

EU migration and asylum law: a complicate picture

EU migration and asylum law applies in a multi-layer legal system:

- (i) Geneva conventions regime (expressly referred to by the TFEU)
- (ii) Customary rules of international law on the admittance of aliens in the territory of a State
- (iii) Member States ' (MS) competences

The main sources and institutions of EU migration and asylum law:

- Articles 77-80 TFEU and EU Charter
- EU secondary legislation (Dublin regulation et al.: '*Geneva plus*')
- ECJ case-law
- EASO (and Frontex)

But public order and national security matters still belong to MS competences and substantially affect EU action in our field

The 'Dublin format'

EU asylum regime rests on this basic assumptions:

- (i) all MS are parties to Geneva and the ECHR → all are 'safe countries' for the purposes of int'l protection
- (ii) all MS comply with int'l and EU standards and obligations and the principle of mutual recognition prevents any MS to cast in doubt compliance of above standards/obligations by other MS

Thus:

- Only one MS can be responsible for examining an application for int'l protection
- This MS is the first one where the asylum seeker has submitted the application or has illegally entered the EU, i.e. the MS in which she enters the borders of EU territory
- Migrants found in another MS are returned to the 'responsible MS'

The missing assumptions of the ‘Dublin format’ and the flaws characterizing the CEAS

The ‘Dublin format’ apparently solves ‘asylum shopping’ and ‘refugees in orbit’ issues, but

- (i) Migrants flows are not proportional to MS population and wealth, and depend on geography
- (ii) MS mostly affected by migrations are those particularly hit by economic and ‘euro’ crisis, what reduced their budget capacity
- (iii) Migrants are not entitled to move among MS, but EU internal borders control have been removed by the Schengen regime

Further elements have turned these flaws into a ‘perfect storm’:

- Collapse of many middle east and Northern African States functioning as ‘external borders’
- Rise of terrorism, but above all
- Inadequate application of the solidarity principle (Art. 80 TFEU)

The ECJ role in filling the CEAS gaps...

The ECJ has remarkably contributed to the improvement of the CEAS and its judgments have been used to recast the Dublin regime. Inter alia

- (i) the principle of mutual confidence notwithstanding, a MS is prevented from transferring an asylum seeker to the ‘responsible MS’ when aware of «systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that [MS]» (*N.S.&M.E.* judgment)
- (ii) Humanitarian grounds change the criteria for identifying the ‘responsible State’ and oblige a MS to examine an application for asylum (*K* judgment)
- (iii) Any MS if it so wishes may examine an application for asylum, notwithstanding the Dublin regime (*Halaf* judgment)

... and its role to safeguard minors

In the *M.A.* judgment the ECJ stated that

- (i) Under the EU Charter interests of the child are the primary consideration of all States; therefore
- (ii) «unaccompanied minors form a category of particularly vulnerable persons»; and «it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another [MS]» →
- (iii) «where an unaccompanied minor with no member of his family legally present in the territory of a MS has lodged asylum applications in more than one MS, the MS in which that minor is present after having lodged an asylum application there is to be designated the ‘Member State responsible’»

Some improvements in the Dublin Regulation Recast (no 603/2013)...

In 2013 the EU has largely recast the Dublin regime

- (i) the *N.S.&M.E., Halaf, K, and M.A. principles* have been incorporated in the Dublin III Regulation
- (ii) procedural guarantees have been improved for applicants and exchange of information between MS interested in the transfer of an applicant to the ‘responsible MS’
- (iii) a ‘timid’ mechanism for early warning, preparedness and crisis management has been established, yet onuses are still upon the MS concerned by the migratory emergency

However,

- asylum seekers or beneficiaries have no right to move in other MS
- operational solidarity measures are ‘foreseen’ but not concretely established

Article 80 TFEU: is solidarity a mere financial issue?

Art. 80 TFEU: *'The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, ... appropriate measures [shall be adopted to] give effect to this principle'*

Until a few months ago, solidarity has worked exclusively through financing

- (i) 2007-2013 SOLID programme (4bn €)
- (ii) 2014-2020: **Internal Security Fund** [ISF-Borders Fund (security and borders control: 2.76bn €) + ISF-Police Fund] and **Asylum Migration and Integration Fund-AMIF** (3.1bn €). Denmark does not participate

In March 2016 a proposal under Art. 122.2 TFEU has been issued by the Commission to establish a permanent instrument entirely funded by the EU budget to be activated on a case-by-case basis. Will it be approved?

AMIF implemented

AMIF works largely to finance national programmes:

- (i) 88% of budget allocated to national programmes dealing with reception and asylum systems (improved administrative structures, training of staff, developing alternatives to detention, etc.), measures for integrating non-EU nationals in the Member States and for voluntary returning and re-integrating these persons in their countries of origin
- (ii) 12% only devoted to real EU programmes
- (iii) 6,000 € for each MS accepting an asylum beneficiary coming from another MS

AMIF and ISF are implemented together by Reg. 514/2014: asylum and external border control are seen as two faces of the same coin

The new (and strongly objected) relocation instruments adopted in September 2015

Decisions 1523 and 1601/2015:

- (i) 40,000+120,000 applicants having high probability to be eligible for asylum shall be relocated from Italy/Greece to other MS in 2 years
- (ii) In exchange to this, Italy/Greece must improve '*capacity, quality and efficiency of their systems in the area of asylum, first reception and return*' (i.e. proceed more systematically to migrants' identification and fingerprinting and apply more rigorously the EURODAC Regulation)
- (iii) Relocation is decided by national authorities and EASO. No right for applicants to decide, but parameters e.g. family links, language, cultural/social ties will be considered

Slovakia and Hungary have immediately challenged these Decisions before the ECJ: they refuse relocation as a principle. Other MS simply 'close their borders' or threaten to do so for (alleged) national security reasons

The downsides of a policy based on intergovernmental and unilateral approaches

The CEAS suffers systemic weaknesses due to

- (i) Intergovernmental approach characterizing the ‘migration emergency’: all measures adopted under Art. 78.2 TFEU (Council, i.e. MS)
- (ii) Horizontal approach → fragmentation and politically biased decisions: ‘second line’ Member States have reacted through (temporarily?) re-establishing border controls to ‘push back’ irregular migrants, as allowed by the Schengen Border Code
- (iii) Other MS have endorsed unilateral actions: Germany (*Halaf* doctrine and open doors for Syrians) and Italy (*Mare Nostrum*), with EU spill-over effects
- (iv) Fears for terrorism subordinates long-term humanitarian strategies to national security evaluations, for which MS are exclusively competent

The EU-Turkey agreement in a nutshell

Purposes:

- (i) stop irregular/illegal immigration from Turkey to the EU (*i.e.* to Greece)
- (ii) target criminal organizations' business model through which hundreds of thousands of migrants have been smuggled to the EU

Tools:

- Turkey shall take back all migrants reaching the Greek coasts after March 20, 2016, and take «any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU»
- for every Syrian citizen returned from Greece to Turkey another Syrian will be resettled legally to the EU
- 3 + 3bn € allocated to Turkey under the Facility for Refugees in Turkey
- visa requirements for Turkish citizens lifted no later than June 2016
- Turkey accession process to the EU shall be «re-energized»
- Adhesion by MS to 'voluntary humanitarian admission schemes'
- Intensified coasts patrolling by MS, Frontex and NATO

First assessments on the EU-Turkey agreement

Upsides:

- (i) The EU position is (finally?) common among MS
- (ii) No free-riding on migrants by smugglers (arrivals to EU coasts dropped)
- (iii) Declared improvement of compliance with int'l standards in affected EU countries (Greece) through direct EU action

Open issues:

- Is Turkey a 'safe country' for the purposes of Geneva? In principle yes and anyway the *N.S.&M.E.* doctrine would apply
- Is the exchange between Syrians arriving to the EU and Syrians relocated from Turkey consistent with Geneva standards? The ECJ has replied to this question in the affirmative (the *Mirza* case)

And yet, this is is not the perfect world in which we would like to be and seems a limited short-term solution (Italy proposed a Migration Compact)

CEAS as the fairy tale *The Emperor's New Clothes*?

The migration emergency is unprecedented, and yet the CEAS has shown significant weaknesses: the image of a united Europe sharing the same humanitarian values under an harmonized legal principles has been brutally replaced by

- ✓ short-term (myopic) domestic tactics
- ✓ pursuit of national interests
- ✓ mutual distrust
- ✓ incapability to carry out a cohesive and long-term EU strategy for asylum and management of migratory flows

The ‘Dublin format’ is totally unjust and unfit especially for handling migrations by sea

The duty to rescue persons at sea whose life is in danger cannot identify as ‘responsible State’ the MS whose navy has taken onboard migrants or whose coasts have been reached by them upon their rescue

International law indicates that the non-refoulement principle at sea obliges coastal States to provide ‘territorial asylum’ to refugees trying to enter their territorial waters, contiguous zone and prospected disembarkation port

‘Territorial asylum’ grants a ‘temporary refugee’ status, which States comply with through the re-direction of the refugee to a safe third State. For EU Member States, the *Hirsi* judgment adds on to the above obligation an extended duty also for refugees intercepted in the high seas. It does not, however, imply an obligation to become the ‘responsible State’ for processing requests for international protection

Conclusive proposals for a CEAS consistent with solidarity (Art. 80 TFEU) and sincere cooperation (Art. 4.3 TEU)...

The 'Dublin format' is inconsistent with Art. 80 TFEU and 4.3 TEU. These principles mandate

- (i) Relocation of migrants eligible for asylum according to objective and proportionate criteria applied vertically, automatically and no opt-out
- (ii) Directly funding by the EU for patrolling seas, rescuing migrants, processing applications of int'l protection and taking back economic migrants
- (iii) Gradual freedom of movement of asylum beneficiaries 'established' in a MS to another MS, under conditions similar to those enjoyed by EU citizens pursuant to the Directive 2004/38 → principles embodied in Directive 2003/109 should be amended

... and the unavoidable alternative

The reality is much different and the rule of law is mistreated

As a consequence, the Schengen regime might altogether collapse, with enormous down-sides for the EU

Similarly to the UME crisis, we need a ‘really closer Union’

If this cannot be implemented with 28 MS, then better considering to re-start a really ‘closer Union’ (back to the old ‘European Community’?...) comprising only those MS available for radical changes

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