Searching for Solidarity
in EU Asylum and Border Policies

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Contents

Failure by Design? On the Constitution of EU Solidarity

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How to Research Solidarity

I shall introduce this paper by considering how our way of framing the question of solidarity in legal research implies a community, and therewith a political choice of sorts. More often than not, we do not choose consciously, as the mapping of our choices would mean so much work. Then again, terms as "solidarity" are intermediary terms in the sense that they lack the precision of ordinary legal norms while still being part of binding law 'in some sense'. In what sense, then? We perform well-rehearsed moves: Article 80 is hardly sufficiently concrete to oblige states to do anything particular, but material enough to be more than a nullity. This calls for a procedure to make sense of the discretion it mandates.

Solidarity: History of a Concept

The prevailing interpretation is that Article 80 TFEU concerns solidarity between Member States only, and not solidarity between Member States and refugees, or Member States and other recipient states in crisis regions (think Lebanon and Jordan, who are carrying a disproportionate burden in the reception of Syrian refugees). But the term "solidarity" is pointing in the opposite direction.

The term has its roots in Roman civil law, referring to the relationship between a creditor and a group of people responsible for the debt. In joint and several liabilities, the creditor can demand payment of the whole debt from any one of the debtors at any time, not just that particular debtor's share of the debt. Solidarity thus increases the chance of a debt being paid. How the debtors among themselves handle the situation when the creditor has demanded payment from one of them, is another question.

As a contrast to the Roman legal solidarity, I shall explain how 19th Century positivists developed a concept that I term French social solidarity. While Roman legal solidarity is based on an ex ante contract between creditor and debtor, French social solidarity is based on the real existence of a social organism.

Why Article 80 TFEU is Bound to Fail

If we read Article 80 through the original Roman law meaning of solidarity, we see that this limited scope is very problematic indeed. In the Roman law of obligation, solidarity presupposes a contract between a creditor and a debtor. By letting "the principle of solidarity" govern no more than relations "between the Member States", the drafters of Article 80 TFEU distanced themselves from this concept of solidarity.

Here is my proposal for a reading of Article 80 TFEU. With the failure of the 2004 Treaty Establishing a Constitution for Europe in French and Dutch referenda, the EU was thrown back into being the piecemeal functional alliance on nation-statist grounds that it had been trying to emancipate itself from so long. If anything, the de-constitutionalization by referendum suggested that no social organism existed at a pan-European level. If you are an EU policy maker and you were just denied a constitution by a couple of obstinate peoples, conjurations of solidarity are the second-best way forward. Hence the EU gestured at the existence of a European social organism through a number of solidarity clauses in the Lisbon Treaty – amongst them, Article 80 TFEU. The social organism implied in these solidarity clauses is a competitive venture: an alternative to the social organisms implied in the nations of the Member States.

So why does Article 80 TFEU fail? The simple answer is that French 19th Century solidarism is based on the experience of the French revolution – an empir-

ical corroboration that an informal social organism can overpower any Ancien regime, regardless how well-established it is in the formal sense. Nowhere does the EU ever come close to this: its history is a result of dirigism from above rather than emergent from below. If we think like French 19th Century positivists, there is simply no social organism in evidence here, and the use of the label "solidarity" in the treaties is a meaningless appropriation of a historical experience particular to the French nation state.
My point is that Article 80 TFEU is so contradictory in its legal construction that it cannot lead to any practical results – neither in policy nor in front of the EU Court of Justice.

Article 80 Compared to Other Solidarity Provisions

May other provisions in primary law help in an effort to read Article 80 TFEU? Roman legal solidarity as well as French social solidarity might provide a backdrop against which these provisions may be analysed.

Amongst the EU's "Common Provisions" set out at the beginning of the TEU, Article 3(3) offers a first use of the very term we are preoccupied with:

> [The Union] shall promote economic, social and territorial cohesion, and solidarity among Member States.

This is arguably a transmutation of French social solidarity in the sense that it eclipses nation-statist solidarity. The use of the verb "promote" suggests that there is no hard obligation between creditor and debtor at work in this provision, and that Roman legal solidarity is completely absent in this norm. My reading in line with the logic of French social solidarity would be that there is no social organism at the EU level just yet, but to the extent the EU sees it emerging, it has to be promoted. So an obligation under Article 3(3) TEU would only kick in if a "positivist" analysis shows a European people to have emerged. That is quite a tall order indeed.

Looking back at my analysis of Article 80 TFEU now, it appears that the same interpretation is valid for that provision. The solidarity norm in Article 80 TFEU will only provide a hard obligation on Member States and the Union if and only if a European people has been shown to have emerged. It is unlikely, though, that this Article has been drafted with such long foresight.

To corroborate my point that the drafters simply were not on top of the concept they used, let me add an analysis of Article 42(7) TEU and of Article 222 TFEU in order to show that the use of solidarity language is equally misplaced there.

Can European Solidarity be Provoked?

We should take a look at the policy gamble currently performed by the German government. In short, Germany and its asylum procedure is kept accessible to certain nationalities of asylum seekers moving north across the Balkans and Germany has been the main recipient of 2015/16 arrivals in Europe in total numbers. So far, Chancellor Merkel has withstood domestic pressures to adopt stronger deflective policies, while agreeing to various asylum law packages downgrading protection. Even though Germany has quite some weight to toss around in the Council, its attempts to bring about more tangible forms of EU responsibility sharing have been a failure so far.

It is helpful to read this through French solidarity thinking, in particular Léon Duguit. Assume that Chancellor Merkel believes in the existence of the European people as one organism whose very survival depends on "solidaristic" behaviour. Duguit holds that the law can very well be out of sync with organic solidarity, and that it is organic solidarity that will prevail in the end. What the Merkel government has been doing since mid-2015 could be cast as a provocation of organic solidarity. That other Member States resist her attempts to make more "solidaristic" laws might be just a symptom that EU law indeed is out of touch with its factual base. If she thinks as Duguit, there is no other alternative for her but to insist, lest she be prepared to forgo the survival of the European people as a solidarity organism.

It is indicative that EU articulations of solidarity make no sense under either Roman legal solidarity of French social solidarity traditions, but that her policy does, for all its practical limitations. Whether that is enough for it to succeed is quite another matter.

Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance 'crisis'?

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1. EU's 'refugee crisis' as an implementation governance crisis

The last year was marked by the implosion of EU's asylum system. The EU 'refugee crisis' is certainly a crisis for the refugees themselves who embark on perilous journeys in order to reach the EU territory in a clandestine manner and thereafter face dire humanitarian conditions in several parts of the Union. Keeping this background and intense human suffering in mind, this short paper is concerned with the perspective of the EU refugee crisis as an asylum policy governance crisis, notably in what concerns the implementation stage. The issue of solidarity and fair-sharing of responsibility between Member States rests at the core of this line of analysis. I critically assess the initial assumptions around the implementation of the policy, the picture revealed after the conclusion of the second stage of legislative harmonisation, and finally the latest set of 2015 measures, with a focus on those establishing people-sharing arrangements.

