

European issues

n°434

16th May 2017

Dublin and Schengen: Restoring confidence and strengthening solidarity between the Member States of the European

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Abstract: The Dublin regulation that is presently being re-drafted aims to protect the area of free movement rather than share the burden of asylum seekers between Member States. The migratory crisis of 2015 demonstrated that this system could endanger the Schengen Area, kindling a confidence crisis between Member States and forcing the EU into uncertain cooperation agreements with third countries that threatened its values. Although greater border control seems vital right now, this does not mean that the issue of making a qualitative leap forward in terms of European migratory solidarity can be avoided.

At present the Europeans are considering the revision of the Dublin regulation (604/2013 of 26th June 2013) that aims to make one Member State responsible for the assessment of an asylum request and the timeliness of making it an instrument of "solidarity and fair sharing of responsibilities between the Member States," in line with the measures set out in article 80 of the TFEU². However, the logic of this regulation has always been to protect the area of free movement, rather than the sharing of asylum seekers between Member States, with migratory solidarity taking other forms. The migratory crisis of 2015 demonstrated however that this system could become counter-productive and contribute to threats to the area of free movement; it has also been at the centre of a major confidence crisis between the Member States, who are now trying to find solutions to the migratory question via the strengthening of uncertain cooperation agreements with third countries and by achieving greater control over their borders. These approaches do not mean that the issue of making a qualitative leap forward in terms of European migratory solidarity can be avoided.

I. THE DUBLIN SYSTEM, THE KEY TO SECURING THE SCHENGEN AREA

1. Since the creation of the Schengen Area in 1985, the participating States' goal (at present 26) has been to strengthen their common external borders, in exchange for the creation of a free area of movement.

Three types of citizen from third countries can arrive at these external borders: "those with no issues" who can enter the Schengen area with or without a visa; those who are refused access, because they do not fulfil the criteria to enter (travel documents) or because they are a threat to public order or internal security. Finally there are the asylum seekers, who, in virtue of the non-refoulement principle of article 33 of the Geneva Convention cannot, in principle, be refused access, at least for the period of the assessment of their asylum request.

1.1 The principle of the responsibility of the Member State of first entry.

This principle, which is part of the 1990 Dublin Convention and at present under debate, makes

1. The opinions expressed in this article are uniquely those of the author.

2. Article 80 of the TFEU: "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, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

the Member State who allows or who does not prevent the arrival or stay of an asylum seeker responsible for the assessment of the asylum request (art. 12 to 14 of regulation 604/2013). The aim of this regulation is not the fair sharing of asylum seekers between Member States but the smooth running of the Schengen Area: not all asylum seekers have access to international protection, and indeed the idea is to regulate migrants flows on the Union's external borders, because once this barrier has been crossed the European area is, in principle, an area of free movement. Making the Member States that lie on the external borders responsible for the assessment of the asylum requests of those who enter via their territory is supposed to encourage them to prevent illegal entries. To guarantee the smooth running of this system, the information base EURODAC records the fingerprints of illegal migrants and makes it possible to see whether they have asked for asylum in another Member State. When this is the case articles 23 to 31 of the Dublin Regulation provides for a transfer of the person to the Member State of first entry. The effective application of the principle of the responsibility of the country of first entry is therefore designed to help limit "secondary movements" of asylum seekers in the area of free movement. Stopping migrants on the Union's external borders is also supposed to facilitate their return to their countries of origin or a transit country and have a dissuasive effect in terms of economic migrants who are not eligible for asylum.

1.3 The revision of the Dublin regulation in 2013

In the latter the criteria of family reunification (art 8 to 11 and art 16) is presented as the one to privilege in designating the Member State responsible for the assessment of an asylum request. However, this criteria, which can contribute toward increasing diaspora present in a Member State, it is not an instrument for the sharing of asylum seekers between the Member States.

2. The question of fair sharing in terms of the reception of asylum seekers was raised during the migratory crisis of 2011

2.1. Deeming that the criteria for the reception of asylum seekers in Greece showed systemic failings that could be likened to poor processing, the decisions taken by the European Court of Human Rights (ECHR), then the European Court of Justice (ECJ) of January and December 2011³ asked the Member States to suspend the transfer of asylum seekers to Greece, thereby obliging the Member States to share the reception of migrants with this country.

