

CHALLENGE EUROPE

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EU priorities for 2019-2024

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Solidarity in EU asylum policy: From an emergency-driven approach to the fair sharing of responsibility

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MAIN RECOMMENDATION ▶ Redesign the CEAS so that it structurally embeds solidarity and the fair sharing of responsibility in terms of allocation arrangements and in the funding design.

WHAT TO DO:

- ▶ Greater integration between EU and national administrations.
 - ▶ Have a more rational approach around protection seekers' agency, their personal circumstances, family and social links.
 - ▶ Meaningfully address – rather than merely eschew – the issue of solidarity by structurally embedding fair sharing of responsibilities in law and in practice.
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Policymakers conceptualise the Common European Asylum System (CEAS) as a “common area of protection and solidarity”. And yet, the absence of solidarity and fair sharing in the legislative design and implementation of the European Union’s (EU) asylum policy is glaringly salient. Increased arrivals in the summer and early autumn of 2015, dubbed a crisis, overwhelmed the EU and triggered several political and legal reactions at the national level. This piece argues that rather than a refugee crisis, i.e. a crisis due to the numbers of protection seekers, we are actually dealing with a governance crisis. The crisis has laid bare the inadequacies of the EU asylum policy. In this contribution, I explore the scope and impact of the legal principle of solidarity and fair sharing of responsibility

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in EU asylum law; I critically analyse the EU's efforts to implement solidarity; and I reflect on meaningful ways forward towards realising the fair sharing of responsibility. The next politico-institutional cycle needs

to result in a redesign of the EU asylum policy, which embeds solidarity and fair sharing of responsibility structurally, rather than linking it with the notion of emergency.

We need to talk about the CEAS

Two key factors explain the CEAS' poor performance:

► A first important factor is **path dependence**, which has led to the entrenchment of a responsibility-allocation scheme that was conceived almost a decade before the EU came to exercise powers in the policy area. The Dublin system, initially established in a 1990 convention outside of EU law, was largely blind to fair sharing, let alone to the preferences of asylum seekers. It created asymmetrical burdens by assigning the primary duty to examine an asylum claim and to provide materially for asylum seekers to the state 'responsible' for the asylum seeker's presence in the EU.

► A second important reason for the CEAS' current troubles is the **over-reliance on legislative harmonisation** as the main avenue for achieving the goals of a common policy, at the expense of implementation efforts. The EU has failed to properly consider the administrative dimension of the asylum policy. It has sought to provide

what is effectively a regional public good, asylum, by allocating the vast majority of obligations – including financial ones – to member states with different levels of economic development and different conceptualisations of welfare.

The principle of solidarity and fair sharing of responsibility enshrined in the EU Treaties remained a dead letter for several years. Eventually the 'implementation gap' in the EU asylum policy led to the slow emergence of measures with a solidarity potential: the institutionalisation of practical cooperation efforts through an EU agency, the European Asylum Support Office (EASO); the creation of exceptions to the normal responsibility allocation system through ad hoc programs of redistribution of protection seekers between the EU member states (relocation); and the emergence of an EU funding component that is geared towards complementing national financial allocations rather than compensating member states for implementing their obligations under the CEAS.

Solidarity and fair sharing of responsibility in EU asylum law

Solidarity in asylum matters is not merely an aspiration; it is a legally binding duty established by the EU Treaties. The

principle of solidarity and fair sharing of responsibility under Article 80 of the Treaty on the Functioning of the European

Union (TFEU) profoundly impacts the goal of EU asylum policy, dictates a certain ‘quality’ in the co-operation among the different actors, and arguably unsettles its implementation modes. Article 80 TFEU states:

“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, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”

This provision creates binding legal obligations and should impact both the legislative and implementation phases. The Article’s wording not only permits, but in fact *requires* the adoption of concrete measures, whenever necessary. Special importance should be attached to the Article’s reference to “solidarity and fair

sharing of responsibility”, which implies that member states have a duty to go beyond simple solidarity mechanisms. The aim is to provide support up to the point where each member state is contributing its fair share. More ambitiously, the objective should be to structure the policy and its implementation in such a way that asymmetrical burdens do not occur in the first place.

Inter-state, intra-EU solidarity is therefore a vital legal principle in the context of the EU asylum policy. It is structural to this policy area and should have far-reaching effects. Merely limiting its scope to adopting partial, compensatory measures, such as short-term deployments, is not enough. It requires measures that offset the effects of the CEAS that existing solidarity measures do not compensate for. It can even require a redesign of the CEAS’ legislative instruments and, possibly, its implementation modes.