2. Implementation of the EU asylum policy: 'initial assumptions'

The initial assumption for the operationalisation of the EU asylum policy was that it would happen through the rather 'classical' model for the administration of policies when competence is shared between the Union and Member States. Namely, each Member State was expected to hold the primary responsibility to implement at national level the legal rules that had been harmonised at EU level. These norms created a number of obligations, such as running a functioning and well-resourced asylum system, including the provision of adequate material reception conditions and an effective determination system. Asylum procedures would lead to a national determination outcome; if it were positive it would be valid at national level, if it were negative, it would be valid throughout the EU. Recognised beneficiaries did not enjoy freedom of movement rights, in the sense of an authorisation to legally settle and work in Member States other than the one that had granted a residence permit for protection grounds. In such a conception, 'burden-sharing' was mainly realised through 'sharing of norms'. This was expected, somewhat naively, to have in and of itself a double effect. Legal harmonisation would ensure that inequalities would not persist in practice, thus taking away the incentive from asylum seekers to move between Member States. Common minimum standards were also expected to ensure that Member States would not compete with each other in deflecting protection obligations by going below the agreed minimum.

In this initial stage of development, part of the asylum measures were explicitly conceptualised as 'directly related flanking measures' to the aim of ensuring free movement of persons.[1] This was the case for an administrative component of the asylum policy, the Dublin Regulation, which governed the allocation of responsibility for asylum applications between the Member States. One member state was to be responsible for each application. The regulation provided a hierarchy of criteria for identifying the responsible state, in principle the state primarily responsible for the person's presence in the EU. In effect, this usually means the state first entered. As many refugees travel without visas, making air travel to the EU virtually impossible, this tends to shift the EU's aggregate responsibility for refugees toward states at its eastern and southern periphery and would have left these Member states bear-

1 See Treaty Establishing the European Community, OJ C 325 [henceforth: TEC Amsterdam], Article 61(a) read in conjunction with Articles 63(1)(a) and 63(2)(a).

ing the bulk of that responsibility-had the Regulation been dutifully applied.

The measures that were put in place in this first period to offset imbalances[2] were rather meagre. They mainly consisted in re-allocation of funds, through the European Refugee Fund, that only partially covered national expenses incurred in this field. For the rest, responsibility-sharing was more seriously contemplated in exceptional circumstances that would call for the operationalisation of the Temporary Protection Directive. This is an extremely brief and rather simplified presentation of the initial implementation construct. However, it is not hard to discern the 'systemic deficiencies' in terms of responsibility-sharing in the operationalisation of EU's asylum policy.

3. Implementation of the EU asylum policy: 'what happened next'

What resulted from this implementation construct has been well documented and analysed in a wealth of other research undertaken by academia, civil society and think tanks. In a nutshell, divergent recognition rates, uneven distribution of responsibilities, structural deficiencies in national asylum systems, inability and unwillingness to implement standards and the prevalence of mistrust among Member States were some of the symptoms plaguing EU's asylum policy. In the meantime, EU's ambition remained high. After the adoption of the first generation instruments, the goal was that of the establishment of a 'Common European Asylum System' (hereafter CEAS), and it was acknowledged that further legal harmonisation alone would not bring about this result. Another piece of research critically analyses in detail the incremental development of the elements of CEAS other than legislative harmonisation.[3] I will focus here on another perspective, that of the ensuing picture in terms of the governance of implementation in the so-called 'second stage of development' of CEAS, which could be summarised as follows.

Firstly, legislative harmonisation was further enhanced. Overall, it can be concluded that this later round of legislative harmonisation brought about moderate improvements in different areas: coherence between asylum instruments and the level of harmonisation, as well as adherence with fundamental rights and with international refugee law norms. However, the amended instruments failed to move beyond the initial policy confines and to include provisions that would have helped render the system cogent by altering the envisaged model of implementation in order to introduce significant elements on fair responsibility-sharing.

Notably, no fundamental reform of the system's responsibility-allocation mechanisms was undertaken, despite the mounting criticism of the Dublin Regulation's shortcomings. Moreover, no measures were taken to realise the Lisbon Treaty's call for the creation of a 'uniform status of asylum for nationals of third countries, valid throughout the Union'.[4] Logically, this would entail mutual recognition of positive asylum decisions and the transfer of protection statuses between the Member States. The limited amendments to the Long-Term Residents Directive have not addressed any of the above issues.

Practical co-operation between national asylum administrations did gain prominence and culminated in the establishment of an EU agency, the European Asylum Support Office (EASO). In a nutshell, although it carries within it great potential, the agency is restrained through its budget, mandate and governance structures. Hence, I would argue that the creation of EASO did not mark a radical departure from the classical model of implementation, and responsibility continued to primarily rest with individual Member States. The type of activities envisaged in the Regulation are beneficial but cannot address structural deficiencies, or offset imbalances in the distribution of responsibility between different Member States.

Sharing of financial resources evolved as well with the creation of the Asylum, Migration and Integration Fund. Several positive developments can be discerned such as: establishment of multi-annual planning;

2 Those were based on TEC Amsterdam, Article 63(2)(b) which directed the EU legislative bodies to adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees'.

3 P De Bruycker and E Tsourdi, 'Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension' in V. Chetail, P. De Bruycker & F. Maiani (eds.), Reforming the Common European Asylum System: The New European Refugee Law (forthcoming, Brill/Martinus Nijhoff 2016).

4 See TFEU, Art 78(a).

stronger incentives for Member States to participate to refugee resettlement initiatives; lowering the level of co-financing, or even completely doing away with that requirement in emergency situations. Nevertheless, the amounts are distributed taking into account certain indicators that are calculated on the basis of absolute, rather than relative figures, and therefore fail to take into account the actually perceived 'burden' of each Member State in running an asylum system.[5] In addition, the Fund still is conceived in such manner that the current amount of EU funding only covers a rather moderate percentage of the costs actually incurred by each Member State in this area.

Physical solidarity, meaning the intra-EU transfer of asylum seekers or protected persons between EU Member States was extremely limited and underdeveloped prior to the 2015 measures. It was applied on a small scale through ad-hoc initiatives of a voluntary nature that were undertaken exclusively in Malta. Very concretely, 227 individuals, mainly protection beneficiaries but also asylum seekers, were relocated from Malta in 2011 and 356 places were pledged for the second phase of the project in 2012.[6] Intra-EU relocation initiatives had been limited to such an extent that they could be viewed as political tokens rather than as fully-fledged operations.

To conclude, 'what happened next', was that the further legislative and policy measures and initiatives that were undertaken, including practical co-operation, financing and the limited people-sharing experiments, did not fundamentally alter the initial assumptions and arrangements for the implementation of the policy. Naturally, they therefore failed to address the 'implementation gap' that resulted from the first phase of legislative harmonisation. This led to an implosion of the system when it was strained by increased arrivals in the course of 2015.

