FROM THE MEDITERRANEAN TO THE BALTIC: THE PROBLEM OF IMPLEMENTING THE PRINCIPLE OF SOLIDARITY IN THE EU AREA OF IMMIGRATION AND ASYLUM

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The 2015 migration crisis significantly affected the EU's area of freedom, security, and justice and challenged the cohesion and solidarity of the European Union. Although the crisis is past its peak, it is not over yet: problems and challenges associated with it persist. One of them is the lack of a common approach among member states to the implementation of the principle of solidarity in the EU area of immigration and asylum. This work aims to consider the legal and political aspects of the implementation of the principle of solidarity and fair sharing of responsibility in the area of immigration and asylum. This study relies on the works of Russian and international experts in European integration and European law and on the analysis of EU regulations. There are two dimensions to the implementation of the principle of solidarity: the political and legal ones. The legal perspective provides certain clarity to the issue. According to the European Court of Justice, this principle is binding: it is capable of imposing the legal obligation of solidarity. However, as to the political perspective, member states have not been able to reach compromise. Although it is possible to introduce a permanent relocation mechanism using qualified majority voting, the Council usually seeks consensus. In this situation, the goal of the EU is not to ensure the right decision but rather to create conditions for it to be implemented by all the member states.

Keywords: migration crisis, principle of solidarity, refugee relocation system, migration policy, Dublin Regulation, refugees

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Introduction

Border management, including the area of immigration and asylum, is the key component of the EU area of freedom, security, and justice. The legal framework for this policy is Chapter 2, Title V of Part Three of the Treaty on the Functioning of the European Union (further, the TFEU). In the international literature, this legal framework is often referred to as the EU Immigration and Asylum Law [1; 2].

According to Article 80 of the TFEU, the EU area of immigration and asylum and its implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.

Solidarity is the founding principle of the EU immigration policy, the EU system of Justice, and European unity [3]. In other words, solidarity can be interpreted as the general principle of the EU law [4, p. 179]. At the same time, solidarity is considered a basic value of European integration [5, p. 213].

Over a long time, the principle of solidarity stood strong, and it was strictly adhered to by the Union and its member states.

However, in the early 2010s, the situation in the EU changed dramatically. The economic and migrant crises challenged European unity and its founding principles, including that of solidarity.

Obviously, Brexit came as the most painful blow to the EU. One of the central causes of the UK's withdrawal from the Union was the reluctance of Britons to share responsibility and show solidarity with the other EU countries in the face of the migrant crisis.

Equally painful to the EU is the violation of the principles of solidarity within the EU immigration and asylum policy. Although in the case of Brexit, the Union accepted the decision of the UK, it took a tough stance over the area of immigration and asylum and resorted to enforcing compliance.

This article addresses the implementation of the principles of solidarity, and fair sharing of responsibility among EU member states in the are of immigration and asylum.

Solidarity amid the migrant crisis

The 2015 migrant crisis came as a serious challenge to the immigration policy and the Common European Asylum System (further, the CEAS). In particular, strong challenges to the EU were the uneven distri-

bution of asylum seekers among EU member states and the inability of some of the countries to ensure prompt and effective identification of such persons [6, p. 2]. The situation is often referred to as the *refugee* crisis [7, p. 19], which gives a new shade meaning to the term and emphasises the problems of the CEAS implementation rather than an increase in the number of undocumented immigrants [8, p. 1196]. In other words, this is a crisis of the CEAS.

In 2015, the EU received over 1.8 million undocumented immigrants, which is six times the 2014 level.[1] Most immigrants found themselves in the countries lying on the central Mediterranean and Western Balkan migration routes: Italy, Greece, and Hungary. However, these countries were not the destination most migrants had in mind. Having entered the EU, they continued their way to the states they considered more attractive: Germany and other countries of Western and Northern Europe [9, p. 230]. The Dublin Regulation[2] requires the state through which the asylum seeker first entered the EU to examine his or her asylum application and thus bear the cost of the reception.

This situation required an appropriate response from the Union and an active contribution from the member states located at a distance from the migrant routes.

This brought to the fore the question of enforcing compliance with the principle of solidarity (Article 80 of the TFEU). Although the provisions of Article 80 of the TFEU have direct legal consequence, this rule remains abstract, since it lacks a clear and well-grounded implementation mechanism [10, p. 1550].

