EU legal framework on asylum and irregular immigration 'on arrival'
State of play

SUMMARY

With asylum-seekers and immigrants still dying off the shores of European Union Member States, EU asylum and migration policies are high on the political agenda. The newly completed Common European Asylum System and the many pieces of legislation on irregular immigration at EU level have not succeeded in stopping further tragedies in the Mediterranean. Calls are therefore increasingly being voiced for a 'holistic' approach to asylum and irregular immigration. However, the concrete design of this holistic approach is the subject of difficult policy choices, seeking to strike the right balance between humanitarian aspects and security concerns.

According to many stakeholders and experts the way forward in EU asylum and migration policy should necessarily pass through a new legal reform taking the approach of better burden-sharing between Member States. Others plead for the operational instruments of the newly adopted legislation to be fully exhausted first before embarking on further reforms. The European Commission has launched work on a comprehensive European Agenda on Migration, to be presented in May, and stated already that the focus will be placed on securing effective implementation of the existing legislation rather than proposing any further modifications.

This briefing takes stock of the existing legislative and policy framework in the field of asylum and irregular immigration and highlights the causes of friction.

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> **Glossary**
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> Irregular immigrant: A third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.
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> Asylum-seeker: A person claiming international protection due to the risk of persecution in their home country. (Article 1 A (2) UN Geneva Refugee Convention)

Towards a holistic EU approach on asylum and immigration?

The EU policy on asylum and irregular immigration has moved a long way. From originally autonomous national policies, some minimum common standards at EU level were facilitated by the Amsterdam Treaty. The 2009 Stockholm Programme heralded a common, EU-framed, policy which the Lisbon Treaty embedded in a comprehensive legal framework based on solidarity between Member States. While at first different actions under EU asylum and immigration policy were not systematically integrated into a broader strategic framework, political actors and other stakeholders soon recognised that a holistic approach is necessary to deal with this sensitive topic. This holistic approach should take into account the geopolitical and economic challenges which are bringing an increasing surge of asylum-seekers and irregular immigrants to the EU, as well as demographic changes in EU Member States and the need to secure social cohesion in those Member States receiving large numbers of immigrants.

In this regard, several initiatives at EU level have sought to shape EU asylum and migration policy in a more strategic way, which includes external as well as internal dimensions, through better organising legal migration, fighting irregular migration, strengthening the external borders, building an EU asylum system and creating a global partnership for migration and development.[1]

However the concrete design of this 'holistic approach' is the subject of sometimes competing policy options. The difficulty consists in striking the right balance between the humanitarian aspects of asylum and immigration, with the aim of ensuring migrants' fundamental and human rights, and security concerns. Furthermore, many call for the reasons that lead people to embark on dangerous journeys, such as poverty and insecurity in their countries of origin, to be addressed. On the other side though, public opinion towards immigration has become increasingly negative in recent years, not least as a consequence of the economic crisis in many Member States.[2]

After repeated calls from the European Parliament for a more holistic approach to asylum and migration (most recently in December 2014), the European Commission announced on 4 March 2015 its work on a comprehensive European Agenda on Migration, to be presented in May. It will consist of four pillars: 1) full and coherent implementation of the recently completed Common European Asylum System, 2) fighting irregular immigration, with particular emphasis on actions against human smuggling and further development of readmission agreements with third countries, 3) securing the effective management of EU external borders, *inter alia* by strengthening Frontex's operational capabilities and pooling more resources amongst Member States, as well as 4) a new EU policy on legal immigration through a review of the EU Blue Card Directive.

EU asylum framework and its persistent shortcomings

Common European Asylum System

The Lisbon Treaty provided a legal basis for a common asylum policy, allowing the removal of differences in treatment of asylum-seekers across the EU so as to prevent them moving between Member States and 'asylum shopping' by choosing for their asylum application the EU Member State with the highest protection standards. Whilst in the first phase of the Common European Asylum System (CEAS) only common minimum standards could be adopted, major progress was made in 2013, with the completion of the second phase of the CEAS. Five key acts make up the CEAS.