4. Implementation of the EU asylum policy: 'crisis-induced people-sharing initiatives and why they miss the mark'

Noting with concern deaths at sea and the increased number of arrivals to the EU territory, the European Commission launched in May 2015 a European Agenda on Migration and adopted a series of measures in its aftermath, including two relocation decisions, respectively adopted on 14 and 22 September 2015, as well as a proposal for a crisis relocation mechanism. The scale of envisaged support was certainly greater than in the past and a more serious effort was made to reflect on how responsibility was shared among the Member States. Do these measures signal an evolution in the 'implementation governance' of CEAS though? This is in fact a rhetorical question; I give some conceptual accounts as to why that was not the case, focusing in particular on people-sharing.[7]

Most importantly these measures form part of an exceptionality regime. The two relocation decisions establish a temporary derogation to the first entry criterion of the Dublin Regulation. Theirs is a time-limited mechanism that concerns a specific number of beneficiaries. It cannot be adjusted according to the actual number of arrivals. Interestingly, Member States that relocate asylum seekers under this scheme are to receive a lump sum per relocated person under Union funding. Acknowledging that emergency funding has been disbursed to both Italy and Greece, I note that there is however no full equivalent under the normal working of the Dublin system i.e. neither Member States at the EU external border, nor 'destination' Member States could claim a lump sum of Union funding per asylum seeker as part of the Dublin system. The other proposed mechanism, that is to be permanently anchored in the Dublin Regulation, is also conceptualised as a response to an exceptional situation, a crisis straining the national asylum system. None of these measures provide assurances that responsibility to provide protection will be shared equitably on a permanent basis.

Moreover, all schemes concern a particular type of asylum seekers, those whose nationalities carry a first-instance recognition rate equivalent or higher to 75% according to the latest available updated quarterly Union-wide average Eurostat data. This is justified by the logic of not unduly prolonging the stay in EU territory of third country nationals that are more likely to be an object of a return order. In practice,

5 See also P De Bruycker and E Tsourdi, 'In search of fairness in responsibility sharing' (2016) 51 FMR, 64.

6 EASO, EASO Fact Finding Report on Intra-EU Relocation Activities from Malta, 2012, 4.

7 Some of the points in this analysis were raised in greater detail in the following publication: E Tsourdi and P De Bruycker, 'Relocalisation: une réponse adéquate face à la crise de l'asile? Note d'analyse' (Newsletter EDEM, septembre 2015).

it leaves border Member States to deal with applicant caseloads that raise more complex facts and are thus more resource-intensive, if EU standards on decision-making are to be upheld. In addition, it is up to those same Member States to bear the responsibility for processing, and financing to a large extent, return.

Finally, asylum seekers' agency is once again largely disregarded in the framework of both the relocation and crisis mechanisms. Although Member States are called to take into account the 'specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties', there is no guarantee that these will be upheld. Nor is their acquiescence necessary prior to the enforcement of a relocation decision. These restraints are not counterbalanced in the post-recognition phase, given that freedom of movement rights for recognised beneficiaries are tied to the very strict conditions of the Long Term Residents Directive. Hence, current proposals fail to address also another set of factors that undermined the efficiency and practicality of previous responsibility-allocation arrangements.

Other contributions in this publication expand in detail on the nature and extent of practical co-operation efforts that complement these people-sharing initiatives. Suffice to say though that so far the mandate and governance structure of and method of funding operations for EASO have not been amended and therefore many of the limitations touched upon in the previous section persist. Therefore, on the whole, the 'crisis-induced' measures also do not seem apt to addressing the 'implementation gap' or rationalise the governance of what is to be a common system.

5. Conclusion

Not so long ago, in 2014, EU institutions and Member States heralded the dawn of the age of implementation in the EU asylum policy.[8] However, as this short paper has synoptically exposed, the limitations inherent in the conceptualisation of EU's asylum system, and lack of fair responsibility-sharing persist. This inability to reshape the governance of the implementation stage, thus addressing responsibility-sharing issues at their core, continues even now that the EU is in 'crisis mode'. Ineffectiveness and rational thinking are not the only factors pointing to the necessity of change. I elsewhere advance an interpretation of Article 80 TFEU enouncing the principle of solidarity and fair-sharing of responsibility as a provision that establishes a 'duty to support', i.e. that demands concrete action from both Member States and EU institutions at the implementation stage, while at the same time indicating how far-reaching such action should be. [9]

In the meantime, EU institutions and Member States have made a U-turn within the course of just a few months and seek salvation through different paths. On the one hand they newly aspire to externalisation.[10] Such a solution may seem appealing at first sight, as one that makes 'the problem' disappear without even requiring putting our own house in order. However, it raises serious questions as to its compatibility with fundamental rights,[11] let alone its viability from an international relations perspective.[12] On the other hand, destination Member States, that in recent months had to deal with increased arrivals that happened through uncoordinated but tolerated secondary movements, are increasingly finding the result of these ad-hoc 'arrangements' unfair. One might have thought that this

8 See European Council conclusions, EUCO 79/14, 27 June 2014 and for a commentary P De Bruycker, 'The Missed Opportunity of the "Ypres Guidelines" of the European Council Regarding Immigration and Asylum' (Migration Policy Centre Blog, 29 July 2014).

9 E. Tsourdi, Administrative Governance in the European Asylum Policy: Towards a Common System (forthcoming, ULB 2016).

10 Press reports on the recently agreed deal of NATO's envisaged operation in the Mediterranean characteristically state that the hardest hurdle to overcome was 'making sure the NATO mission wouldn't end up acting as a transport company for migrants' and that this would be ensured in the following manner: 'when NATO ships rescue people, they'll take them back to Turkey rather than on to Greece'; see F Eder, '72 hours to launch NATO's migrant mission', Politico (11 February 2016)

11 See S Peers and E Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?' (EU Law Analysis, 5 February 2016).

12 Turkish President Recep Tayyip Erdoğan is reported to have stated the following on 11th February 2016: '[w]e do not have the word 'idiot' written on our foreheads. Don't think that the planes and the buses are there for nothing. We will do the necessary'; see EurActiv.com with agencies, 'Erdogan threatens to send refugees to the EU by plane and bus', Euractiv.com (11 February 2016).

would have led them to use their political capital to push for the introduction of permanent measures of fair-responsibility sharing between all Member States, irrespective of their geographic position. They have nevertheless responded by 'intra-EU externalisation' efforts, i.e. a domino of reintroduction of internal border controls with their neighbours that can only be legally sustainable through what effectively amounts to 'scapegoating' Member States at EU's external borders, notably Greece.[13] In the meantime, EU institutions are calling for the same Member State to uphold its obligations through the Dublin Regulation in view of resuming transfers. We therefore seem to be moving back to square one… If, admittedly difficult, discussions on the governance of the implementation stage halt in view of these developments, the 'next day' will find the EU more ill-prepared and divided than ever.

