

Refugee rights protection in the EU and the burden-sharing inequalities created by the Dublin system. The search for a long-term solution

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In 2015, the European Union was hit by the biggest inflow of refugees since World War II, when approximately one million people seeking or likely to seek international protection entered it.¹ This phenomenon has been very challenging for the EU institutions and the Member States when dealing with the irregular arrivals by sea and the territorial distribution of refugees among the Member States. The massive refugee influxes entering the EU are mainly regulated by the Dublin Regulation, that raises complex issues during the process of distribution, reception and integration of asylum seekers. Mainly, it has generated an uneven share of burden among the EU Member States during the reception and integration phases of the asylum seekers, which has led to the violation of their fundamental rights.

This paper aims to analyze the main issues caused by the shortcomings of the Common European Asylum System (CEAS), the lack of solidarity and an unfair share of burden among the Member States that has led to a disproportionate responsibility on States situated at the external borders of the Union. The above-mentioned deficiencies represent points of relevance for EU, its Members States, as well as for the

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¹ Filippo Grandi, United Nations High Commissioner for Refugees, 'Opening Statement at the 67th Session of the Executive Committee of the High Commissioner's Programme' (2017) 29 International Journal of Refugee Law 346.

asylum seekers themselves. They negatively affect the EU coordination of the migrant crisis, as they emerge into an insufficiently funded, disordered and unplanned asylum mechanism that in turn undermines the economic situation of certain Member States. Last, but foremost, they put at risk the life and well-being of asylum seekers.

1. Introduction

Europe has suffered several migrant crises during its existence. By the end of the Second World War, there were 60 million refugees from the developing countries searching for a new life in the Western European States.² After the end of the Cold War a mass exodus - of approximately 700,000 asylum seekers, from the former communist States who were seeking to be resettled in Europe - took place.³ More recently, the Middle East civil wars, as well as the Ukrainian conflict, have brought an unexpected number of refugees on the EU's territory.⁴

The arrival of more than one million migrants in 2015, many of them refugees to be, within the European Union borders, has been proved to be an enormous test for it,⁵ leading to a polarization of opinions regarding EU asylum

² Lily Rothman and Liz Ronk, 'This Is What Europe's Last Major Refugee Crisis Looked Like' Time (New York City, 11 September 2015) <<http://time.com/4029800/world-war-ii-refugee-photos-migrant-crisis/>> accessed 25 August 2018.

³ Phillip Connor, 'Number of Refugees to Europe Surges to Record 1.3 Million in 2015' (Pew Research Center, 2 August 2016) <<http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>> accessed 25 August 2018.

⁴ Viola Gienger, 'Ukraine's Invisible Crisis: 1.5 Million Who Fled War with Russia' (*USIP*, 23 November 2015) <<https://www.usip.org/publications/2015/11/ukraines-invisible-crisis-15-million-who-fled-war-russia>> accessed 26 August 2018.

⁵ Mediciens Sans Frontieres, 'EU-Turkey Deal: Migrants and Asylum Seekers are Paying the Price with their Health' (*Medicines Sans Frontieres*, 14 March 2017)

policy. The process of determining Member States' obligations towards displaced people has evolved into one of the most critical issues facing the EU. Particularly, the debates between international institutions, States, politicians, and scientists about the ways in which the former must discharge their obligations and how far they must go beyond the frontiers, became one of the most controversial topics. Another cause of controversies has resulted from the fact that some of the EU Member States have fulfilled their obligations towards asylum seekers less than the others, as their reception frameworks were guided by dissimilar asylum policies. Additionally, there were different opinions about the absence of an EU coordinated body that could have ensured guidelines, monitored and assessed the Member States' asylum capacity and performance that in turn has provoked an unequal coordination of the migrant crisis all-over the EU.

During these debates the narrow government interests have displaced an effective reaction to the problem, thus preventing the Member States to assure protection of asylum seekers' fundamental rights and thus raising questions about the Union's purposes and limits.⁶

<<http://www.msf.org/en/article/one-year-after-eu-turkey-deal-migrants-and-asylum-seekers-are-paying-price-their-health>> accessed 26 August 2018.