- The Qualification Directive (2011) clarifies the grounds on which international protection is granted to asylum-seekers.
- The Asylum Procedure Directive establishes common procedures for granting and withdrawing international protection, while strengthening the rights of asylum-seekers during the asylum procedure. A regular asylum procedure may now not last more than six months.
- The Reception Conditions Directive[3] ensures a common standard in Member States for asylum-seekers' access to healthcare, education, employment, etc. While detention is possible only as a last resort and for a period 'as short as possible', criticism has been made of the possibility that asylum-seekers may be kept in prisons if no specialised detention facilities are available.
- The Dublin III Regulation establishes the criteria for determining which Member State is responsible for examining an application for international protection to avoid the phenomenon of 'refugees in orbit' (asylum-seekers for which no Member State takes responsibility) and to prevent multiple asylum applications. By default the first Member State that the applicant entered is responsible.
- The implementation of the Dublin Regulation is facilitated by the EURODAC Regulation, a fingerprint database in which Member States register the fingerprints of asylum-seekers and irregular migrants in order to identify the point of entry or the first application made by a claimant.

Figure 1 – Asylum applications in EU Member States (in thousands)
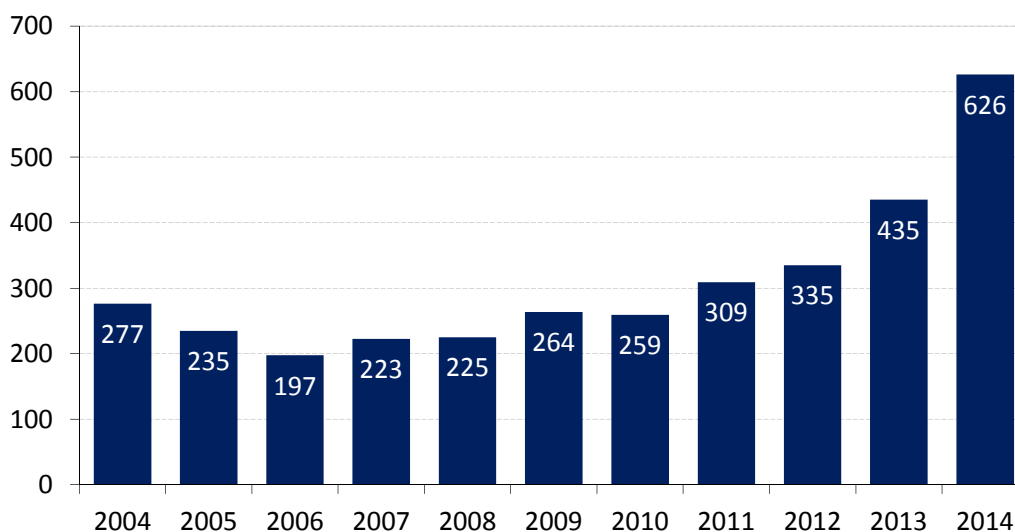
Data source: Eurostat.

The 'Dublin dilemma'

The Dublin II Regulation was seen as one of the structural problems of EU asylum policy. In the absence of an EU-wide asylum status, it regulated the Member States' responsibilities for the examination of asylum applications and, as a consequence, the responsibility to grant protection if the asylum application is justified.[4] The Dublin II Regulation established that, by default, the first Member State an asylum-seeker entered is responsible for examining their application for international protection. This means that an asylum-seeker who moves to another Member State is automatically transferred back to the Member State at the EU's external borders. As a consequence of the Dublin rules, Member States on the EU's external borders are literally on the front line for asylum applications. This has led many to criticise the Dublin rules for placing responsibility for asylum-seekers on those Member States under high pressure of irregular immigrants. The overload on some Member States' asylum systems is said to lead to violations of asylum-seekers' human rights.