13 See F Maiani, 'Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?' (EU Migration Law Blog, 3 February 2016).

Practical cooperation and the first years of the EASO

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* The views expressed herein are the personal opinions of the author, and do not necessary reflect the position of UNHCR or the United Nations.

The European Asylum Support Office, established by Regulation[14] in 2010 and operational from mid-2011, has been mandated to support practical cooperation among EU Member States on asylum (Articles 3-7, EASO Regulation). According to the Preamble of the agency's founding Regulation, such practical cooperation was needed to 'increase convergence and ensure ongoing quality'[15] in the asylum claim decision-making, in light of the acknowledged disparities in practice and standards between Member States.[16] Its central functions were also defined to include supporting Member States subject to 'particular pressure' (Articles 8-10); and contributing to the implementation of the CEAS (Articles 11-12). The Preamble to the Regulation foresaw that it should become a 'European centre for expertise on asylum, so Member States are better able to provide international protection. while dealing fairly and efficiently with those who do not qualify'[17] for such protection under EU law.

This paper seeks to analyse and draw some conclusions about key areas of EASO's activity, based on the experience of five years of the agency's operation to date, and in the changing context in which EASO's role and working methods have developed.[18] It seeks to draw conclusions on the organisation's positive achievements, as well as its limitations, and the reasons for less optimal outcomes in some areas of its work.

Information, documentation and analysis

Based on Article 9 of the EASO Regulation, the agency is empowered to 'gather and analyse' information on asylum, including on asylum applications, pending cases and decisions on asylum claims, among other information. Some of this data is also assembled and published regularly by other organisations, including notably Eurostat and UNHCR. Unlike Eurostat and HCR, however, the statistics compiled by EASO are compiled on a monthly basis, and confidentially shared with MS and EU institutions. They also appear in public form in Quarterly Reports that are made available on the internet. While EASO's statistics are admittedly drawn from raw data provided by MS which has not been checked and verified, it has the advantage of appearing much earlier than that of other bodies, potentially serving the needs of those users looking for information closer to 'real time.' Some question, however, whether such unverified information provides a sufficiently accurate and consistent EU-wide picture to inform critical policy-making processes.[19]

Training

EASO has taken forward the development of a common Training Curriculum for MS' asylum officials, covering core legal questions and skills involved in the asylum decision-making process. This curriculum has been developed through e-learning and blended training tools, among others, in ways that aim to make it

14 Regulation (EU) 439/2010, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF

15 Ibid, Recital 5

16 Ibid, Recital 2.

17 Ibid, Recital 13.

18 Note: this document does not examine in detail the mandate and powers of EASO, which will be discussed in another session.

19 See Laczko et al (2016), 'What do the data really tell us?', Forced Migration Review: Destination Europe.

as accessible as possible to MS, including some which previously had few or no training resources for new staff or those in need of ongoing training. As such, it has addressed an important gap, which was acknowledged in new provisions in the recast Asylum Procedures Directive, mandatorily requiring training for officials on key topics. However, it remains available in limited languages only, and reliant on expert trainers from the MS to deliver key parts. It has also been argued that the EASO training materials could and should be made more widely and publicly available, including to lawyers and civil society, in order to build their skills and improve the quality of representation and submission in national asylum procedures, and in the interests of transparency and maintaining high standards in the materials.

Special and emergency support

EASO's work to assist States requesting support, including in situations of 'particular pressure' such as those experienced by Italy and Greece in recent years, has arguably been among its most important undertakings. The agency has emphasised its readiness and ability to assist States in very different situations, highlighting training support provided to Luxembourg (2011-12) and Sweden (2012). For States with more far-reaching needs, however, the constraints on the expert resources available at EASO's disposal have limited its impact. The agency relies on MS to nominate and deploy personnel to take part in 'Asylum Support Teams' which provide advice and capacity-building help. Yet as MS across the Union have experienced increased demand, their readiness and ability to make available experienced staff has diminished. Support to Greece's asylum reform process required deployment of significant numbers of experts across many areas of the asylum process, for extended periods, in order to achieve far-reaching change. Yet this level of contribution was more than many MS were able to sustain over time.

Limits on the asylum support teams' ability to engage in operational activity – extending beyond offering advice, suggestions for working methods and tools – has also been identified as a shortcoming. When Bulgaria in 2013-14 required immediate help in the form of personnel deployed on the ground to construct shelter, provide meals and render medical services, UNHCR and NGOs were able to move in and address those gaps. EASO's assistance to Bulgaria, by contrast, took the form of advice and standard operating procedures to improve processes. While useful, it could be argued that these were not necessarily the immediate priority in that situation.

Early warning – EASO is responsible for gathering information and supporting the operation of 'early warning' systems under its own Regulation (Article 9) as well as the recast Dublin Regulation (Article 33). Both systems place the agency in a pivotal role, as the information it provides should assist the Council and Commission to reach a decision on launching early warning measures. These should serve to avert situations of 'crisis' due to particular pressure, related to deficiencies in the functioning of a national asylum systems or otherwise.

Yet despite mounting evidence of weaknesses in several MS' asylum systems since 2013, the 'early warning' mechanism under the Dublin Regulation has never been invoked. There were reports that the Commission in 2014 was preparing to propose its use for Italy and Dublin, but that other MS opposed the idea, apparently fearing that courts might find such measures constitute grounds for suspending transfers under the Dublin system. Although the early warning system should have triggered the provision of resources and preparation of preventative action plans, and if necessary, crisis management plans, MS showed reluctance to use a tool designed to facilitate the provision of solidarity, in the collective interest of the MS and preserving asylum standards in the EU.

Relocation and hotspots

EASO has a key role in the process of relocating asylum-seekers under the emergency relocation scheme agreed in September 2015, as the designated agency responsible for dealing with asylum-seekers entering and registering in the EU's 'hotspots', identifying asylum-seekers eligible for relocation and matching them with MS offering places. Relocation measures undertaken to date have been criticised for their slow pace, complex administration and disregard of key legal principles and protection safeguards, among other problems.[20] EASO's work has been hampered by the limited number of personnel made available by MS to staff its activity, only a fraction of the several hundred

20 F. Maiani, Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?' Odysseus Network Blog, February 2016

for which it called. But the apparent focus on ensuring that refugees do not choose their countries of asylum, made clear by the European Commission and others, may have also dissuaded some asylum-seekers from cooperating fully with the process. The lack of clear coordination arrangements between the EU agencies and institutions deployed to staff the hotspots, as well as MS and other personnel, would appear further to have limited the scope for an efficient, swift and protection-oriented process for distributing responsibility for asylum claims more effectively among MS through relocation.

In conclusion, EASO has achieved valuable outcomes and progress in some important areas, including information gathering, analysis and dissemination, and development of common training tools. However, the demands placed upon the CEAS in recent years have outpaced the resources and commitment to collective and mutually-supportive action that MS have been ready to invest in practical cooperation. Expectations and shifting priorities around the EASO's work have not been managed in a way that could have made clear the need for greater MS engagement and stronger coordination mechanisms to facilitate more effective implementation of the CEAS' goals and standards, in line with the principle of solidarity.