Technically, such situations should be resolved by giving to asylum seekers temporary protection, the legal framework for which is Council Directive 2001/55/EC.[3] According to the Directive, temporary protection is a special procedure used in exceptional circumstances, i. e. cases of a mass influx of displaced persons from third countries.

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[1] *Frontex* Annual Risk analysis. 2016-04-05. URL: http:/frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2016.pdf (accessed 20.03.2019).

[2] *Regulation* (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Official Journal L 180, 29.6.2013, p. 31—59.

[3] *Council* Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212, 7.8.2001, pp. 12—23.

However, during the 2015 crisis, this mechanism was never used. Temporary protection is given when the influx of displaced persons is caused by a concrete conflict, a circumstance that is temporary by definition. The mass arrival of immigrants in 2015 was a result of unstable situations across many states. Moreover, the prospects for political and economic stabilisation were unclear [11, p. 272]. Directive 2001/55/EC did not provide a mechanism for resolving the situation, in which Italy and Greece found themselves at the time: the system of temporary protection suggests that the asylum seeker is given protection in the member state of the first arrival. The distribution of asylum seekers across the EU within the procedure of temporary protection is carried out in the spirit of Community solidarity, i. e. on a voluntary basis.

During the 2015 migrant crisis, the decision was made to invoke the mechanism described in Article 78(3) of the TFEU. According to this provision, 'in the event of one or more Member States being confronted by an emergency characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned'. However, this Article does not specify the measures that can be taken in such a situation.

On May 13, 2015, the European Commission issued the communication 'A European agenda on migration',[4] which called for the institutions of the Union and its member states to respond to the migrant crisis by the principles of solidarity and fair sharing of responsibility. In particular, the Commission prepared proposals on the use of the mechanism for relocation, i. e. the redistribution of potential asylum seekers who have already arrived in the EU.

The relocation and redistribution of immigrants who have arrived in the EU to seek asylum is a form of solidarity. For the first time, a proposal to enshrine a relocation mechanism in law was made in the early 1990s. It was a response to the migrant crisis in the Balkans. However, the proposal was not supported by the Council [12, p. 76]. Relocation schemes were voluntarily accepted by member states during the migration crisis of 2011 [13, p. 318].

[4] *Communication* from the Commission to the European Parliament, the Council and the European Economic and Social Committee and Committee of the Regions A European Agenda on Migration. URL: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migrationen.pdf (accessed 19.03.2019).

In September 2015, the Council adopted two decisions, 2015/1523[5] and 2015/1601,[6] on the relocation of 40,000 and 120,000 migrants respectively, who arrived in Italy and Greece and required international protection. Both decisions were to be in effect for two years until September 2017. Relocation (Article 3) was limited to individuals holding nationalities for which the EU-wide recognition rate of asylum claims was at least 75% (Syria, Iraq, Eritrea). In other words, this measure was applied to persons who had a considerable chance of acquiring refugee status in the EU. The asylum application was to be considered by the state, where the asylum seeker would be relocated and where he or she would live and receive social safety net support. Thus, asylum seekers were to be evenly distributed among all the EU member states from the Mediterranean to the Baltic Sea.

Initially, the draft decision on the relocation of 120,000 asylum-seekers applied the mechanism in question to three countries: Italy, Greece, and Hungary.[7] However, Hungary refused to participate as either a receiving country or a beneficiary of the mechanism. Finally, the country was excluded from the scope of the mechanism and included in the list of receiving states.

These were ad hoc measures. However, in line with the European agenda on migration, it was decided to consider the creation of a permanent automatic relocation system.

Today, the migrant crisis is past its peak; the EU is not under a strong migration pressure. Nevertheless, the crisis is not yet over. Firstly, it severely aggravated all the conflicts rooted in the multinational and multidenominational nature of European society' [14, c. 14]. Secondly, it led to a rift between member states, primarily, as regards the implementation of the principle of solidarity [15, p. 63]. In other words, the migration crisis moved from the outer boundaries towards the inside of the EU.

[5] *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 OJ L 239, 15.9.2015, p. 146—156.

[6] *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 OJ L 248, 24.9.2015, p. 80—94.

[7] *Proposal* for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary. COM/2015/0451 final. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015PC0451 (accessed 20.03. 2019).

The principle of solidarity in the EU area of immigration and asylum suggests support from non-affected states for those under migration pressure.