> The European Asylum Support Office (EASO) was established in 2010 to contribute to the implementation of the CEAS by providing support and facilitating cooperation among Member States as a centre of expertise on asylum. It has set up an 'Early warning and preparedness system' under which it provides, on a regular basis, a regional outlook with an analysis of asylum trends and push-pull factors, as well as risk scenarios.

Unaccompanied minors and the Dublin Regulation

Following a 2013 judgment of the Court of Justice of the EU (CJEU), the Dublin III Regulation is currently under revision. The CJEU held that the Member State responsible for examining an asylum application made in more than one Member State by an unaccompanied minor is the state in which the minor is present after having lodged an application there. Critics point out however that this could lead to an increased use of minors by traffickers in human beings and that such a system could be misused under the family reunification rules. The Commission proposal is currently being discussed in Parliament's Committee on Civil Liberties, Justice and Home Affairs (rapporteur Cecilia Wikström, ALDE, Sweden).

The 2013 Dublin III Regulation takes account of judgments of the European Court of Human Rights and the Court of Justice of the EU demanding that asylum-seekers are not transferred to a Member State with systematic deficiencies in asylum procedures or in the reception conditions of asylum-seekers. However, the Council opposed the introduction of a **formal procedure for suspending** such transfers. Instead, an **early-warning mechanism** was established to prevent pressure on the asylum systems of Member States experiencing difficulties coping with a surge of migrants. The new Dublin Regulation entered into force in January 2014.

Many argue that the structural shortcomings of the Dublin system will not be resolved by the new early-warning mechanism. Moreover, experts argue that the objective originally pursued by the Dublin Regulations – to avoid 'asylum-seekers in orbit' (in search of the Member State responsible) – has not been achieved, with Dublin transfer procedures being long and cumbersome.[5]

> **The European Court of Human Rights on the asylum system in Italy**
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> While suspensions of Dublin transfers relate so far mainly to Greece, the European Court of Human Rights recently held that the transfer of an asylum-seeking family to Italy would amount to inhuman and degrading treatment. The Court however ruled differently in January 2015 and held that the overall reception arrangements in Italy cannot act as a bar for all transfers there. The Court justified the different results with the fact that in the second case, the applicant was an 'able young man' and not a family with children.

Calls for burden-sharing between Member States
Commentators agree that the 'Dublin system' of responsibility for asylum applications in the EU has not been radically changed. As a result, some Member States face very large numbers of asylum application in absolute figures, and others in proportion to their population.

In 2014, some 76% of asylum applications in the EU were concentrated in six Member States (Germany 32.4%, Sweden 13%, Italy 10.3%, France 10%, Hungary 6.8% and the UK 5.1%). In proportion to their population, the Member States receiving most asylum applications per million habitants in 2014 were Sweden (8 417), Hungary (4 331), Austria (3 296), Malta (3 174), Denmark (2 609) and Germany (2 509).

Intra-EU relocation of asylum-seekers
The European Parliament is therefore calling for a system based on burden-sharing between Member States, providing fair distribution of asylum-seekers among Member States. Currently, there is an ad hoc intra-EU relocation programme in place for Malta (Eurema II project), with Member States committing on a voluntary basis to take asylum-seekers. EU funding offers assistance to those Member States who are willing to implement resettlement programmes. Since 2005, some 700 persons have been resettled from Malta to other Member States, either within the Eurema projects or based on bilateral relocation agreements.[6]

Calls from the EP, e.g. the 2012 report of the Civil Liberties Committee, to establish a permanent relocation mechanism, met opposition from several Member States which fear that relocation might become a pull factor for migrants.[7] Parliament reiterated again in December 2014 the need for the EU to 'step up fair sharing of responsibility and solidarity towards Member States which receive the highest numbers of asylum-seekers in either absolute or proportional terms (in compliance with Article 80 TFEU)'.