Moreover, during the Arab Spring of 2011, Italy, which witnessed the arrival of nearly 28,000 people on its shores, deemed European solidarity inadequate (extension of the operation Hermes set up by the Agency FRONTEX)⁴. It therefore decided on 5th April 2011 to grant 6 month humanitarian resident permits to people who had arrived in Italy before this date, with the latter being able to travel across the entire Schengen Area. This episode was behind a revision of the Schengen Border Code (regulation 1051/2013 of 22 October 2013) which enabled the reintroduction of internal border controls if there were serious and continued breaches by one Member State that threatened the overall functioning of the area where there were no border controls.

This crisis also led to a revision of the Dublin regulation enabling the establishment of a rapid warning mechanism, which has not led however to the supportive sharing of asylum seekers between the Member States: the principle of the country of first entry has been maintained; in the event of its asylum system coming under pressure because of major flows, the latter must adopt preventive action or crisis management plans (art. 33 of the regulation) with the support of the European Asylum Support Office. The idea is to prevent the Member States of first entry from declaring that their asylum system is saturated.

3. ECHR, 21st January 2011, *MSS c/Belgium and Greece, req. 30696/09 and ECJ, 21st December 2011, NS c/Secretary of State for the Home Department et ME, ASM, MT, KP and EH c/Refugee Applications Commissioner and Minister of Justice, Equality and Law Reform, aff. jointes C-411/10 and C-493/10.*

4. Carrera (Sergio), *Guilid (Elspeth), Merlin (Massimo), Parkin (Joanna), "Race against Solidarity. The Schengen Regime and the Franco-Italian Affair", CEPS Paper in Liberty and Security in Europe, April 2011. Malmström (Cecilia), "Immigration flows – Tunisia situation", Strasbourg, 15 February 2011, Speech 11/106.*

2.2. European solidarity mechanisms prior to 2015 especially target a strengthening of the countries of first entry's capacity to cope with migrant inflows

The directive on temporary protection (2001/55) adopted in July 2001 after the Kosovo War was supposed to enable the sharing of a very wide range of "displaced people" (art 26), that might include people that were not eligible for asylum. Since this directive requires a qualified majority within the Council if it is to be triggered, it has never been activated. Likewise, European relocation programmes involving beneficiaries of international protection led between 2009 and 2013 to the relocation of just over 400 individuals⁵.

Solidarity is however a financial issue. The "Asylum, migration and integration" Fund (AMIF) totalling 3.137 billion € over the period 2014-2020, aims to help the Member States strengthen their asylum system. Likewise, the European Internal Security Fund (EISF) has been provided with an "external border and common visa policy" chapter totalling 2.76 billion € to help the Member States to do this. Over the period 2014-2020, Greece will have received 509 million € in aid, and Italy 592.6 million to protect their external borders and to strengthen their asylum systems.

Prior to 2015 European solidarity involved operational support to Member States provided by FRONTEX, in terms of border control and the European Asylum Support Office. On the request of the Member States encountering problems, both of these agencies are able to send in experts and equipment to help distinguish in situ economic migrants from refugees and organise the return of migrants who are not eligible to asylum. However, we should note that the Member States do not really appreciate an external player interfering in the way they address such sensitive issues as sovereignty and migratory policy.

II. THE 2015 MIGRATORY CRISIS REVEALED THAT SHORTFALLS IN MIGRATORY SOLIDARITY MECHANISMS COULD ENDANGER THE

FUNCTIONING OF THE SCHENGEN AREA, THE SPIRIT OF SOLIDARITY BETWEEN MEMBER STATES AND THE UNION'S VALUES

In 2015, in a context of worsening political and economic crises in the Union's southern neighbourhood (conflict in Syria, progressively extending to Iraq, and the collapse of Libya), nearly one million people came to Europe, 154,000 of whom came via the Central Mediterranean and especially 885,000 of them arrived in Greece via the Eastern Mediterranean. In 2015 Italy "only" registered 83,000 asylum requests and Greece 11,370! Germany however registered 441,800 new asylum requests, i.e. 35% of the Union's total, Hungary 174,400 (14%), Sweden 156,100 (12%), Austria 85,500 (7%) and France 70,600 (6%)⁶.

1. Singularly the principle of responsibility of the State of first entry has not been implemented very much.

As on other occasions in the past, due to a lack of material means, and as they could, both Italy and Greece, who have seriously challenged the principle of the responsibility of the State of first entry, registered as few of the arrivals in the EURODAC system as possible and maintained open reception systems, allowing migrants to continue on their way. Greece waited until the reintroduction of internal border controls within the Schengen Area was imminent in December 2015⁷ to ask for FRONTEX's rapid intervention teams⁸. The non-respect of the common rules appeared in Italy and Greece to be the most effective method to force their European partners to assume the sharing of the reception of the migrants.