Solidarity as a sovereignty-reducing penalty for failing to meet responsibility in the European Border and Coast Guard

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EU agencies like Frontex for the external borders policy or EASO for the asylum policy are European tools for establishing solidarity between Member States. Their goal is indeed to support Member States to better implement the EU rules and policies in those areas. Because those agencies receive their funding from the EU budget, the services they provide are clearly of significant benefit to Member States. As each Member State contributes to the EU budget, solidarity is stronger when the agencies develop activities targeting in particular Member States that are facing disproportionate pressures, such as Greece, for instance, in the case of external border management.

The European Commission tabled on 15 December 2016 a proposal aimed at reinforcing the Frontex Agency by transforming it into a "European Border and Coast Guard Agency" (COM(2015)671). There is without doubt a need to reinforce the control of the external borders in the crisis that the EU has faced since 2015. This is the responsibility element behind that proposal. Simultaneously, there is also a need to strengthen the solidarity between Member States. This has finally been recognised by the EU in the field of asylum, in particular with the proposals on the relocation of asylum seekers between Member States. There is obviously also a need for solidarity in the external borders policy as the Member States controlling those borders act not only for their own interest but also for the interest of the entire Schengen Area.

There is actually an inversely proportional relationship between both elements: the more responsibility is European, the less there is a need for solidarity between Member States; the less responsibility is European, the more there is a need for solidarity between Member States. This is why it is important firstly to understand precisely how responsibility will be shared between the EU and its Member States regarding the control of external borders in the new European Border and Coast Guard. Secondly, on the basis of the results of that analysis, it will be possible to evaluate whether or not responsibility and solidarity are adequately fixed at the right level in the Commission proposal.

1. From the network model to a hierarchical model

The Frontex Agency has been build as the European core of a network made of the national authorities in charge of border controls. Despite the fact that the new Commission proposal intends to enlarge considerably the competences of Frontex, the biggest envisaged change concerns the institutional nature of the Agency: if the proposal is adopted without fundamental changes, Frontex will become the line manager of Member States' authorities in charge of external borders control. The goal of the proposal is to remedy to the insufficient power of Frontex, which desperately needs the cooperation of Member States to act efficiently.

Several of the envisaged provisions make this clear:

- Frontex will adopt a European "operational and technical strategy" with which the "national strategies" that are to be established will have to be "coherent" (Article 3);
- Member States shall "take Frontex risk analysis into account when planning their activities" (Article 10(6));
- Member States have a general obligation to provide timely and accurate information to the Agency (Article 9);

- The Agency will deploy in Member States its own Liaison Officers who will report regularly to its Executive Director on the capacity of Member States to deal with the situation at their external borders (Article 11(3)(e));
- Frontex will control Member States' "capacity" to control their section of external borders: if this "vulnerability assessment" concludes that their capacity is insufficient, a sanction is foreseen: the Executive Director can take a "binding decision imposing corrective measures" to the Member State and if this decision is not implemented, the Management board of the Agency and finally the European Commission may intervene (Article 12);
- Finally, the proposal contains a provision giving to the Agency the power to substitute a Member State's authorities in the case of non-implementation of the corrective measures following a vulnerability assessment or in the case of "disproportionate migratory pressure at the external border risking to jeopardise the Schengen Area"; in such a case, the Member State will be obliged to cooperate with the Agency, which will apply the measures identified by the Commission. This mechanism foreseen by Article 18 of the proposal became immediately infamous as several Member States expressed their opposition to what they consider as a violation of their sovereignty.

2. Responsibility versus solidarity

The Commission proposal envisages transforming the implementation of EU legislation in the field of external borders into a shared responsibility, while Member States have thus far been in charge of controlling their borders corresponding to external borders of the Schengen Area.

The Preamble of the Commission proposal is clear on the way responsibility will be shared between the EU and its Member States by saying that "Member States retain the primary responsibility for the management of their section of the external borders in their interest and in the interest of all member States (recital 5). This underlines that border guards are functionally split by playing a double role at national and at European level. However, border guards remain organically national as their appointment, salary and equipment correspond to a responsibility of each of the Member States. One can therefore conclude that the European Border and Coast Guard proposal prioritises national responsibility over European solidarity.

This does not mean, however, that it is not adequate for contributing to resolving the present crisis at the Greek external borders of the EU. On the contrary, by presenting it as a sanction consisting of the diminishing of the sovereignty of an irresponsible Member State, it can make solidarity more acceptable for the other Member States. However, such a solution will probably prove to be insufficient: firstly, it provides only a temporary solution to a structural problem as the envisaged tools (Joint operations of Member States coordinated by Frontex and Rapid Border Interventions of border guards) are temporary in time; secondly, if such a solution may prove to be useful in the short term, it may be counter-productive in the long run. The lack of financial solidarity between the Schengen States in the funding of border management may indeed incite Member States with external borders to disinvest as the sanction that they risk is… that the EU will intervene instead with its own funding! This could actually even act as a catalyst for more future crises at the external borders of the Schengen Area…

One could then think that more financial solidarity between Member States would be the solution to such distribution of executive competences. However, some Member States that would be requested to contribute more to the EU budget could, with a certain logic, say that they also want to decide about how their money is used, in particular if they do not trust - as is the case for the moment - the Southern Member States in charge of the critical Schengen external borders. Therefore, the only solution seems to be to progress towards a model where the responsibility for the management of the external borders would no longer be shared with Member States but rather concentrated into some kind of truly European agencies resembling federal ones…

Control and Closure of Internal Borders in the Schengen Area

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I. From the Schengen Agreements to Article 77 TFEU and to the Schengen Borders Code

The subject of control and closure of internal borders in the Schengen Area, i.e. an area in which the free movement of persons across the internal borders of the EU (the common borders of the Member States) is ensured, must be contextualized by Article 77(1) TFEU. According to this provision, the Union shall develop a policy with a view to (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders and (b) carrying out checks on persons and efficient monitoring of the crossing of external borders. Free movement of persons within the area without internal border control is thus "a key Union achievement", the origins of which are in the Schengen Agreement of 1985 and in the Schengen Convention of 1990. The latter, recalling that the Treaties establishing the European Communities, "supplemented by the Single European Act", defined the internal market as comprising "an area without internal frontiers", provided for in Article 2(1) that "internal borders may be crossed at any point without any checks on persons being carried out". However, this fundamental rule should not prevent a Contracting Party from deciding, "where public policy or national security so require", that "for a limited period national border checks appropriate to the situation shall be carried out at internal borders".

The Schengen acquis was transformed into EU law with the entry into force of the Amsterdam Treaty and has been developed since then in the framework of the EU in order to contribute towards achieving the objective of offering Union citizens "an area of freedom, security and justice without internal borders". Currently the common rules on the crossing of external borders, on the abolition of checks at internal borders and on the temporary reintroduction of border control at internal borders in exceptional circumstances are codified by the Schengen Borders Code – SBC (Regulation No 562/2006 of 15 March 2006) which repealed and substituted the provisions of the Schengen Convention regulating those matters. The common rules on the reintroduction of border control at internal borders (Articles 23 to 31) were recently amended by Regulation No 1051/2013 of 22 October 2013.