With the number of asylum-seekers, particularly from Syria (more than 3.5 million) having increased dramatically in recent years, the UN High Commissioner for Refugees (UNHCR) called on EU Member States to resettle some 130 000 asylum-seekers and refugees present in third countries (mostly countries bordering Syria) in 2015 and 2016, while Member States have pledged some 36 000 places, with Germany having accepted some 25 500 refugees in 2013-14. The new Asylum, Migration and Integration Fund provides funding to Member States that voluntarily agree to resettle refugees.

Mixed flows of asylum-seekers and irregular immigrants and 'humanitarian corridors'
Asylum-seekers cannot be refused entrance at borders nor be returned to a third country if there is a risk of persecution or other serious harm. This is the principle of *non-refoulement* established by the 1951 Geneva Refugee Convention and incorporated into EU law (Article 78(1) TFEU). EU law does not provide for the regulated arrival of asylum-seekers, so their entry to EU territory is in most cases irregular, as they travel without the necessary documentation and/or use unauthorised border crossing points. As a consequence, the EU asylum rules apply only from arrival on EU territory and not before.[8] The Asylum Procedures Directive laying down the asylum procedure and guarantees, for instance, does not apply to those who cannot reach the border of a Member State, or at least its territorial waters (Article 3(1)).

Due to mixed flows of asylum-seekers and irregular immigrants, it is often difficult for national authorities to establish at the arrival or interception of immigrants at sea whether they are irregular immigrants or rather persons entitled to seek international

protection. Commentators and NGOs criticise 'push-backs' at sea or refusal of entry at borders as possibly representing a violation of the principle of *non-refoulement*.

Therefore, there have been calls to give asylum-seekers the possibility to apply for asylum from outside the EU, preventing them from undertaking dangerous journeys. The European Commission-led Task Force for the Mediterranean has launched a feasibility study on possible joint processing of protection claims at Member States' consulates in third countries.

The creation of legal channels for EU entry has also been demanded repeatedly by Parliament. Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (rapporteur Juan Fernando López Aguilar, S&D, Spain) is currently looking, within the review of the Visa Code (recast), into the possibility of 'humanitarian corridors' for the provision of humanitarian visas to people in danger in third countries, allowing for

> **Task Force Mediterranean**
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> After the tragic events which took place off the coast of Lampedusa on 3 October 2013 when 366 migrants lost their lives, the European Commission established the Task Force Mediterranean to identify concrete short- and medium-term operational actions to better mobilise the EU's efforts. In its Communication 'on the work of the Task Force Mediterranean', endorsed by the European Council in December 2013, the Commission outlined different strands of action: increased engagement with third countries in order to avoid migrants embarking on hazardous journeys towards the EU; regional protection, resettlement and legal ways to access Europe; the fight against trafficking, smuggling and organised crime; increased border surveillance; and assistance for and solidarity with EU Member States facing migratory pressures.

the derogation from visa admissibility requirements on humanitarian grounds.[9]

Way forward

Some commentators called, right after the completion of the CEAS in 2013, for a thorough modification of the newly adopted legislation. Several experts demand, above all, an overhaul of the very essence of the 'Dublin system', shifting from the allocation of individual national responsibilities to a burden-sharing system. However, the prevailing interest of the Member States to assert national control over immigration makes political acceptance of responsibility based on burden-sharing difficult.[10] That is why other commentators point to the need now to focus on effective implementation of the newly adopted legislation in the Member States, rather than making further modifications. This is also the stance of both the Council and the European Commission, which stress the need to uphold and fully implement the CEAS, including through increased operational cooperation.

Legal framework for irregular immigration 'at arrival'

The EU's legal framework for irregular immigration is scattered over many legal instruments. Those which apply at the point of a migrant's arrival focus on border management, and prevention of irregular immigration through cooperation with countries of origin and transit. This approach, focusing on control of and combat against irregular immigration rather than a rights-based one, is rooted in the TFEU (Article 79 (1)).[11] The EU Charter of Fundamental Rights is, however, also applicable to migration management measures, including enforcement measures, such as the return of irregular immigrants.