The prevalence of emergency-driven solidarity in the CEAS

Notwithstanding the importance of inter-state solidarity and fair sharing, the CEAS currently lacks a genuine system for allocating responsibility among the member states based on objective indicators. EU countries often assert that they are ‘overburdened’, but such claims cannot be objectively substantiated and they raise the suspicion, among other member states, that the failure to comply with EU law obligations derives not from inability but from unwillingness.

Generally speaking, the claim of migratory ‘pressure’ is not based on pre-defined, objective criteria but is merely ascertained

on a common sense basis. Even when objective criteria are evoked to support common sense assessments, e.g. the number of migrants arriving, there is no clarity as to whether migratory pressure should be evaluated on an absolute or a relative basis. Instinctively, almost any observer would agree that the arrival of, say, 20,000 asylum seekers (an objective metric), will have a different impact in Germany than in Malta. A more complete understanding of fair sharing would seek to put this ‘pressure’ into perspective by taking into account characteristics of the receiving state, such as population, GDP, unemployment rates, and so on.

The principle of solidarity and fair sharing of responsibility under Article 80 of the Treaty on the Functioning of the European Union (TFEU) profoundly impacts the goal of EU asylum policy, dictates a certain 'quality' in the co-operation among the different actors, and arguably unsettles its implementation modes.

Rather than emergency needs in the area of asylum, these pressures point to structural needs, and call for an overhaul of the CEAS implementation modes, in view of operationalising the principle of solidarity and fair sharing.

But exporting the challenges and responses to them is not the panacea that several policymakers think it to be; it is not the EU's newest quick fix.

Nevertheless, the tweaks to the implementation design of the EU asylum policy that aim at operationalising solidarity are modest; they are often not embedded in the policy design but constitute exceptional, emergency-driven responses. First, in what concerns operational support, EASO's operational deployments are targeted at addressing particular pressures on the national asylum and reception systems. They were supposed to be limited in time. EASO deployees have begun to move away from expert consulting and undertake more hands-on tasks. In Greece, this includes independently conducting parts of the asylum process that entails discretion, while final decisions are adopted by the Greek Asylum Service. The proposal for a future European Union Agency on Asylum (EUAA) uncouples operational support from particular pressure, extends the minimum limits of the deployment of individual experts and clearly foresees more operational, hands on tasks for those deployed. However, deployments of the future EUAA are still expected to be limited in time, rather than structurally involved in assisted or common forms of processing of asylum claims.

Next, emergency relocation decisions adopted in 2015 established people-sharing arrangements for the benefit of Greece and Italy. They basically consisted of intra-EU transfers of asylum seekers between member states as a short-term exception to the normal rules on assigning responsibility. These relocation schemes established quotas that were obligatory, thus representing a first attempt to frame solidarity *and* fair sharing as an obligation, rather than as a discretionary act.

However, these measures were a temporary derogation to the workings of the normal responsibility allocation regime and concerned a fixed amount of asylum seekers. A legislative proposal on the reform of the responsibility allocation system, currently under negotiation, aims at creating a relocation mechanism that would be automatically triggered as soon as a predetermined threshold is overpassed. In its initial design, this mechanism prioritised the goal of externalisation over fair sharing, thus undercutting its effectiveness to deliver the latter. It saddled member states with additional obligations, while excluding asylum seekers found inadmissible from relocation. Even for those eligible, the administrative workings of the mechanism promised to be unworkable.

The component of EU funding that is more akin to an instrument of solidarity is emergency funding. Emergency funding, as its name suggests, was and continues to target situations of heavy migratory pressure. The emergency component of EU migration funding has been redesigned to make it more flexible and has no co-financing requirement,

meaning that the emergency amount comes exclusively from the EU budget. Nonetheless, emergency funding draws from an extremely small overall Home Affairs financial portfolio and can only partially compensate member states for their spending. There is an increasing number of contenders for it, including well developed economies such as Germany and France. Intra-EU humanitarian aid, a new non-migration specific funding line was established in 2016. It taps financial resources from the general EU budget and was immediately activated to support Greece. However, it is also a time-limited measure, with a maximum three-year duration. It is geared at responding to an emergency situation rather than a structural form of financial assistance.

Every effort is being made to suggest that it is not necessary to depart from the

initial implementation design, and that solidarity measures seek to address passing emergencies, created by *force majeure*, the 'external' pressure. And yet, some member states, such as Greece and Italy, have drawn almost constantly from 'emergency funding' since its inception, while the EASO steadily continues to renew 'emergency plans' with 'special support plans' on the ground.