However, many EU countries located at its eastern borders both rejected a permanent automatic relocation system and refused to abide by Council decisions 2015/1523 and 2015/1601 on the redistribution of asylum seekers. According to the Report from the European Commission,[8] Hungary and Poland have not received a single asylum-seeker within the relocation procedure, whereas the Czech Republic ceased to receive immigrants in May 2016. According to Steve Peers, the proposed system failed [16].

Hungary, Poland, and the Czech Republic are members of the Visegrád Group, which also includes Slovakia. These states took a tough stance over the plans of the Commission to put the solidarity principle in the area of immigration and asylum into effect, which resulted in a series of court cases.

Judicial control over the implementation of the solidarity principle

In 2015, Slovakia and Hungary brought a challenge against Decision 2015/1601 to the European Court of Justice. Poland intervened in support of the two countries. The Council was represented by Belgium, Germany, Greece, Italy, Luxembourg, Sweden, and France. In effect, this court case revealed differences in the understanding of the solidarity principle by EU member states [17]. The claims of Slovakia (case C-643/15) and Hungary (case C-647/15) were joined. The final decision in the cases was reached on September 6, 2017.[9]

[8] *Report* from the Commission to the European Parliament, the European Council and the Council. Fifteenth report on relocation and resettlement. Brussels, 6.9.2017 COM (2017) 465 final. URL: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_fifteenth_report_on_relocation_and_resettlement_en.pdf (accessed 22.03.2019).

[9] *Joined* Cases C 643/15 and C 647/15, Judgment of the Court (Grand Chamber) of 6 September 2017. Slovak Republic and Hungary v Council of the European Union. Actions for annulment — Decision (EU) 2015/1601. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX:62015CJ0643 (accessed 20.03.2019).

Only one of the two decisions on relocation was contested: the one adopted on September 22, 2015. The first decision of September 14, 2015, which was agreed by consensus, was not contested. The claimants, the Czech Republic, and Romania voted against Council Decision 2015/1601 of September 22, 2015.

Slovakia supported its claim with six and Hungary with ten pleas. All of them can be divided into three groups. Firstly, according to the claimants, Article 78(3) of the TFEU lacks a legal basis for the contested decision. Secondly, the claimants alleged a breach of procedural requirements. Thirdly, they entered substantial pleas.

The court rejected all the arguments of the claimants and dismissed all the claims.

Particularly, the Court ruled that the provisional measure could have been adopted in a non-legislative procedure and had to be regarded as a non-legislative act (point 66). The Court emphasised that the contested decision did entail derogations from the Dublin Regulation, which has greater legal force than Council Decisions do. However, these circumstances do not involve a breach of the Union law, since such derogations are of temporary and exclusive nature (points 79, 82).

The Court rejected all the arguments relating to procedural breaches. In particular, the Court dismissed as unfounded the claim that the contested decision had to be adopted by unanimous vote. According to the Court, Article 78(3) TFEU allows the Council to use a qualified majority procedure (point 148). Moreover, the Court did not find either a breach in the procedure in relation to consultations with the European Parliament (points 166, 167) or violations of the rights of national parliaments (point 193).

The substantial pleas concerned the principles of proportionality and legal certainty. In particular, the claimants stressed that there was no actual need for the adoption of a decision impinging on national sovereignties. Moreover, they questioned the efficiency of the measures given the actual number of asylum-seekers. As to the latter argument, the Court emphasised that the legality of an EU act could not depend on retrospective assessments of its efficacy (point 221). The Court acknowledged that the decision corresponded to the proportionality principle and that the Council was fully entitled to take the view that the distribution of the persons to be relocated had to be mandatory (point 246). The Court ruled that, when adopting the contested decision, the Council had given effect to the principle of solidarity and fair sharing of responsibility (points 252, 253). The Court clarified the central idea of the principle of solidarity in the EU area of immigration and asylum. Solidarity, according to the

Court, means that, if one member state faces an emergency, the burdens entailed by the provisional measures for the benefit of that member states must be divided between all the other member states (point 291).

The Court judgment in joint cases C-643/15 and C-647/15 is of immense significance since the Court both reaffirmed the mandatory nature of the principle of solidarity and emphasised the possibility of enforcing compliance. In other words, the Court confirmed the legal obligation of solidarity among member states in the EU area of immigration and asylum [18]. The Court rejected the idea about the voluntary nature of the principle of solidarity among member states. Moreover, based on a systemic analysis of the provision of Article 80 of the TFEU and Article 78(3) of the TFEU, the Court acknowledged the right of the Council to determine how the principle of solidarity should be implemented into concrete measures in the area of immigration and asylum.