Border surveillance

There is no EU coastguard, which means that Member States are in charge of managing their external borders, under the conditions established by the Schengen Borders Code, in a way that ensures the mutual trust on which the Schengen area of free movement is

based. As these borders are also the EU's external borders, Member States experiencing particular migration pressure receive support from the EU and the other Member States under the principle of solidarity (Article 80 TFEU). To this end, in 2004, the Frontex agency was created to reinforce and streamline cooperation between national border authorities through coordinating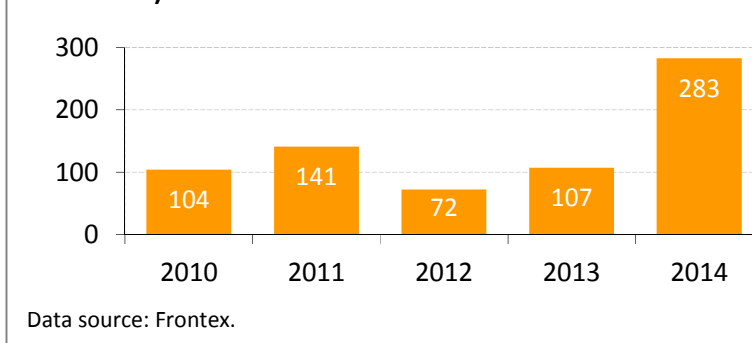 joint operations of Member States, providing risk analysis, research and training and assisting Member States in return operations. Frontex can also deploy European Border Guard Teams (EBGT) in joint operations and rapid border interventions. Frontex however does not have its own operational capabilities, and owns no ships or aircraft, but Member States lend ships and aircraft to each joint operation. In the same way, the EBGTs consist of border guards from Member States and experts in border management.

Figure 2 – Number of detected illegal border-crossings (in thousands) at the external sea and land borders of the EU

Data source: Frontex.

Frontex's insufficient funding was highlighted by Commission President Jean-Claude Juncker in his political guidelines. Frontex's budget for 2015 amounts to €114 million (compared to €97 million in 2014), of which 72% goes to operational expenditure. A new Asylum, Migration and Integration Fund (AMIF) with a total budget for 2014-20 of €3.1 billion replaced the previous four funds in this area, including the External Borders Fund and the European Refugee Fund.[12] In addition, emergency funding (€50 million for 2014 and 2015) comes on top of the regular AMIF funds Member States receive for the implementation of their national programmes for the 2014-20 period. The European Commission has awarded an amount of €13.7 million in emergency funding from the AMIF to Italy, to support it in managing the influx of asylum-seekers and improve the situation on the ground.

In November 2014, a new Frontex mission, *Triton*, was launched. After initial confusion over whether Triton was supposed to replace the Italian *Mare Nostrum* operation, the Commission clarified before Parliament's Civil Liberties Committee in September 2014 that Frontex-led operations will contribute to national search and rescue (SAR) operations and not replace them.[13] In this regard, *Triton*'s scale is unlikely to reach that of *Mare Nostrum*, which had a cost of approximately €9 million per month,[14] while the Triton budget is estimated at €2.9 million per month.

External border management is being further strengthened by the Eurosur communication system. This facilitates real-time sharing of

Criticism of Frontex

Frontex has been accused by some of alleged push-backs at sea of immigrants trying to reach the EU coast, which would represent an infringement of the Refugee Convention and of the principle of *non-refoulement*. The European Ombudsman issued a special report in 2013, calling on Frontex to provide an effective complaint mechanism against fundamental-rights violations. Conversely, Frontex, as well as some experts, argues that the Agency has no independent executive powers and that the responsibility for operational activity at sea lies mainly with the Member States. The Ombudsman's report has been forwarded with the recommendations to Parliament, where it is to be the subject of an own initiative report from the Committees for Civil Liberties, Justice and Home Affairs and Petitions (joint procedure under Rule 55).

data and intelligence from various authorities and surveillance tools, such as satellites and ship-reporting systems, to improve the management of the EU's external borders. The system is also used to help save migrants' lives when in danger.