The Schengen Area comprises currently 22 EU Member States and 4 third States. The 26 are usually designated as the 'Schengen States'. The SBC is fully applicable to all of them.

II. On the Concepts of Control and Closure of the Schengen Internal Borders

The SBC defines 'border control' as "the activity carried out at a border, in accordance with and for the purposes of this [Code], in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance". 'Border checks' are "the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorized to enter the territory of the [Schengen] States or authorized to leave it". Finally, 'border surveillance' is defined as "the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks" [Article 2(9) to (11)].

The SBC does not foresee any "closure of internal borders", but only the closure of a "specific border crossing point". Although Article 2(8) defines a 'border crossing point' as "any crossing point authorized

by the competent authorities for the crossing of external borders", Article 22 expressly refers to "road crossing-points at internal borders". Furthermore, Article 28 provides that, where border control at internal borders is reintroduced, the relevant provisions of Title II of the SBC ("External Borders") shall apply mutatis mutandis. It follows that it is also possible for a Schengen State to temporarily close a 'specific crossing point' at an internal border. This is very different from closing an entire (internal) border between all the border crossing points – besides, such a mission would, to some extent, be impossible as was demonstrated namely by the "Berlin wall", which was never completely 'sealed'...

III. The new "common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances"

Before the entry into force of Regulation No 1051/2013, the SBC foresaw in Article 23 the temporary and exceptional reintroduction of border control at internal borders where a Schengen State was facing a serious threat to public policy or internal security deriving either from foreseeable events (for instance, a contested international summit, a very disputed international sport event, etc.) or in cases requiring urgent action (a terrorist incident). In the former case the procedure to be followed was set out by Article 24 and included the obligation for the Schengen State that was planning to reintroduce border control at internal borders to notify as soon as possible the other Schengen States and the Commission and supply them with the pertinent information. Following that notification, the Commission, with a view to examining the proportionality of the measure at stake, could issue an opinion. In the latter case the procedure was established by Article 25, according to which the duty to notify and supply information to the other Schengen States and the Commission was obviously ex post, "without delay". Furthermore, Article 26 established a procedure for prolonging border controls at internal borders. Through this procedure the "limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days" could be prolonged for an undetermined period, provided that it did not "exceed what is strictly necessary to respond to the serious threat" [Article 23(1)].

The amendments introduced in the SBC by Regulation 1051/2013 amount, on the one hand, to more detailed and "communitarised" substantive and procedural rules for the temporary reintroduction of border control at internal borders in cases of serious threat to public policy or internal security of a Schengen State deriving from foreseeable events (Article 24) or requiring immediate action (Article 25). On the other hand, a new and controversial "specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk" was created (Articles 26 and 26a). The risk should be a result of "persistent serious deficiencies" relating to external border control carried out by one or more Schengen States "and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof". The new "specific procedure" seems likely to put the duty of solidarity between the Member States at risk, especially if the context is as problematic as the 'refugee crisis'. In all these cases the Commission has acquired a more active and interventional role [Articles 24(4) to (6) and 25(2)].

The new Chapter II of Title III SBC begins by setting out a "General framework for the temporary reintroduction of border control at internal borders" and for the prolonging of this control. Such framework includes a new and important provision according to which the border control "shall only be reintroduced as a last resort" [Article 23(2)]. Furthermore, in accordance with Article 23a, the Schengen State concerned "shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security, and shall assess the proportionality of the measure in relation to that threat". For that purpose, it shall take namely into account the likely impact of such a measure on free movement of persons within the Schengen Area. The current Article 23(4) provides that, in the cases of reintroduction of border control at internal borders enumerated by the former version of the SBC, the total period during which such control is reintroduced, including any prolongation of up to 30 days, "shall not exceed six months".

Since September 2015 six Schengen States – Germany, Austria, Sweden Denmark, Norway and more recently Belgium – applied Article 24 or 25 SBC in order to reintroduce border control in all their internal borders in connection to migratory flows. France, however, reintroduced such border control in connection

with security reasons (emergency state declared further to the terrorist attacks in Paris on 13 November 2015). In its opinion on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, issued on 23 October 2015, the Commission considered such reintroduction in compliance with the SBC, since it was intended to maintain the control over the extraordinary number of arriving persons by means allowed under national and EU law "in relation to the fact that most of those persons had not been registered in another Schengen State and the non-registration of those persons led to a security deficit given their sheer number".

Concerning, finally, the new Articles 26 and 26a SBC and going straight to the point, these provisions allow, as a maximum, the suspension, isolation or, perhaps better, the ostracism from the Schengen Area of a Schengen State faced with unmanageable difficulties in controlling its external borders pursuant to the SBC, due to a unprecedented migration and refugees pressure over these borders. Such suspension is legally possible only through the adoption of a Council recommendation to "one or more Member States" (and certainly not to the Member State to be "ostracised") in the sense that this/these Member State(s) "decide to reintroduce border control at all or at specific parts of their internal borders". This recommendation shall be based on a proposal from the Commission, "as a last resort and as a measure to protect the common interests within the area without internal border control, where all other measures (...) are ineffective in mitigating the serious threat [to public policy or internal security]" caused by "persistent serious deficiencies relating to external border control" carried out by the Schengen State at stake. However, before the Commission may trigger the application of the procedure provided for by Article 26, two cumulative conditions should be met. Firstly, such deficiencies must be identified in a prior evaluation report drawn up pursuant to Article 14 of Council Regulation No 1053/2013. Secondly, the Commission should conclude that the special situation persists after a three-month period during which the evaluated Schengen State neither followed the recommendations adopted by the Council to remedy any deficiencies identified in the evaluation report, pursuant to Article 15 of that Regulation, nor the recommendations of the Commission adopted "with a view to ensuring compliance with the recommendations referred to in Article 15 of that Regulation" [Article 19b(1) and (3) SBC]. In such conditions border control at internal borders may be reintroduced for a period of up to six months, which can be extended, no more than three times, for a further period of up to six months if the exceptional circumstances persist. Thus, a total of two years of derogations to free movement of persons within the Schengen Area.

Although Article 26 SBC enables the Council to "recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders", this provision should be interpreted, in accordance with the principle of proportionality, as only enabling Schengen States to reintroduce or to maintain border control at their internal borders with the Schengen State concerning which the Council recommended a reintroduction or maintaining of border control, due to the serious deficiencies in the carrying out of external border control identified in the evaluation report. The provision does not allow every Schengen State to do that with all the others. Such an interpretation would disproportionately jeopardize "the free movement of persons within the area without internal border control". Furthermore, Article 26 is the only provision of the SBC that allows the temporary extension of the total period during which border control is reintroduced to a maximum length of two years [Article 23(4)]. But this is only applicable to the Schengen States to which the Council recommended the reintroduction of border control in their internal borders.