The specific nature of the external maritime borders also helps explain the Greek and Italy bid to avoid the rules of the Dublin/EURODAC system. Indeed coastguards often say that "at sea, there is no border surveillance, one can only undertake rescue": the Triton operation launched by FRONTEX in November 2014 firstly only aimed to monitor the borders just off the Italian coast. However, after the loss of nearly 1,200 migrants at sea in April 2015, its means were tripled, its intervention area extended and it became

5. European Asylum Support Office, Annual Report 2013, July 2014.

6. Eurostats, "Record number of over 1.2 million primo asylum requests registered in 2015" Press Release, N° 44/2016 - 4th March 2016.

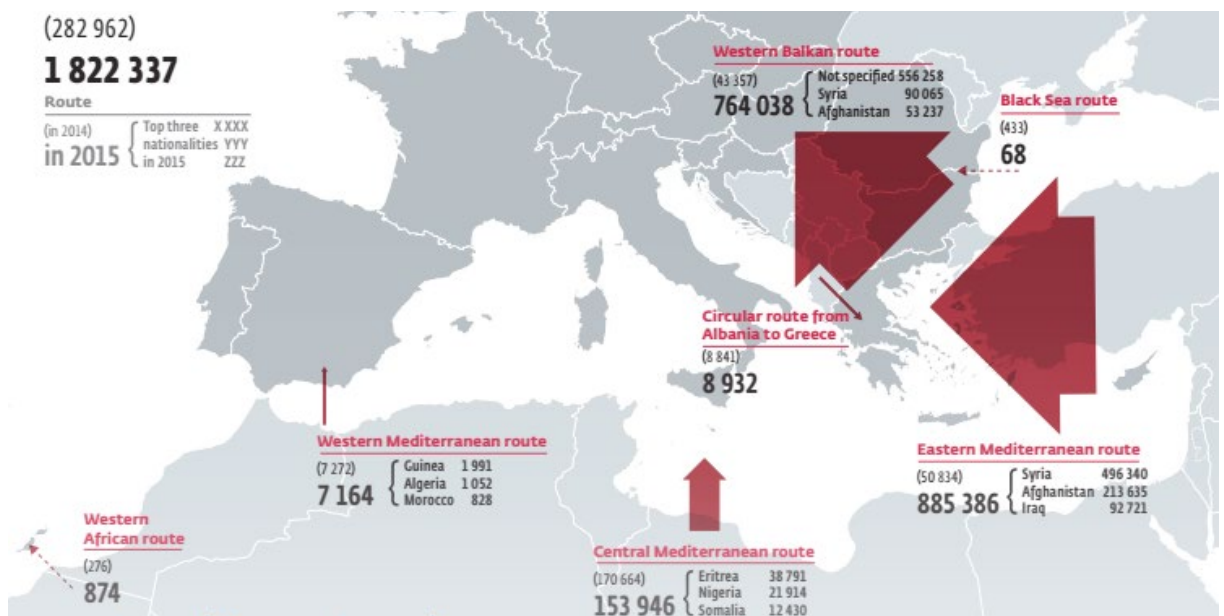
7. « Migrants : l'Europe menace d'exclure la Grèce de l'espace Schengen », Le Monde, 2nd December 2015.

8. <http://frontex.europa.eu/news/frontex-accepts-greece-s-request-for-rapid-border-intervention-teams-amcPjC>

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an operation that mainly targeted rescuing migrants at sea. The same applied to the Poseidon operation in the Eastern Mediterranean, since both led to the rescue of 250,000 lives in 2015⁹. However, once saved in the (contiguous) Greek and Italian waters or on the high sea, most of the people had to land in Italy or Greece, as "safe harbours", particularly if they were claiming asylum. This led to the application of the non-refoulement principle, as set out in the Geneva Convention, that is notably repeated in article 4 of the

regulation 656/2014 dated 15th May 2014 governing FRONTEX's maritime operations. As a result the greater the influx of migrants, the more Greece and Italy had an interest in not respecting the measures contained in the Dublin/EURODAC system. At the same time the fact that the migrants knew that they could continue their journey to the north of Europe might also have increased the flows. A vicious circle then triggered increasing flows and the non-respect of the measures contained within the Dublin and EURODAC regulations.