Rather than being purely external, the pressures are also internal, created by the misconception of the implementation design of the EU asylum policy itself, and the lack of fair sharing. Increased arrivals in 2015 have magnified pressures, but they did not create them. Rather than emergency needs in the area of asylum, these pressures point to structural needs, and call for an overhaul of the CEAS implementation modes, in view of operationalising the principle of solidarity and fair sharing.

Moving forward: Embedding fair sharing of responsibility in law and in practice

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The inability of a collective of 28 member states, with a population of roughly 500 million people, to manage arrival numbers that only moderately surpass those that Lebanon, with a population of 6 million people, had to deal with during the same period, reveals that the current crisis is one of governance and solidarity, rather than a refugee crisis.

The explosive mix of the initial implementation construct, combined with a responsibility assigning system that had glaring disregard for fair sharing, led to the establishment of an administratively dysfunctional CEAS. Not enough has been done to address this. Until 2013, member states stubbornly insisted on maintaining the

implementation design largely unaltered, and continued down the path of placing emphasis on enhanced legislative harmonisation. Only during 2015 did more radical shifts, such as the first signs of joint implementation through EASO, or baby steps towards more structural forms of funding (that are for now limited to pooling together different emergency funding lines) appeared.

► But more needs to be done in the next politico-institutional cycle to enhance the ability of the EU and its members to effectively address the governance and solidarity crisis we are facing. While the Juncker Commission seems to be more aware of implementation design issues and the imperative of fair sharing

in its latest proposals, there is an externalisation pull that is undercutting the success of such plans. A more principled approach would be a redesign that aims to structurally embed solidarity and fair sharing in responsibility allocation arrangements and in the funding design. We need an implementation construct that identifies structural demands instead of one that attempts to 'fix' the situation with a cascade of 'emergency measures', hoping that lumping them together will somehow add up to a structural response. A redesign which fully recognises that asylum provision is a regional public good and draws the necessary consequences.

► One possible pathway is a greater integration between the EU and national administrations in implementing EU asylum policy. This is foreshadowed by the joint processing of asylum applications that is taking place in Greece, with EU involvement through EASO in different stages of the asylum procedure, while the final decision is adopted by the Greek Asylum Service. This will be enhanced in the new mandate and envisaged workings of the European Union Agency on Asylum proposal. The advantages of such an implementation mode are a greater steering potential towards harmonisation and a slight enhancement of fair sharing, to the extent that deployments would become lengthier and more numerically robust. This is not to say that enhanced administrative integration should be celebrated as something that is inherently positive. This type of integration brings its own challenges, of both a constitutional and practical nature, and requires a rethink of accountability processes so that it does not lead to a *de facto* watering down of procedural guarantees. Alternatively, the redesign could realise fair sharing through a compensation logic behind funding where the EU covers national expenses related to asylum provision through the EU budget. This would involve a drastic enhancement of the overall volume of funding available for the area of freedom, security and justice.

► Any of the two above approaches would need to be combined with a more rational approach to protection seekers' agency. A future responsibility allocation mechanism would need to be better at taking into account their personal circumstances (e.g. level of vulnerability), family links (including extended family) and social links (e.g. language skills), without this necessarily entailing the establishment of a free choice model. It would mean distancing the policy from the coercion course, which it is now pursuing with renewed fervour. In addition, policy makers would need to address the absence of free movement rights. At the moment, only the Long-Term Residence Directive contains some meagre opportunities for free movement. The policy redesign would need to foresee some variant of post-recognition free movement rights, without this necessarily meaning unqualified rights to free movement.

The EU and its members need to address the above internal shortcomings in the years to come. Yet, they have chosen to move in a different direction, given that externalisation is becoming the primary goal. But exporting the challenges and responses to them is not the panacea that several policymakers think it to be; it is not the EU's newest quick fix. Externalisation ultimately rests on the viability of political agreements struck with third country partners. This renders the EU hostage to the whims of foreign political leaders. It does not address but merely delays the conversation on genuine intra-EU solidarity. It makes for shaky ground to base the redesign of the implementation construct of the policy on. Presented as the principal way to achieve some relief from unfairly shared obligations, it incentivises governments to become zealous participants in operations with dubious fundamental rights implications.

Future political leaders and policymakers should follow a different path. They should seek to meaningfully address – rather than eschew – the issue of solidarity by structurally embedding fair sharing of responsibilities in law and in practice.