In any case, Article 26 SBC seems to be based on a hypothesis which – if not dismissed by EU solidarity measures of technical and financial support towards the Schengen State with unmanageable difficulties in controlling its external – will weaken not only the Schengen State in question but also the whole of the EU. Furthermore, the ostracism of a Schengen State faced with such a situation through the application of Article 26 will appear to be a form of punishment for that State, as if it were necessarily guilty for being faced with circumstances objectively beyond its control. Given the geo-political situation surrounding the southern and eastern EU external borders, it is not difficult to foresee which Member States could potentially be the first recipient(s) of that kind of 'punitive measures'...

In this context, the Council has just adopted on 12 February 2016 a recommendation pursuant to Article 15 of Regulation No 1053/2013 and prompting Greece to "remedial actions to address the serious deficiencies identified by the evaluation report adopted

on 2 February 2016 by the Commission, following an unannounced on-site evaluation visit to Greek sea and land border sites carried out from 10 to 13 November 2015. Hopefully such a recommendation will not culminate in the implementation of a Council recommendation pursuant to Article 26 SBC, urging all the other Schengen States to reintroduce border control at their internal borders with Greece, which are exclusively maritime and/or aerial borders. It would be another very bad sign for the EU.

Hotspots: the case of Greece

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Introduction

This paper aims to give a brief overview of the developments with regard to Hotspots[21] in Greece. It needs to be stressed that, given the fact that staggering and ongoing changes occur in a daily basis, this attempt will have to face the challenge of describing a very fluid picture.

Until mid February, solely the Hotspot in Lesvos was functional, yet still not fully operational.[22, 23] The Hotspot in Chios has been inaugurated only on the 16th of February.[24] According to the Greek Government, the Hotspots in Leros and Samos are also set up and their operation is to be expected in the foreseeable future.[25] Little progress has been made with regard to the construction of the Hotspot in Kos. The total capacity of Hotspots will be around 7000 places, which was about the number of daily arrivals in Lesvos during October.[26]

Even though there is still no clear picture of the implementation of the hotspot approach in practice, several concerns can be expressed both in the light of the functioning of the Hotspot in Lesvos to-date and the problematic aspects of the Hotspots approach in general.

No tailored national legislation

At the moment, no tailored national legislation has been set in force to regulate the establishment of Hotspots and the procedures taking place within their context. The Common Ministerial Decision No 2969/2015[27] issued in December 2015 provides for the establishment of five "First Reception Centers" in the Eastern Aegean islands of Lesvos, Kos, Chios, Samos and Leros, the regulation of which is provided for by existing legislation regarding First Reception Ser-

21 EC, The Hotspot Approach to managing Exceptional Migratory Flows, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf

22 EC, Commission Recommendation of 10.02.2016 addressed to the Hellenic Republic on urgent measures on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013, 10 February 2016, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2016:038:TOC

23 The hotspot in Lesvos was inaugurated on the 16 October 2015. Please see, EC, Remarks by Commissioner Avramopoulos in Athens, following his visit in Lesvos, 17 October 2015, available at: https://ec.europa.eu/commission/2014-2019/avramopoulos/announcements/remarks-commissioner-avramopoulos-athens-following-his-visit-lesvos_en

24 CNN Greece, Εγκαινιάζεται αύριο το hot spot στη Χίο, 15 Φεβρουαρίου 2016, available at: http://www.cnn.gr/news/ellada/story/21800/egkainiazetai-ayrio-to-hot-spot-sti-xio (in Greek)

25 Kathimerini, Four of Greece's five 'hotspot' migrant centres ready, says Kammenos, 16 February 2016, available at: http://www.ekathimerini.com/206027/article/ekathimerini/news/four-of-greeces-five-hotspot-migrant-centres-ready-says-kammenos

26 UNHCR, Lesvos island snapshot – 27 Nov. 2015 available at: http://reliefweb.int/report/greece/greece-lesvos-island-snapshot-27-nov-2015

27 Common Ministerial Decision No 2969/2015 (OG 2602/B/2-12-2015)

vice.[28] However, this legislation fails to respond to and regulate all the challenges arising within the scope of Hotspots' function. As a result, issues not addressed by the existing legislation, for example the involvement of EU Agencies, remain in a legislative vacuum. Only recently, a draft law[29] for the amendment of the Law Regulating First Reception Services[30] (hereinafter Draft Law) aiming to plug this gap has been under public consultation.

First reception services

Contrary to the national first reception legal framework,[31] the vast majority of the people registered in the Hotspot are not provided with first reception services. In particular, in Lesvos those who are registered by the Greek Police as unaccompanied minors are almost exclusively referred to the First Reception Service and thus benefit from such services, yet in conditions that amount to *de facto* detention.[32] It is, however, interesting to mention that, minors commonly declare themselves as adults or accompanied, in order to avoid detention. Therefore, as no special procedure for age assessment or screening is conducted by the Police, only a relatively insignificant number of minors, declaring themselves as unaccompanied minors before the police, are in practice referred to the First Reception Service. The failure to offer first reception services to all newcomers not only raises major protection issues as such, but also does not guarantee that vulnerabilities can be identified– even though this might also play an important role with regard to relocation procedure – and properly addressed.

Asylum Service's capacity

What is also challenging for the fulfilment of the purposes of the Hotspot approach is the capacity of the Asylum Service. The latter, which is the competent authority to deal with both the asylum and relocation applications of newly arrived population and the asylum claims of third country nationals already residing in Greece, can receive and process around 1500 applications per month.[33] This amounts to not more than 18000 applications per year. Therefore it is apparent that, unless there is an emphatic and immediate support of the Asylum Service, Greece will not be in a position to receive and process the 65000 applications for relocation as provided to be done by the relocation scheme within a two-year period,[34] let alone guarantee full and unimpeded access to the asylum procedure to everyone willing to seek international protection. Bearing in mind the extremely high numbers of arrivals[35] and the high percentage of prima facie refugees amongst the newcomers,[36] the limited capacity of the Greek Asylum Service reveals itself to be even an even more problematic issue.

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28 Law 3907/2011 'On the Establishment of an Asylum Service and a First Reception Service, transposition into Greek Legislation of the provisions of the Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third- country nationals" and other provisions".