Source : FRONTEX, Annual risk analysis, 2016.

2. The impact of these dysfunctions was firstly a double threat to the Schengen Area

2.1. The first threat involved security.

Borders are not just obstacles to human exchange: they are also protect against threats to public order and internal security. It is within the protection of European borders that refugees seek protection. The lack of border controls in Greece and Italy helped a few jihadist fighters (non-European and European) to enter the Schengen area and to carry out terrorist attacks. This was all that was required for populist discourse to flourish and make statistically unfounded amalgams between migrants and terrorists.

2.2. In response the area of free movement has been restricted

The Schengen border code enabling the re-introduction of internal border controls (art 25 and 29 in particular) was triggered in spite of the practical difficulties and economic costs. Hence France has maintained controls on its borders on public order and unforeseeable internal security grounds as part of the state of emergency following the terrorist attacks; Germany, Austria, Sweden, Denmark and Norway are maintaining controls in response to migratory flows that are still inadequately controlled in Greece¹⁰. Moreover, the European Commission is looking into a further revision of the Schengen Border Code and is due to publish

9. European Commission, Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, 10.02.2016.

10. General Secretariat of the Council, implementing decision of the Council regarding a decision on the extension of the temporary control of the internal borders in the event of exceptional circumstances that endanger the overall functioning of the Schengen Area, 6020/17, 7 February 2017.

recommendations to facilitate the re-introduction of internal border controls, notably on the grounds of public order or internal security. The closure, since March 2016, of the Western Balkan route¹¹ aims to secure the Schengen area.

3. The migratory crisis increased tension between the Member States in terms of the principles of solidarity and responsibility and undermined confidence

The “free passage” policy adopted by Italy and Greece was condemned by “omission” since all of the declarations made by the European Council in 2015 and 2016 called for the Union to take back control of its external borders. At the same time there was a multitude of accusations regarding the lack of European solidarity towards the countries who were most affected by the flows.

3.1. Difficulties in adopting and implementing the two emergency relocation decisions of September 2015 from Greece and Italy illustrate this¹².

Supposedly these were to enable the sharing of 160,000 people who clearly needed protection between the Member States over a two year period – by 10th April 2017 only 16,340 people had been relocated i.e. slightly over 10% of the total after 19 months of implementation¹³. The Member States’ difficulties, during a time of migratory crisis, in mobilising staff and equipment in support of the functioning of the hotspots, where those eligible for relocation were to be distinguished from other categories of migrants, a certain amount of resistance on the part of the Italian and Greek authorities to European intervention in the management of their national migratory policy and their continued bid to allow migrants continue their journey beyond their borders contribute to explaining these results.

3.2. The proposal to revise the Dublin regulation presented on 4th May¹⁴

It tries to combine the principle of the responsibility of the State of first entry with a corrective relocation

mechanism that would trigger automatically and is encountering the same problems: those who defend the principle of the responsibility of the country of first entry are against an automatic redistribution mechanism, that focuses on the category of migrants – eligible asylum seekers – very much wider than that retained in the relocation mechanisms adopted in 2015 (people clearly in need of protection); since between acceptability and eligibility to asylum there is a difference that might prove costly and vain, if after financing relocation, the deportation of those relocated, but finally rejected from asylum has to be financed. For their part the countries of first entry (Italy and Greece) deem the system inadequate since it obliges them to assess the acceptability of all asylum requests, and does not relieve their asylum system in any way in the event of major inflows of migrants.

3.3. To overcome stalemate in debate over the revision of the Dublin regulation

The countries of the Visegrad group, then the Slovakian and Maltese presidencies, have hosted discussions regarding ideas of “effective” “flexible solidarity”, and the links between solidarity and responsibility in terms of asylum. Tortuous discussions over triggering terms (automatic or political?) of a sharing mechanism, the challenge or not to the responsibility of the country of first entry, the obligatory or voluntary nature of contributions to the solidarity mechanism, the possible forms of solidarity (relocation, contribution to FRONTEX, EASO, development aid, etc.) are proving difficult.

3.4. Recommendations regarding the progressive return to transfers of asylum seekers to Greece in virtue of the Dublin regulation as of 15th March 2017¹⁵, and the extension of internal border controls in the Schengen Area illustrate the prevalent mood amongst the Member States.

