huertas Moraga 2014). Other criteria proposed assign special duties to states based on their historical involvement in displacement (Miller 2016; Souter 2014), while some authors have advocated the right of states to set their admission capacity freely (Miller 2016).

Against this background, what is striking about the EU is that its member states have openly committed to the principle of solidarity and the fair sharing of responsibility to manage asylum. These principles form the basis of the CEAS, a complex regional governance system. How should we understand this commitment, then? Building on reciprocity-based internationalism (Sangiovanni 2013; 2015), here I will assume that when two or more agents – in this case, states, on behalf of their citizens and residents – establish, contribute to, and benefit from shared institutions and practices, they have a reciprocal duty to act in solidarity with each other. Solidarity, in this case, should be understood as ensuing not only from the material fact that states have established these institutions and practices together, but also because they are co-responsible for them and their pursuit (Milazzo 2021).

Member states' interactions in the field of asylum and international protection – as in other domains of EU integration – are governed by norms of reciprocity. Each member state has contributed to the establishment of the CEAS and keeps it running, receiving benefits from it as well as incurring some costs. Moreover, the CEAS relies on supranational governance institutions for its functioning, including judicial and executive enforcement and representatives of both EU citizens and states in the European Parliament and in the Council (Bauböck 2018a, 148). This system supports member states in discharging their human rights obligations by pooling together resources (Noll 2003; Bauböck 2018b). Last but not least, the CEAS safeguards the member states' strategic interests by compensating the risks associated with establishing an internal free movement area (Whitaker 1992; Bauböck 2014; 2015; Noll 2000).

What I want to suggest is that the CEAS involves a set of practices and institutions that EU member states have contributed to establish and from which they all benefit, the internal free movement

1 Following Goodin (1995), by (perfect) duty I mean a duty whose fulfilment requires a prescribed action (i.e. the duty not to push back asylum seekers), while I refer to "responsibility" or "imperfect duty" as one that can be discharged by a set of actions, and not by a specific one (i.e. ensuring that refugees are protected).

regime being a case in point. In virtue of this scheme of cooperation, I argue, member states owe each other a fair return for their respective contributions to the establishment and maintenance of the CEAS. I will refer to these associational obligations as a duty to act in solidarity.

In what follows, I first argue that return sponsorship cannot be considered a contribution to the fulfilment of protection duties for which member states should act in solidarity with each other. Then, I explain why return sponsorship rests on an unjust asymmetry of contributions. Lastly, I argue that, even if we were to reject my previous arguments on why return sponsorship does not further solidarity among member states, we should still reject the proposed return sponsorship mechanism if we want to uphold the rights of rejected asylum seekers.

Contributing to what?

The fact that EU member states have a reciprocal duty to act in solidarity to support the CEAS requires, at the very least, that they pool resources together and set up a mechanism to redistribute them in times of need. This is a common understanding of the actions required by solidarity, both when we employ this term descriptively and when we do so normatively, i.e. to spell out what solidarity requires (Stjernø 2009, 2; Milazzo 2021).

If resource pooling and redistribution are the actions demanded by the duty of solidarity, we should ask what kind of contribution EU member states should make exactly. Surely, their contribution should be directed at furthering the jointly established institution or practice at stake, thus helping those who are struggling to do so. The institution concerned here is a protection system, the CEAS. As I sketched out above, EU member states have contributed to its establishment and maintenance, benefitting from it both in terms of greater security and with respect to fulfilling their human rights obligations. The aims of the CEAS as a jointly established practice are to provide asylum and protection, and to share the related costs. Managing migration, including executing deportation orders of those who are found not to have a right to stay in EU territory, is part of the CEAS as a broader migration management system. But it is not directly linked to sharing the costs of providing protection to the greatest number of those who are entitled to it.

By allowing member states to contribute to the CEAS through the execution of deportation orders, this proposal puts contributions to asylum and to irregular migration management on equal footing. Not only is this practically problematic. I believe it also leaves the problem of fairly sharing the costs connected to protection duties unsolved.