Rescue at sea

Interception of immigrants on the high seas is governed by international law, in particular by the UN Convention on the Law of the Seas, the Safety of Life at Sea (SOLAS) and the Search and Rescue Conventions. These instruments include the obligation to rescue persons in distress at sea and to bring them to a safe place.

Following a judgment by the CJEU[15] annulling the 2010 Council guidelines, in May 2014 a new Regulation establishing rules for border surveillance in the context of joint operations at sea coordinated by Frontex was adopted. According to the Regulation, immigrants intercepted on the high sea can be disembarked in a third country from which the vessel is assumed to have departed, or otherwise in the Member State in which a sea operation takes place or from which it is launched. Critics argue that the new rules do not prevent push-backs and disembarkation in unsafe third countries which would be a violation of the principle of *non-refoulement*. In this regard, a certain ambiguity seems to persist as to Frontex's role in SAR: while Frontex is a border control agency and SAR is said to be largely entrusted to Member States, the newly adopted Regulation places a greater emphasis on SAR in Frontex's joint operations.[16]

Prosecution of smuggling and trafficking

In its conclusions of 10 October 2014 on 'Taking action to better manage migratory flows' as well as at its meeting on 12 March 2015, the Council emphasised the need for cooperation with third countries, with specific focus on the fight against smugglers and traffickers in human beings. The Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, has also put the issue high on the Commission agenda.

EU law provides for measures sanctioning those facilitating unauthorised access of migrants to EU territory *inter alia* through smuggling and trafficking.[17] The Facilitation Directive harmonises definitions of unauthorised entry, transit and residence, and provides for sanctions against those who facilitate such breaches. Moreover, in 2011, the Directive on trafficking in human beings was adopted, requiring Member States to introduce effective, proportionate and dissuasive sanctions (Article 3). The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–16 sets the priorities for further action in this field. Furthermore, the Carrier Sanctions Directive provides for sanctions against those who transport undocumented migrants to the EU.

> Over 8 000 facilitators were detected in 2014. However, according to Frontex, on several routes, there is a tendency for facilitation networks not to accompany the migrant boats to the EU (so called 'ghost ships'). This is said to be due to a shift towards the abuse of legal channels and document fraud, allowing facilitators to operate remotely without accompanying migrants during border crossings.

Cooperation with third countries

Both the conclusions of the Task Force Mediterranean as well as the outcome of the JHA Council meeting of 12 March 2015 emphasise the strengthening of the EU's external borders and cooperation with third countries. In this context, the externalisation of European migration policy is seen as a necessity, in order to address the roots of the migration influx from third countries by promoting socio-economic development and EU values in the countries of origin, and transit, of migration.

Return

As of end-2010, the [Return Directive](#) introduced common rules on return and removal, detention and re-entry, and establishes certain rights of people intercepted in connection with their irregular border crossing. Member States return immigrants either under the [EU readmission agreements](#) or under their bilateral agreements with third countries. Frontex plays a key role in operational cooperation on return. The [European Return Fund](#) provides Member States with funding. Up to September 2014, EU Member States issued more than 190 000 return decisions, while during the same period some 120 000 non-EU nationals left their territory.[18]

It is argued that the low probability of return for irregular immigrants who do not need international protection is a pull factor, and undermines public trust in national and European authorities. The absence of readmission agreements with third countries of origin or transit, as well the non-compliance of third countries with existing ones,

> The European Ombudsman, Emily O'Reilly, [launched](#) an inquiry in October 2014 into joint return operations coordinated by Frontex, looking into issues with fundamental rights protection of returnees.

and the difficulties in establishing the identity of an immigrant are pointed to by Member States as the main challenges for the return of irregular immigrants to their countries.[19]

Mobility partnerships

Mobility partnerships seek to commit third countries to increasing the surveillance of their coastlines and to prevent boats with irregular immigrants leaving from them. They are compensated in return by making visas easier to obtain. Seven mobility partnership agreements have been concluded so far, with Morocco, Cape Verde, Georgia, Armenia, Moldova, Tunisia and Jordan.