Significant progress can of course be highlighted in terms of the Greek asylum system, as far as its reception capacities and the processing of asylum requests are concerned. However continued inadequacies (congestion and inability to process asylum requests rapidly) have been noted in reports

11. “L’Union européenne s’entend pour fermer la route des Balkans aux migrants », *Le Figaro*, 6th March 2016.

12. Decision (EU) 2015/1523 of the Council of 14th September 2015 and Decision (EU) 2015/1601 of the Council of 22nd September 2015

13. European Commission, 11th report on relocation and resettlement, COM(2017) 212 final, 12.04.2017.

14. European Commission, COM(2016) 270 final, 4.5.2016

15. European Commission, Commission Recommendation, addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013, C(2016) 8525 final, 8.12.2016.

regarding the implementation of relocation decisions¹⁶. Incidentally the fragility of the Greek asylum system justified the creation in March 2016 an intra-European humanitarian aid instrument, EUROECHO¹⁸, of which Greece is the primary beneficiary. Envisaging taking up transfers again in virtue of the Dublin regulation as of 15th March 2017 bears witness to a pro-active approach by the European Commission, which speaks on behalf of certain States, like Germany, Austria and Belgium¹⁷, so that Greece takes full responsibility in the processing of the asylum requests that are its duty on the threshold of the Schengen area. At the same time announcing the extension of internal border controls in the Schengen area and thinking about how to facilitate the reintroduction of these controls is a sign, notably regarding Greece and Italy, of Europe's determination to prevent a renewal of the "free-passage" policy. This does not mean that the people transferred to Greece in virtue of the Dublin regulation will immediately take the road back to the North of Europe. We can see that there is not really any trust between the Member States. However "solidarity is founded on trust that demands responsibility"¹⁹. If the Europeans see that Greece and Italy are tempted to pretend that they are taking on their responsibilities in virtue of the Dublin/EURODAC regulations, they may then pretend to offer them solidarity and so forth.

4. Towards greater cooperation with third countries, at the risk of threatening the Union's values?

4.1. Of course cooperation with third countries in the area of migration is nothing new.

Since 2005 it has been formalised in the "overall approach to migration and mobility", renewed in 2012 after the Arab Spring²⁰. In order to end the head on collision between requests for legal immigration routes to the Union expressed by neighbouring and developing countries and European demands to counter illegal migration, the goal of this overall approach is to widen the field of cooperation beyond these two areas: firstly by adding development support action, that aims to counter the deep rooted causes of illegal migration, and, since 2012, support work to asylum systems in

third countries to stabilise refugee populations closer to their countries of origin. Cooperation with third countries is developing as well as within bilateral and regional frameworks covering all aspects of the overall approach (mobility partnerships, the Rabat and Khartoum Process, regional protection and development programmes).

4.2. All of these processes did not lead in 2015 to the regulation of migratory flows.

Stepping up cooperation with all of the countries on the migratory routes of the Central and Eastern Mediterranean is therefore being sought²¹. Hence a *Trust Fund* (Madad) mobilising around 1 billion € aims to help Syrian refugees and support the host countries in Syria's neighbourhood; an emergency Africa Infrastructure Partnership Trust Fund (PTU) provided with 2.5 billion € aims to address the in depth causes of illegal migration, particularly within the framework of enhanced partnerships with five African countries²²; finally an external investment plan of 3.35 billion € to support private investments in Africa and in the Union's neighbourhood is under negotiation. The impact of this work remains modest at this point in time²³.

Especially in order to achieve rapid results within these cooperation agreements, whilst flows seemed to grow at the beginning of 2016, with an estimated 3,777 deaths in the Mediterranean in 2015²⁴, a joint EU-Turkey declaration was signed in March 2016²⁵. The measure aimed to substitute illegal entries with legal paths of access to the European Union possibly involving up to 72,000 Syrian refugees registered in Turkey. It was notably based on Turkey's commitment to improving control over its borders, and to readmit all illegal migrants coming from the Greek islands and to improve conditions for refugees in Turkey. In exchange Turkey was to be offered a renewed perspective visa liberalisation, financial support (3 billion €) and the re-opening of membership chapters to the European Union. The implementation of this joint declaration has led – to date – to the drastic reduction in illegal entries (182,000 in 2016, of which 112,000 in January and February 2016, in comparison with 885,000 in 2015) and the deaths of migrants in the Eastern

16. 9th report on relocation and resettlement, COM(2017) 74 final, 8.02.2017.

17. Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union.

18. Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union.