⁶ Human Rights Watch, 'World Report European Union Events of 2015' (2016) <<https://www.hrw.org/world-report/2015/country-chapters/croatia-european-union-france-germany-greece-hungary-italy>> accessed 28 August 2018.

Experts believe that history could have taught the European Union to foresee a potential refugee crisis, get ready for it, and even anticipate its effects.⁷ They believe that if the European heads of States had gathered at the right moment and proposed certain solutions to the migrant policies, its effects would have been softened considerably.⁸ Yet, even if it could have been foreseen, the crisis has been met in a very unprepared way.

2. The development of CEAS

The Union comprises about 500 million nationals, which makes it one of the strongest powers in the World. It is a complex system that gathers together the interests of the Member States, which gives it the burden to act at the unison and effectively. Since the EU is an area of open frontiers and free movement, the establishment of a Common European Asylum System (CEAS) has been among the first priorities of the European Union politicians, as it would have brought to a common path of asylum crisis management through an equitable, efficient and resistant to abuses way.

CEAS started with the adoption of the Amsterdam Treaty, which defined common asylum and refugee policies as central elements of the development of an area of security, freedom and justice. It stipulated specific provisions regarding visa, asylum and immigration legislation, in this way integrating migration and asylum in the Community section of the Treaty.⁹ Subsequently,

⁷ EY, 'Managing the EU Migration Crisis From Panic to Planning' (EYGM Limited 2016) <<https://www.ey.com/Publication/vwLUAssets/ey-managing-the-eu-migration-crisis/%24FILE/ey-managing-the-eu-migration-crisis.pdf>> accessed 28 August 2018.

⁸ *ibid.*

⁹ Consolidated Versions of The Treaty on European Union and of the Treaty Establishing the European Community [2002] OJ C325/1 (Amsterdam Treaty), Title IV.

during the Tampere meeting of 1999, that aimed to practically develop the European Community into a common area of freedom, security and justice, Member States agreed to cooperate in order to establish a Common European Asylum System, which is composed of a legal framework covering all aspects of the asylum process and a support agency - the European Asylum Support Office (EASO). The Tampere conclusions concentrated on the collaboration with the asylum seekers' countries of origin, the equitable treatment of third country citizens and the management of migration flows. In addition, the Tampere meeting reinvigorated the significance of the right to claim asylum in the spirit of the Refugee Convention¹⁰ and of the non-refoulement principle.¹¹

CEAS has approached the asylum issue through the Dublin system, that has been originally conceived in order to deal with the effects created by the Schengen Agreement. The elimination of the internal frontiers within the EU has given the asylum seekers the possibility to move freely from one Member State to another, thus creating disputes regarding the responsible Member State for processing asylum requests.¹² Other reasons for the creation of the Dublin Convention were the preclusion of asylum seekers from practicing "asylum shopping" and the implementation of a faster procedure of according the international protection.

¹⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

¹¹ Ian Goldin and Geoffrey Cameron, *Exceptional People: How Migration Shaped Our World and Will Define Our Future* (Princeton University Press 2011).

¹² Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1.

Later, the Dublin II Regulation, that has substituted the Dublin Convention, was created in order to ensure that all asylum requests were substantively examined. Additionally, it set up the EURODAC, the database containing the asylum seekers' fingerprints, thus assuring a higher level of security regarding those entering the EU borders.¹³

Finally, the Dublin III Regulation has hierarchized the principles designing the responsible Member State and has established a mechanism to prevent possible problems within Member States' asylum systems. Dublin III also introduced the prohibition of transferring asylum seekers to Member States with "systemic flaws", which according to the ECHR are exposures of an asylum seeker, by a Member State, to inhuman or degrading treatment.¹⁴

Further improvements to the CEAS have been brought by the Asylum Procedures Directive, which provided for a higher protection of the asylum seekers by stipulating their right to be interviewed during the determination procedure,¹⁵ and by the Reception Conditions Directive which widened the notion of family member.¹⁶ Still, these improvements have not contributed to a significant development of EU asylum mechanism, which means that a further analysis of its function is pertinent.

¹³ *ibid.*

¹⁴ *MSS v Belgium and Greece* ECHR 2011-I 255, para 308.

¹⁵ Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 (Asylum Procedures Directive), art 14.

¹⁶ Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96 (Reception Directive), art 2(c).