At this point, one could object that some of the burden is lifted from the shoulders of frontline states when other states execute returns. Below, I will argue that this poses problems for states' duties to migrants. For now, notice that this objection fails to account for the fact that the effort to manage deportation orders is very different from granting protection. Considering the former as a substitute for the latter makes it all-too easy for states to unburden themselves from the costs of ensuring different forms of protection for individuals that are entitled to it. On this point, recently it has been suggested that that there are several morally relevant forms of protection, including asylum, sanctuary, and refuge, and that each involves different costs, ranging from fully-fledged integration to temporary protection (Owen 2020, 70–86). These varying degrees of protection and the different capacities involved should be taken into account when determining host states' duties. The point is, though, that all of them entail more, i.e. greater long-term efforts, than executing deportation orders from a distance or relocating deportees while attempting to do so.

At this point, I am going to argue that, even if we were to assume that the costs of taking in refugees and deportees were comparable, we would still encounter another substantial problem. It remains unclear, in fact, why some EU member states should be allowed to contribute solely to one aspect of the CEAS.

The latter is a multidimensional protection system that involves a wide range of resources deployed over time, including people, norms, and in-kind resources (Noll 2003). The system also involves a process dimension with different stages, including maritime and land arrivals, status determination, potential relocation, and short-term as well as long-term integration measures. If, under their reciprocal duty of solidarity, member states are co-responsible for the maintenance of the shared practice from which they benefit, then redistribution should cover all resources and stages of the institutional arrangement at stake (Milazzo 2021).

Member states ought to establish a permanent system of both financial and in-kind contributions that cover all resources and stages involved, particularly reception, accommodation, status determination and – when necessary – longer term integration. This is key to achieving a certain level of predictability as to the distribution of costs and benefits, and, this way, ensure compliance (Suhrke 1998, 402; Noll 2003, 241). The system should be based on their capacity and the reasonable dedication of domestic funds, ensuring that asylum seekers and refugees have access to just procedures and adequate standards regardless of the member states that host them. This includes creating a safety net for member states and redistributing resources in times of need. In this sense, solidarity presupposes cooperation and fair sharing of responsibility, but it is a more demanding commitment (Milazzo 2021).

This does not mean, I believe, that we should rule out flexible contributions in a solidarity system provided that minimum thresholds are set for contributions in each area of the protection system. A certain degree of flexibility, in fact, would allow states to specialise in areas where they have a comparative advantage (Thielemann and Dewan 2006, 351). However, without clear thresholds that establish a fixed minimum contribution in each area of CEAS maintenance, across all stages and resources involved, flexible contributions should be rejected. They unjustly favour some states over others, reinforcing existing inequalities and creating a perverse incentive to contribute to preferred areas only.

Note that there is also another reason why, under a duty of solidarity, we should reject à la carte contributions, this time specifically in the form of return support. Systematically allowing states to fulfil their solidarity obligations through return sponsorship has the effect of shifting the CEAS' goals. In the scenario proposed under the Pact, member states would increasingly be cooperating not to ensure that adequate protection is offered to the greatest number of refugees, but to avoid precisely having to ensure such protection. While this may not be wrong as such – and, as I will point out below, we could even say that member states have a duty to act in solidarity in this field, the system's goal would effectively become keeping migrants out and speeding up returns to the expense of adequate protection.

A pragmatic answer to this issue is that the Pact represents a successful example of cross-loading policy preferences brought about by those member states that oppose mandatory relocation (Hadj Abdou 2021, 10) and helps to elicit their compliance. Interestingly, this pragmatic reason suggests precisely that the goal of this contribution scheme is not to ensure that fellow member states are supported in securing asylum seekers and refugees' human rights. Rather, the goal of the system is to avoid having to compel member states to ensure such protection. In fact, it is a move that further contributes to the hybridisation of asylum and migration management, understood as "blurring" the distinction between asylum and border control policies (Brouwer et al. 2021). This hybridisation results in lower safeguards for deportees and gives states more leeway to shirk their protection duties.