19. Rob Visser, « Le défi des migrations », Séminaire sur « L'intégration européenne : l'Unité dans l'efficacité », Rotterdam, 21st November 2016.

20. European Council of Brussels on 15th and 16th December 2005

21. Action Plan, 2015 Valletta Summit on Migrations, 11-12 November 2015. Declaration of the High-level Conference on the Eastern Mediterranean - Western Balkans Route, Council of the EU, Press Release 714/15,08/10/2015.

22. European Commission, COM(2016) 385 final, 7.06.2016. and the European Council, Conclusions of 28 June 2016.

23. European Commission, 2 March 2017.

24. IOM, <https://missingmigrants.iom.int/mediterranean>

25. Council of the European Union, Declaration EU-Turkey 18 March 2016.

Mediterranean (68 between April and December 2016, in comparison with 789 over the same period of 2015). However, to enable the dispatch to Turkey of people who have arrived illegally in Greece, the former must clearly be shown to be a "safe" third country or to be a first asylum country in line with the "procedures" directive (2013/32). In spite of positive developments regarding the treatment of Syrian refugees (access to humanitarian aid²⁶ and to the legal employment market²⁷), the refugees' situation remains uncertain²⁸; in addition to this developments in the Turkish regime, especially since the coup in July 2016 and the referendum on 16th April 2017²⁹ are feeding doubt about Turkey's 'safe' nature, and about the strength of its migratory commitments towards the EU.

The idea launched by the European Council in February 2017³⁰, for greater cooperation between the EU and the Libyan authorities³¹ to settle potential illegal immigrants heading towards Europe in this country raises questions. It is based on the observation that illegal entries into Italy from the Central Mediterranean increased by 18% between 2015 and 2016, rising from 154, 000 to 181,000, and that 90% of the arrivals departed from the Libyan coast. The number of deaths at sea has risen sharply on the Central Mediterranean route – from 2,869 to 4,581 people between 2015 and 2016; most of the migrants who arrived in Italy in 2016 comprised Nigerians (21%), Eritreans (11%) and Guineans (7%) whose rate of asylum acquisition in the Union on first request totalled 24.5% for the Nigerians 89.8% for the Eritreans and 37.88% for the Guineans in 2015³². When asylum requests are rejected it is difficult to deport the rejected, since their effective rate of return was only 36.4% in 2015³³.

The quest for greater cooperation with Libya based on the joint EU-Turkey declaration would aim to strengthen Libya's capacities to control its borders against smugglers, possibly as part of a regional framework; this would also involve improving the reception conditions of migrants in Libya with the help of the OIM and the HCR, contributing to their

local integration or their return to their country of origin. However, the effective establishment of a cooperation agreement like this is a major challenge due to Libya's extreme political fragility and to the unreliable nature of the Libyan players with whom the EU would have to work. The reticence of the States neighbouring Libya (Tunisia, Egypt and Morocco), to commit to readmission agreements also has to be overcome³⁴. The absence of the HCR in situ and the presence of local militia who have been responsible for atrocities committed against the migrants³⁵ are also of serious concern. Finally, whilst in the joint EU-Turkey declaration the Commission suggested the development of legal paths via resettlement in the EU, this possibility is not mentioned in the Malta Declaration dated 3rd February 2017, and is deemed almost impossible at present by the OIM and the HCR³⁶. Hence, although the Member States are converging more towards stepping up cooperation with third countries than toward sharing the burden of hosting migrants amongst themselves, cooperation with third countries seems problematic: uncertain in terms of its effectiveness, the EU indeed might be found wanting in terms of its ambitions to carry the principles such as "the universality and indivisibility of Human Rights and fundamental freedoms and the respect of human dignity" into the world (art. 21 TEU).

III. THE 'UNCERTAIN' RECOVERY OF CONTROL OVER THE EXTERNAL BORDERS WILL NOT MEAN THE ISSUE OF A QUALITATIVE LEAP FORWARD IN TERMS OF EUROPEAN MIGRATORY SOLIDARITY CAN BE AVOIDED

1. Fear amongst the executive in terms of the European migratory policy: priority is given to strengthening border controls

In the present context of terrorist attacks the reduction of the vulnerability of the external borders of the European area of free movement is seen as a priority, in comparison with the sharing out of asylum seekers between Member States. Several instruments have been adopted – or are under discussion – to reduce this vulnerability: the European border and coastguard,

26. http://ec.europa.eu/echo/news/eu-announces-new-348-million-humanitarian-aid-refugees-turkey_en

27. The European Parliament asked for an inquiry into the Syrian refoulements on the Syrian-Turkish border. "MEPs ask EU to verify whether Turkey is shooting Syrians who try to cross border", European Parliament, press release, 21.06.2016.