This 'externalisation' of EU borders is seen however by some commentators as flawed due to North African countries' lack of ability to prevent the departure of unsafe boats with immigrants[20] and due to alleged incompatibilities with international law.[21]

Main references

Minos Mouzourakis, '[We need to talk about Dublin](#)': Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Refugees Studies Centre, Oxford Department of International Development, December 2014.

C. Balleix, [A review of post-Lampedusa: What type of EU migratory cooperation with third countries?](#), Fondation Robert Schuman, European issues n°301, February 2014.

Endnotes

[1] See e.g. the [European Pact on Immigration and Asylum](#) adopted by the European Council in 2008 and the strategic framework adopted by the European Commission in 2011, the [Global Approach to Migration and Mobility](#) (the GAMM initiative).

[2] In this context, immigration has also had an impact on intra-EU mobility and triggered a modification of the Schengen Borders Code to enable the immediate re-introduction of some internal border controls when significant numbers of third-country nationals cross an external border, or when Schengen states persistently fail to protect it.

[3] Denmark, Ireland and the United Kingdom are not bound by the new Reception Conditions Directive, but the UK will continue to apply the [2003 rules](#) as it 'opted in' to the 2003 Reception Conditions Directive.

[4] M. Mouzourakis, [We need to talk about Dublin. Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union](#), Refugees Studies Centre, Oxford Department of International Development, December 2014, p. 5.

[5] Ibidem, p. 18.

[6] European Commission, [Second Forum on Relocation and Resettlement](#), 25 November 2014.

7   EASO fact finding report on intra-EU relocation activities from Malta, European Asylum Support Office, 2012, p. 16.

8   Handbook on European law relating to asylum, borders and immigration, EU Agency for Fundamental Rights, 2013.

9   See U. Iben Jensen, Humanitarian Visas: Option Or Obligation?, Study prepared for DG IPOL, Policy Department C, Citizens' Rights and Constitutional Affairs, September 2014.

10 M. Mouzourakis, We need to talk about Dublin, op. cit., p. 24.

11 'The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration [...].'

12 For further information please see A. D'Alfonso, Asylum, Migration and Integration Fund, European Parliamentary Research Service, March 2015.

13 See also Frontex, Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN-Triton to better control irregular migration and contribute to SAR in the Mediterranean Sea, August 2014, p. 10.

14 H. Brady, Mare Europaeum? Tackling Mediterranean migration, EU Institute for Security Studies, September 2014.

15 The Court held that the guidelines contained essential rules on external maritime border surveillance based on certain political choices, which makes the involvement of Parliament necessary.

16 S. Carrera, L. den Hertog, Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean, CEPS, January 2015, p. 10.

17 While smuggling represents willing entry to the EU by immigrants, trafficking means 'recruitment, transportation, transfer, harbouring or reception of persons, ..., by means of the threat or use of force or other form of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability,..., for the purpose of exploitation'. Article 1, Directive 2011/36/EU.

18 Frontex FRAN Quarterly risk analysis, Quarter 3 2014, p. 60.

19 European Migration Network, Practical measures to reduce irregular migration. Synthesis Report, 2012, p. 52.

20 E. Guild, S. Carrera, EU borders and their controls. Preventing unwanted movement of people in Europe?, CEPS Essay No 6, 14 November 2013, p. 2.

21 T. Demmelhuber, The European Union and illegal immigration in the southern Mediterranean: the trap of competing policy concepts, The International Journal of Human Rights 2011, pp. 818-819.

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