Asymmetric solidarity

The second problem with the return-based model envisaged in the Pact is that it rests on an in-built asymmetry of contributions which is not compatible with a duty of solidarity.

By imposing first admission duties on gateway states, the Dublin Regulation is already a way of allocating perfect duties under the collective responsibility for asylum[2]. In fact, it demands a mandatory contribution to the maintenance of the CEAS leaving little room for flexibility. States with an external EU border have no option but to play their part by applying the country-of-first-entry principle and taking protection seekers in.

Assigning asylum duties on the basis of territorial proximity is supported by both legal and moral reasons. A person claiming asylum is vulnerable to the decision of the state where she lodges her claim. The state concerned, therefore, has a special positional duty of care towards her (Gibney 2004, 55; Carens 2013, 206–7; Miller 2016, 84). The principle of non-refoulement reflects this rationale and codifies the duty of care not to push a person to a country where her life would be at risk.

While, on this basis, admission responsibilities should not be traded, the special positional duty of first-admission states is justified as long as it serves its core aim, namely preventing an existential danger for people seeking asylum. Appealing to this principle does not explain why frontline states which fulfil non-refoulement duties on behalf of all EU member states should also do the rest, namely providing reception and integration. To this we should add that, in fact, upon entering one of the member states, asylum seekers also enter EU territory. This means that they are not only subject to national rules, but also to EU law (Bauböck 2018b, 153). These elements suggest that the costs deriving from fulfilling non-refoulement should be redistributed through relocation in virtue of states' collective responsibility for asylum.

The crucial point for my analysis is that this is a form of mandatory contribution. As I have shown, under the current system, frontline states have no option but to contribute through admission, case management, and, given the very small amount of relocation executed, also longer-term integration. Allowing other states to choose their contribution is a privilege that is not supported by legal let alone moral reasons. While the proposed system gives all non-frontline states the option to choose their contribution, it remains unclear why others are simply left to do their share of solidarity obligations with no option as to the preferred form.

Assessing sponsored returns

So far, I have argued that, under the proposed solidarity model based on contribution through sponsored returns, states would not be doing their share within the protection system for which they are co-responsible. Rather, they would shirk their responsibility by not contributing to reception, case adjudication, and integration through relocations.

Now assume that returns could be considered as a contribution to maintaining the system of protection. Clearly, in fact, if one of the founding aims of the CEAS is to compensate member states for the effects of the partial loss of sovereignty over internal borders, then managing irregular migration should count towards maintenance of the system. Therefore, it could be objected that we should consider return sponsorship as a solidarity contribution in its own right. In addition, one could also note that return sponsorship might indeed be demanded under a duty of solidarity, both as a way to preserve the integrity of the asylum system and because greater sharing of deportation costs would leave more resources for protection in frontline member states. Setting this empirical claim aside, I believe this argument encounters a substantial problem in relation to the way that returns would be carried out under the Pact.

Let me first point out that returns as such are not unjust. States do have a right to return people irregularly present in their territory or, in this case, in EU territory. At the same time, they also have a duty to protect the basic human rights of those living under their jurisdiction, be it temporarily or

2 See Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

permanently, including those of irregular immigrants. This means that there are moral as well as legal constraints to the way in which a state can exercise the right to control immigration under the logic of territorial jurisdiction (Carens 2013, 129–30). At the very least, a state may rightfully remove people without residence rights from its territory as long as this happens with full respect of their human rights (Miller 2016, 117).

These views in the literature, though, do not fully address the moral questions posed by the return sponsorship proposal. In fact, the question that we should ask here is whether people who have few prospects of being repatriated should be moved to another member state where they have weaker support networks, thereby losing personal ties, informal jobs, and prospects of integration. We should also add that relocated rejected asylum seekers would likely face a situation of protracted irregularity, similar to the one already experienced in the benefitting state, but this time with weaker support networks and increased risks of deportation or readmission. As the policy literature I introduced earlier suggests, in addition to making deportation more burdensome for migrants, in fact, sponsored returns are likely to increase the risks of indirect or secondary refoulment, detention and other human rights violations.