28. Amnesty International denounced Turkey, saying that it has refused access to asylum procedure to nearly Afghans and had forced their return to Kabul just after the entry into force of the agreement. Amnesty International, The EU-Turkey deal: Europe's year of shame", 20.03.2017, www.amnesty.org. Human rights watch, "Q&A: Why the EU-Turkey Migration Deal is No Blueprint", 14 November 2016. <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint>. and "The UN is struggling to access refugee camps in Turkey" Euractiv, 20 January 2017.

29. "Comprendre le déclin de la démocratie en Turquie", Le Monde, 9 March 2017.

30. European Commission, JOIN(2017) 4 final, 25.01.2017 and the informal European Council, Malta Declaration by the members of the European Council regarding the external aspects of migration, remedying the situation along the Central Mediterranean route, Press Release 43/17, 03/02/2017.

31. Hence the Council of the presidency and the government of national unity supported by the UN.

32. Eurostat, « The Member States of the EU granted protection in 2015 to more than 330,000 asylum seekers » Press Release, 75/2016 - 20 April 2016.

33. European Commission, COM(2017) 200 final, 02.03.2017.

34. The mandate given to the European Commission to negotiate a readmission agreement with Morocco dates back to 2000 ; those started in June 2013 with Tunisia are not moving forward ; cooperation between the EU and Egypt regarding migration and mobility is at a even more elementary stage.

35. United Nations Support Mission in Libya, United Nations Human Rights Office of the High Commissioner, Detained and dehumanized, Report on Human rights abuses against migrants in Libya, 13th December 2016.: Human Rights Watch, World report 2017, Libya, <https://www.hrw.org/world-report/2017/country-chapters/libya>

36. Joint UNHCR and OIM statement on addressing migration and refugee movement along the central Mediterranean route", 2 February 2017, <http://www.unhcr.org/news/press/2017/2/58931ff4/joint-unhcr-iom-statement-addressing-migration-refugee-movements-along.html#>.

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operational since 6th October 2016,³⁷ is now able to undertake increased surveillance on the Member States' external borders, and if necessary, take action there using a reserve of 1,500 border guards. A targeted revision of article 8 of the Schengen Border Code (regulation 2017/458) also allows systematic controls on the Union's external borders (since 7th April 2017) including that of European citizens.

Moreover, the development of "smart borders" is under negotiation at present: an Entry/Exit System (EES) should enable an improvement in the efficacy of external border controls by 2020 via a badge system of people who abuse their right to legal residency in the Union ("overstayers")³⁸. Likewise the creation of an *EU Travel Information and Authorization System*, ETIAS, based on the American ESTA, will by 2020 enable the assessment of migratory and security risks of people exempted of visa obligations before they enter the Union³⁹. Finally, on 21st December 2016 the Commission put forward three draft regulations for the renovation of the Schengen Information System in the areas of police and judicial cooperation in criminal matters, border controls and finally the return of citizens from third countries who are illegally resident in the Union⁴⁰.

However, we have to be aware that the efficacy of border controls will never be total: since controls are part of State sovereignty, the intervention of the European border guard in a Member States has to be organised by the Council and will always require the cooperation of the State in question (art 19 of the regulation 2016/1624). In addition to this since systematic control could disrupt trade and since the technical capacity to undertake this is *de facto* limited, sometimes targeted controls based on the analysis of danger levels will have to suffice (art 8§2 bis of the regulation 2017/458). More generally, many observers believe that border controls are a "lost cause" since they cannot really dissuade migrants from trying their luck in Europe, but especially they contribute to the development of smugglers organising the increasingly dangerous migration conditions⁴¹.