The above court judgment is the very first step towards enforcing compliance with the solidarity principle.

According to Article 258 of the TFEU, if a member state does not comply with its obligations, the Commission may bring the matter before the European Court of Justice. If the state in question fails to comply with the judgment of the Court, the Commission may once again bring the case before the Court. If the Court finds that the member state has not complied with its judgment, it may impose a lump sum or penalty payment on it (Article 260 of the TFEU).

Following the procedure described above, the Commission brought an action before the European Court of Justice regarding the failure of Poland,[10] Hungary,[11] and the Czech Republic[12] to comply with Council Decisions 2015/1523 and 2015/1601 on the relocation of asylum seekers. Given the Court judgment in joint cases C-643/15 and C-647/15, one might suspect that the Court will satisfy the claim of the Commission. However, the objective of the Commission is not to impose a penalty on the member states but to ensure that these countries comply with the Union law [19, p. 10]. In this situation, the recognition by the Court of the failure of Poland, Hungary, and the Czech Republic to comply with the Council Decision is very unlikely to change the position of these states regarding the matter in question.

[10] *Case* C-715/17: Action brought on 21 December 2017 — European Commission v Republic of Poland. OJ C 112, 26.3.2018, pp. 18—18.
[11] *Case* C-718/17: Action brought on 22 December 2017 — European Commission v Hungary. OJ C 112, 26.3.2018, pp. 19—19.
[12] *Case* C-719/17: Action brought on 22 December 2017 — European Commission v Czech Republic. OJ C 112, 26.3.2018, pp. 19—20.

The Dublin Regulation reform

The discussion about the implementation of the solidarity principle in the EU area of immigration and asylum was taking place not only in court but also in the political arena.

In May 2016, the Commission prepared a new version of the Dublin Regulation,[13] which proposed a permanent corrective allocation mechanism. As mentioned above, by default, the Dublin Regulation imposes responsibility for examining asylum application on the country of the first entry. However, this seems to be at odds with the solidarity principle enshrined in Article 80 of the TFEU [20, p. 454], since, in this case, front-line countries find themselves in an inferior position to the countries that do not have either land or sea borders.

The corrective allocation mechanism is to be invoked if a significant and disproportional increase in the number of asylum applications is observed in a single EU member state. In this case, EU-based immigrants entitled to international protection should be relocated from one member state to other member states according to the quotas. The hierarchy of the Dublin criteria remains intact [21, p. 158]. This mechanism can be considered a means to preserve the EU's legal framework [22, p. 26].

However, this proposal was not supported by the Visegrád Group. The objections of its members repeated word for word their arguments in the case against Council Decision 2015/1601. Particularly, they stressed, the form of solidarity should not be imposed by the Union but rather determined by each state with its available resources taken into account. Thus, discussions on the Dublin Regulation sparked the conflict between southern member states and the Visergrád Group: the former demanded solidarity among all the EU member states and the latter strongly opposed the idea [23, p. 66].

Before the Court judgment in joint cases C-643/15 and C-647/15 was taken, the governments of the Visegrád Group issued a communication emphasising that migration policy should rely on flexible solidarity,

[13] *Proposal* for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Mem-ber State responsible for examining an application for international protec-tion lodged in one of the Member States by a third-country national or a stateless person COM/2016/0270 final/2—2016/0133 (COD). URL: https://eur-lex.europa. eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0270 (accessed 21.03.2019).

which would enable member states to decide on specific forms of assistance to member states under disproportionate migration pressure in view of their own experience and potential.[14] The central idea behind this proposal was that immigrant relocation should be voluntary. Moreover, states themselves should determine the form of solidarity: some states may receive immigrants, and some provide financial or expert support instead [24, p. 7]. However, this vision of solidarity was shared neither by the Commission nor by the other member states [25, p. 46].

In April 2018, during Bulgaria's presidency of the Council, an alternative to the corrective allocation mechanism was proposed in order to respond to disproportionate increases in the number of asylum applications submitted in a single EU member state.[15] The new mechanism suggested a three-tier system for managing crises. Each tier was associated with a set of tools, including the redistribution (relocation) of asylum seekers. However, this proposal was also rejected by member states.