3. Structural deficiencies of CEAS

As the effectiveness of the CEAS was meant to rely on commonalities, a certain way of achieving them was through the adoption of common legislation. The founding legal framework establishing CEAS contains the principle of solidarity as a legal foundation and mentions it also as a general ground for cooperation, or in a specific framework of certain policy areas.¹⁷

The Treaty on European Union (TEU) highlights that the societies of the EU Member States are founded on pluralism, non-discrimination, tolerance, justice, equality and also on solidarity.¹⁸ Also, the Treaty on the Functioning of the European Union (TFEU) mentions that solidarity and fair sharing of responsibilities, including their financial implications, shall be the dominant

¹⁷ Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, recital 9; Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96, recitals 2, 5; Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L180/60 recitals 2, 8; Council Regulation (EU) 604/2013 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 (recast) [2013] OJ L180/31 (Dublin III Regulation), art 3(1), recitals 7, 8, 9, 22, 25, art 34.

¹⁸ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU), art 2.

principles for the EU policies regarding border controls, asylum and immigration.¹⁹

Although the principle of solidarity is a frequently used concept in CEAS, it is neither defined by EU primary nor by secondary law. In order to get a further understanding about the solidarity principle, we can use the interpretation offered by the Court of Justice of the European Union (CJEU), which stated that when one or more Member States face sudden inflows of third countries nationals “the burdens must be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States” since these principles govern the EU asylum policy.²⁰ Albeit the EU primary law and the interpretation of the term stipulate for solidarity and fair sharing for the area of international protection, the legal acts establishing CEAS do not provide for a direct mechanism to implement these principles in practice.

The Dublin Regulation, one of the CEAS foundations, stipulates the hierarchy of principles conforming to which asylum status shall be granted. According to it, the first responsible State is the one in which the asylum seeker’s family member has a refugee status or has lodged an asylum request.²¹ Next responsible State will be the one which has issued a visa or a resident permit to the applicant.²² The following responsibilities will fall on the State in which the

¹⁹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 80.

²⁰ Joined cases C-643/15 and 647/15 Slovak Republic and Hungary v Council of the European Union (Slovak Republic and Hungary v Council) EU:C:2017:631, para 291.

²¹ Dublin III Regulation, arts 3(1), 9.

²² Dublin III Regulation, arts 10, 12(1).

asylum seeker has lodged an asylum request, even in the case of an “irregular entry”.²³ In practice, the “first entry” and “irregular entry” criteria, allocate responsibility to the frontline Member States, which are better accessible across the Mediterranean or the Balkan Route.²⁴ If asylum seekers requested asylum in the Member States of first entry, these would have to process the majority of asylum applications, which places a disproportionate responsibility on States situated at the external borders of the Union. If those States had effective asylum systems, this would mean registering all arrivals (and thus becoming legally responsible under the Dublin mechanism for all but those with close family ties and residents permits or visas elsewhere in Europe), their asylum systems would be under immense strain in situations of mass influx, which will be further analysed.

Moreover, the asylum seekers who wish to arrive on the EU’s territory, have to pursue very dangerous, life-threatening, routes because of the absence of safe and lawful means of accessing the EU. This happens because of the absence of clarity and plenitude of the rules on admission for asylum seeking purposes under the Schengen legal framework and to the absence of a common understanding of the applicable arrangements.²⁵

²³ Dublin III Regulation, art 13(1).

²⁴ Dublin III Regulation, art 13(1).

²⁵ Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (2015) CEPS Papers in Liberty and Security in Europe 83.

The Schengen Borders Code stipulates that persons seeking to enter the EU shall have a valid travel document (and visa if required),²⁶ although it offers protection to refugees and asylum seekers by mentioning that these provisions shall be applied without prejudice to refugees and asylum seekers rights.²⁷ However, the effectiveness of this regime is weakened by the EU carrier sanctions legislation.²⁸ The carriers transporting passengers into EU have been authorized to check their documentation, without being delegated to undertake refugee status determination.²⁹ As a result carriers, concerned to avoid penalties or other punitive measures, refuse to transport persons who do not have a passport. Those who benefit the most from carrier sanctions are the smugglers, who build up enormous businesses on hopeless people who have no other alternative to arrive in the EU. For this reason, arriving in the EU is extremely problematic for anyone seeking international protection.