While we cannot rule return sponsorship as unjust tout court, I believe this creates a strong presumption in favour of objecting to the relocation of rejected asylum seekers who have developed relationships with locals and have entered into a system of social cooperation while waiting for their return (Miller 2016, 124).

It is important to notice that, despite the fact that relocation of rejected asylum seekers implies lower human rights safeguards and increased risks, member states may still be acting in solidarity with each other by enacting return sponsorship. The latter, though, cannot be the object of a duty in this case.

In principle, solidarity may have morally required, morally neutral or even bad goals. Think of the case of a criminal gang whose bonds we could still describe as ones of solidarity. Still, if the goal of the action in solidarity is morally bad, it cannot be morally demanded that it be acted upon (Milazzo 2021). In other words, member states may still act in solidarity with each other in carrying out sponsored returns in the case where they are unjust or there are strong presumptions against them, but this cannot be part of their duty of solidarity.

At this point we can reasonably conclude that the way return sponsorship would be carried out under the Pact sets a strong presumption against it. Furthermore, in any case, returns cannot be part of a duty of solidarity given the risks for human rights that they entail. We could therefore suggest that scrapping the relocation of deportees could be a solution and make the proposed system more just. This, though, poses at least two problems. Firstly, removing the relocation element would not solve the problem of responsibility sharing for returns and deportation in a migration management system. Frontline states would continue to be in charge as long as the sponsoring state does not succeed in readmissions. Scraping the relocation of deportees from the proposal would not solve the problem of responsibility sharing for asylum either. This brings us back to the initial problem of ensuring that solidarity contributions serve the goal of maintaining the institution at stake, albeit allowing for some flexibility.

One last objection that we should consider is that return sponsorship *per se* does not entail increased risks of human rights violations. These risks, it could be argued, could be eliminated or considerably reduced. There is no reason why we could not imagine a return system where the rights of rejected asylum seekers are respected. The question, then, is whether member states should be allowed to contribute via returns in this case.

To respond to this question, we should note that a system that lets member states choose to contribute through return sponsorship negatively selects the sponsoring states that have a strong preference against admitting refugees to their territory. Because of this preference, we can expect

these states to be less likely to respect the rights of the migrants whose return they sponsor. A return system run by EU institutions, rather than by member states directly, might be free from such bias and could represent a solution to the problem. Still, it would have to be monitored by NGOs and independent authorities, such as the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), in order to prevent any abuse.

In sum, while there is a need for a return system, including a mechanism to share responsibility for it, we should reject optional state contributions in the form of return sponsorship. This should apply at least until minimum thresholds of contributions in other areas are met and appropriate safeguards are in place. Doing otherwise, as envisaged in the Pact, inevitably leads to greater risks for the mistreatment of and human rights violations against rejected asylum applicants.

Conclusions

In this article I argued that, even if sponsoring states were more trustworthy and the prospect of returns more likely, we would still have reasons to reject the return-based proposal contained in the New Pact on Migration and Asylum.

Specifically, I argued that return sponsorship should not count towards discharging solidarity obligations among EU member states, and that this is the case for three reasons. The first is that this kind of contribution does not solve the problem of sharing the costs connected to asylum. In fact, it risks shifting the goals of the CEAS away from the morally required provision of adequate protection. Secondly, by giving states the option to contribute either through accepting refugees or sponsoring returns, the proposed system legitimises and perpetuates asymmetric contributions. These contributions unjustly favour member states that are in an advantaged geographical position. Lastly, I claimed that we should be sceptical about return sponsorship because it raises considerable concerns as to the upholding of the rights of prospective deportees. For this reason, I conclude that we should reject return sponsorship not only as a solidarity contribution with respect to the asylum system, but also as a way to share responsibility for returns.

My assessment of the proposals contained in the Pact lends support to a system where relocation of asylum seekers happens upon entry to the EU and without further unnecessary and burdensome relocations at later points in time. Beyond that, it also suggests that flexible solidarity contributions should be acceptable only if they are predictable and once minimum thresholds have been set in each area.

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