Thus, despite a clear position of the Court regarding the obligation of solidarity and the possibility of enforcing compliance, the Union could not reach a political decision on a permanent relocation mechanism.

Note that the legal acts in the area of asylum shall be adopted by ordinary legislative procedure with qualified majority in the Council. The current system of distribution of voting power prevents the Visegrád Group from vetoing Council decisions. However, the Council urgently needs consensus, since, otherwise, the very possibility of implementing the regulation will be sabotaged [26, p. 33]. A decision on the distribution of asylum seekers among member states can be adopted. However, it is very difficult to put it into practice against the will of member states: solidarity is hard to impose [27, p. 399].

As of March 2019, the reform of the Dublin Regulation and the CEAS was at a standstill, and its prospects were unclear. Solidarity became a serious obstacle to the reform of the Dublin system [28, p. 8].

[14] *Joint* Statement of the Heads of Governments of the V4 Countries. 16.09.2016. URL: http://www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919 (accessed 20.03.2019).

[15] *EU* Council, Presidency Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) — New Dublin: Reversing the Dynamics, Document 7674/18 of 9.4.2018. URL: http://www.statewatch.org/news/2018/ apr/eu-council-dublin-state-of-play-7674-18.pdf (accessed 20.03.2019).

Probably, a new Dublin system will require an enhanced cooperation mechanism, the use of which will testify to a serious crisis of solidarity and trust among member states.

In effect, the states of the Viesgrád group were unwilling to sacrifice their interest in the resolution of the migrant crisis. As Sandra Lavenex stresses, during the 2015/2016 migration crisis, opinion polls showed that most respondents approved of stronger support for refugees, yet not in their own country [8, p. 1201]. This attitude towards asylum seekers is typical of residents of many EU countries. However, at the governmental level, this position is supported by the Visegrád states only. According to Philomena Murray and Michael Longo, this response is unprecedented 'in its breadth and depth, given that it constitutes not only contestation but direct opposition to the EU's authority and legal framework' [29, p. 4].

The unwillingness of the Visegrád Group to express solidarity in the relocation of asylum seekers has many reasons, economic considerations being less important ones. Apparently, each country of the Visegrád Group has its reason to avoid receiving asylum seekers from the other EU countries. Their common cause is mere opposition to the solidarity imposed by the Union.

A mono-ethnic country, Poland is apprehensive of Muslim immigrants undermining its established national and cultural traditions. Poland keeps stressing that it has received over one million Ukrainians, who, in effect, are economic immigrants rather than asylum seekers. Of course, it would be naïve to believe that five thousand Muslim immigrants coming to Poland within the relocation mechanism will be able to threaten Polish culture and language. Nevertheless, the Polish authorities are avoiding any potential harm, no matter how minor it may seem. This draws attention to one of the arguments of Poland in joint case C-643/15 and C-647/15: relocation of immigrants into an ethnically homogenous state translates into a considerable cost of adaptation of immigrants with a different cultural and linguistic background. The Court rejected this argument due to procedural reasons and emphasised that it was impossible to take into account the cultural and linguistic background of asylum-seekers when relocating them (point 304). Moreover, the Court stressed that making relocation decisions based on the ethnicity of asylum-seekers contradicted the Union law, in particular, Article 21 of the Charter of Fundamental Rights of the European Union (point 305).

Although one might sympathise with the position of the Polish authorities trying to protect their culture and keep immigrants away from the Baltic Sea coast, this position is very much at odds with the EU values. Moreover, it contradicts the founding principle of the Union, in particular, the principle of non-discrimination.

The countries of the Visegrád Group acceded to the EU of their own will, having assumed all the rights and obligations associated with such membership. Obviously, in 2004, the EU was a successful integration association, free of crises or any other problems. Few could have expected back then that, in ten years, the Union would face a serious challenge demanding an active contribution from all the member states, including the newly acceded ones.

Conclusion

In the EU area of immigration and asylum, the principle of solidarity is both a common value and a legal obligation enshrined in the TFEU and reaffirmed by Court. Solidarity is inseparable from responsibility [30]. Thus, primary law contains the necessary legal basis for the implementation of the principle of solidarity.

However, the problem of implementation of the principle of solidarity in the EU area of immigration and asylum is not yet resolved. Despite the clear position of the Court, the European Union will have to search for a political decision that would satisfy all the countries concerned. This decision will affect both the resolution of the migrant crisis and the prospects of the entire European integration project.

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