29 Ministry of Interior and Administrative Reconstruction, Website for Consultations,"Amendment of the Law 3907/2011 and Law 4251/2014- Adaptation of Greek Legislation" available at: http://www.opengov.gr/ypes/?p=3471

30 Ibid no.7

31 Article 7 of Law 3907/2011.

32 Greek Council for Refugees, Mission in Lesvos, February 2016, available at: http://www.gcr.gr/index.php/en/action/gcr-missions/island-activity-reports/item/530-lesvos-2015 (in Greek)

33 Maria Stavropoulou, 'Refugee protection in Europe: time for a major overhaul?' in Forced Migration Review No55, January 2016, available at: http://www.fmreview.org/en/destination-europe/stavropoulou.pdf

34 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

35 According to UNHCR the total number of arrivals of third country nationals in Greece was over 860.000. Please see: UNHCR, GREECE REFUGEE EMERGENCY RESPONSE- UPDATE #8, available at: http://reliefweb.int/report/greece/greece-refugee-emergency-response-update-8-29-november-31-december-2015

36 According to UNHCR, since January 2016 the 63% of the arrivals concerns of third country nationals from Syria and Iraq. Please see: UNHCR, Greece data snapshot 16 Feb 2016, available at: http://data.unhcr.org/mediterranean/country.php?id=83

EU Agencies

The Hotspots approach involves operational support from EU Agencies. Their involvement plays a critical role in a series of procedures taking place within the context of hotspots. However, such an involvement is not provided for by the existing national legislation. The draft law for the reform of the first reception framework does provide for the operation of EU Agencies. However, the actual extent of their support and the exact framework of their operation are not clearly set out in the draft law as this is instead proposed to be regulated via memorandums between the Greek Authorities and those EU Agencies. Concerns are also expressed due to the fact that, as provided by the draft law, the European Asylum Support Office (hereinafter EASO) is to be involved in the identification and reception procedures, even though the only aspect of these procedures relevant to EASO is the referral of the newcomers to the asylum procedure.[37] Another major issue concerning the involvement of the EU Agencies is the fact that no national legal procedure is provided for the control and the challenge of the procedures conducted by them or of their findings, despite the great impact these may have. A very illustrative example of that has to do with the – not uncommon – incorrect registration of individuals' nationalities, which is based on the findings of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX). The lack of a procedure or mechanism to challenge these findings renders it extremely difficult or even impossible in practice to challenge an incorrect or inaccurate registration.

Detention and Return Operations

According to the hotspot approach, return operations will be conducted for those who are not in need of international protection. However, concerns arise regarding the treatment of those not wishing to enter the Greek Asylum System or not having access to it. Since December 2015, newcomers coming from Turkey and the Maghreb countries face detention upon arrival, contrary to newcomers of other nationalities who are not detained.[38] Although Greek legislation provides that detention shall be an exceptional measure,[39] the significant concerns that Greece is heading to a generalized detention scheme appear to become true. In particular, the Draft Law provides that people entering a Hotspot will be subject to freedom of movement restrictions within the premises of the centre for a period of 3 days. This restriction is applied as a general rule, without any prior individualized assessment. In cases where the reception and identification procedure has not been completed within the initial 3 days, there is a possibility of prolonging the restriction of free movement for a further 25 days in order to complete the procedure. Judicial challenge is possible only against the decision to prolong the freedom of movement restriction.[40] According to the Draft Law, the people under restriction of movement are provided with information regarding their rights and can be in contact with NGOs. However, not only is free legal aid not provided by the law, but access to Hotspots for NGOs providing legal aid is not explicitly provided either. Therefore, the actual access of newcomers to free legal aid is at stake. It is interesting to highlight that, so far, the restrictions of liberty posed to the people entering the "First Reception Centres" established under Law 3907/2011 amounted to *de facto* detention.[41] In the light of all the above, it is critical that all the safeguards regarding detention and returns (i.e. proper detention conditions, proper information provision, examination of alternative measures, administrative or judicial review of detention that can be exercised in practice, access to legal assistance, access to asylum, etc.) are respected.

Relocation

The Hotspot approach is supposed to contribute also to the implementation of the Relocation scheme. Certain issues should also briefly be raised in that respect. Firstly, no tailored national legislation has been put in place to regulate the scheme. So far, relocation proce-

37 ECRE, New Greek Law to Include Detention Regime to Hotspots, 12 February 2016, available at: http://ecre.org/component/content/article/70-weekly-bulletin-articles/1379-new-greek-law-to-include-detention-regime-in-hotspots.html

38 UNHCR, Greece Refugee Emergency Response - Update #8, 29 November - 31 December 2015, available at: http://reliefweb.int/report/greece/greece-refugee-emergency-response-update-8-29-november-31-december-2015

39 Article 30 par. 1 of Law 3907/2011.

40 Article 9 of Draft Law

41 ECRE, What's in a name? The reality of First "Reception" at Evros: AIDA Fact-Finding Mission in Greece, February 2015

dures have been regulated by analogy to the Dublin Regulation.[42] As a result, a lot of issues not addressed by the Regulation remain in a legislative vacuum. The criteria examined regarding the country allocation are not clear, thus information provided cannot be comprehensive. The relocation scheme provides a no- choice basis allocation, even if the asylum seeker is asked by the Asylum Service to express a non-binding preference about which country he or she would like to be relocated to. However, it seems that taking into consideration the will of the individual regarding the Member State of relocation would have a positive effect on halting secondary movement between Member States. On this ground, the individuals subjected to a relocation procedure should be given the chance to appeal against relocation decisions in order to dispute the selection of the Member State of relocation and asking to be relocated to one of the three Member States for which the asylum seeker in the relocation procedure has already expressed a preference. Also, an effective remedy against decisions concerning eligibility should also be provided. So far the scheme has not been an alluring one as the potentially eligible individuals are reluctant to get into a lengthy procedure, that might last even two months, only to end up in a country with poor reception conditions and/or integration policies. Lastly, the relocation scheme does not seem to serve its purpose, that is to say the enhancement of burden sharing between Member States, given the fact that the provision for relocation concerns a relatively insignificant number of people compared to the extremely high numbers of arrivals and the high percentage of newcomers in clear need of international protection.[43] What is also indicative of this is the reluctance of some Member States to pledge places, as well as the fact that the number of places formally indicated as available are significantly lower.[44]

Conclusion

A lot more is to be done in order for Greece to fulfil its commitments under the Common European Asylum System (CEAS) and implement the Priority Actions under the European Agenda on Migration. Current pressure on behalf of the rest Member States will lead to further progress in the near future. However, when it comes to solidarity and burden-sharing, what is to be taken into consideration is the actual capacity of economically devastated Greece to provide protection to all the persons in need reaching its territory, given the limited capacity of the Asylum Service, the extremely limited integration of the recognized refugees, the small number of people to be relocated, the massive flows and the high number of people in need of international protection arriving.

42 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

43 According to UNHCR, the total number of arrivals of third country nationals in Greece was about 860,000. Please see: UNHCR, GREECE REFUGEE EMERGENCY RESPONSE- UPDATE #8, available at: http://reliefweb.int/report/greece/greece-refugee-emergency-response-update-8-29-november-31-december-2015. Since January 2016 the 63% of the arrivals concerns of third country nationals from Syria and Iraq. Please see: UNHCR, Greece data snapshot 16 Feb 2016, available at: http://data.unhcr.org/mediterranean/country.php?id=83

44 UNHCR, Building on the lesson Learned to Make Relocation Schemes Work More Efficiently, January 2016, available at: www.unhcr.org/569fad556.pdf