2. Hence the issue of a qualitative leap forward in terms of European migratory solidarity cannot be avoided.

Fundamentally the main obstacle to the sharing of asylum seekers between Member States lies in the fact that ultimately very few Member States are affected by the migratory crisis. In 2016, Germany received 722,300 asylum seekers, i.e. 60% of the total; Italy, 121,200 (10%), France 76,000 (6%), Greece 49,900 (4%), Austria 39,900 (3%), the UK 38,300 (3%)⁴². For a common migratory policy to become a reality the transnational phenomenon of migration, which cannot be managed individually by the Member States, has to affect a greater number of them. And yet, although only a few are really concerned, those who are much less affected are simply tempted to turn a blind eye and support common rules that strengthen the responsibility of the most affected Member States. For there to be a qualitative leap in terms of European migratory policy the Member States must therefore be aware of their own interest in this solidarity, because they might also be affected by migratory flows one day (due either to modifications in the migratory routes or via the development of secondary flows); or that they opt for solidarity because the "*business as usual*" in terms of the strict application of the principle of the responsibility of the Member State of first entry condemns the Union, in the event of massive waves of migrants, to a vicious circle in the non-respect of the common rules, destruction of mutual trust between Member States, thereby making the European migratory policy a strong factor in the disintegration of the Union.

Enhanced cooperation agreements (art 20 TEU and 329 TFEU), bringing together a minimum of 9 Member States or "intergovernmental cooperation agreements" developed outside of the treaties, bringing together an even smaller number of Member States, but excluding those who refuse to adhere to this solidarity, would not enable a qualitative leap in terms of European migratory solidarity. Indeed apart from the fact that these two types of cooperation agreement would be difficult to launch because they could only work as a last resort, to overcome stalemate in European negotiations, they would reduce the "useful nature" of

37. EU Regulation n°2016/1624 of the European Parliament and the Council dated 14th September regarding the European border and coastguard, modifying regulation (EU) 2016/399 of the European Parliament and the Council and repealing the regulation (EC) no 863/2007 of the European Parliament and Council, regulation (CE) no 2007/2004 of the Council and the decision 2005/267/CE of the Council.

38. European Commission, COM(2016) 194 final, 6 April 2016.

39. European Commission, COM(2016) 731 final, 16 November 2016.

40. European Commission, COM(2016) 882 final.; European Commission, COM(2016) 881 final, 21.12.2016; European Commission, COM(2016)883, 21.12.2016.

41. Beauchemin (Chris), Ichou (Mathieu) (dir.), *Au-delà de la crise des migrants : décentrer le regard*, Kathala, 2017.

42. Eurostat, 1.2 million first asylum requests recorded in 2016, Press release, 46/2017, 16 March 2017.

the sharing of migrants between Member States, if the latter could only be applied between the countries that were really affected by migratory flows and therefore in request of solidarity. Regarding intergovernmental cooperation agreements – these can only be developed in areas in which the Union has not yet intervened⁴³, thereby ruling out their use in terms of relocations or support via FRONTEX or EASO. Finally, because they are derogations in terms of common European action, enhanced and intergovernmental cooperation agreements are not eligible to European financing, which would be particularly problematic in the area of relocations, which have a significant budgetary impact.

Hence a qualitative leap forward in terms of European migratory solidarity should be sought with all of the Member States to enable the reassertion that solidarity is a fundamental principle of European action in the migratory area. If some Member States obstinately refuse to take part in European migratory solidarity their defection should be considered and addressed for what it is, i.e. a violation of a principle that is part of the Lisbon Treaty⁴⁴. This solidarity should therefore help to strengthen the security of the Schengen Area, the viability of the internal borderless area and the EU's credibility as an organisation that carries values forward into the world such as human dignity and the respect of Human Rights.

In the short term, the strengthening of external border controls therefore seems vital and requires full commitment on the part of the States of first entry in order to recover the trust that has been damaged in terms of their European partners; but at the same time the States who are less concerned by the migratory crisis must also accept to make an effort in terms of greater solidarity with their partners on the Union's external borders, which would involve a challenge being made, albeit in part, to the principle of the responsibility of the Member States of first entry and a strengthening of the relocation programmes.

A revised approach to European migratory solidarity will in all events require us to seek a more global vision of the EU's cost-benefits in the values that it carries forward and the will to defend its historic contribution to the peace and prosperity of the European continent over the last 67 years.

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43. According to art 252 du TFEU "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." For example if the Council has asked the Commission to make a proposal and if a proposal has been put forward by the Commission or if a competence has been exercised internally, in the event of an planned external action, the Member States can then no longer launch an intergovernmental cooperation agreement.

44. In this regard some Member States speak of reducing the structural funds in support of new Member States who are reluctant regarding migratory solidarity Cf. « Réfugiés : l'Allemagne suggère de couper les fonds de l'UE aux pays opposés aux quotas », *Le Figaro*, 15 September 2015.

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