The large financial burden on the receiving Member States, that frequently do not have their own financial situation under control, represents another important issue of the CEAS. The only provision regarding the financial expenditure stipulated by the Dublin Regulation,³⁰ concerns only the costs to transfer applicants from the receiving Member State to the responsible Member

²⁶ Council Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1, art 6.

²⁷ *ibid*, art 3.

²⁸ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement [2001] OJ L187/45.

²⁹ Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carrier Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 *European Journal of Migration and Law* 315.

³⁰ Dublin III Regulation, art 30.

States. The Dublin system does not provide for any mechanism that would cover the costs linked with the asylum procedure, such the expenditure for the reception conditions. For this reason, the Member States at the EU external borders have frequently been unable to fulfil their obligations in providing adequate reception conditions and to react in accordance with the EU legal standards to asylum seekers' arrivals.

The increase in asylum requests has also disclosed deficiencies and instabilities regarding the European Asylum Support Office (EASO) activity, which is one of the key players in the application of the Common European Asylum System. EASO is the EU body specialized in the asylum procedure and it has competences in the technical, functional and management spheres.³¹ However, the EASO powers are mostly limited to managing activities and offering services; it does not have any prerogatives over national asylum authorities, nor any lawmaking or executive powers. Accordingly, the design of the procedures and norms regulating the identification, examination and reception of asylum seekers has been left at the discretion of Member States, thus creating uneven asylum policies among Member States. This is one of the reasons why the efforts of harmonizing asylum rules and procedures across the EU have failed to bring effective outcomes.

The above-mentioned drawbacks suggest that Dublin system does not work as an allocation mechanism and that the Common European Asylum System is neither actually common nor a system.

³¹ ECRE, 'Agent of Protection? Shaping the EU Asylum Agency ECRE's Analysis of The Potential and Risks Contained in The Proposal to Transform EASO Into an EU Asylum Agency' (2017) ECRE Policy Note 4

4. Italy and Greece

The above-mentioned gaps have provoked a serious imbalance regarding receiving of asylum seekers by the EU Member States and placed a heavy burden on the Southern European Member States, which due to their geographical location, are the most proximate points to the asylum seekers arrivals.³² The lack of a EU uniform asylum mechanism has led to various problems for these Member States, making them facing the migration crisis more than the rest of the countries.³³

While migration journeys to Italy and Greece have been the main points of entrance into the EU for years, Spain is now accepting six times as many asylum seekers as Italy and double as many as Greece.³⁴ In 2018, Spain became the principal entry point for migrants arriving into EU, receiving approximately 55,570 asylum requests.³⁵ However, this study will focalize on the analysis of the situation in Italy and Greece, given the magnitude and complexity of the asylum issues in these States.

In order to properly manage the massive arrivals in the EU, the European Commission has underlined the urgency to adopt immediate measures, among which were the establishment of hotspots and the implementation of relocation

³² Ažuolas Bagdonas, 'The EU Migration Crisis and the Baltic Security' (2015) 1(2) *Journal on Baltic Security* 7.

³³ Lillian M. Langford, 'The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unravelling of EU Solidarity' (2013) 26 *Harvard Human Rights Journal* 217.

³⁴ AIDA, 'Statistics. Spain' (2018) <<https://www.asylumineurope.org/reports/country/spain/statistics>> accessed 18 March 2019.

³⁵ *ibid.*

programs.³⁶ The hotspots – first reception facilities – were considered a key pillar meant to ensure operational aid to Member States facing disproportionate migratory pressure, while providing an efficient system of reception, identification, and registration of asylum seekers. Those claiming asylum were meant to be directed into an asylum procedure where support units helped in processing asylum claims as rapidly as possible. However, various international actors reported that the hotspots established in Italy and Greece represent serious concerns from a human rights perspective.³⁷ According to various reports, these centers have not been equipped with sufficient receiving capacities, thus asylum seekers frequently experienced overcrowded and inadequate reception conditions, such as: limited access to healthcare, lack of information, delays in the asylum procedure and lack of support for vulnerable asylum seekers, which amounted to an inhuman and degrading treatment.³⁸

In Italy, the constant afflux of approximately 200.000 individuals yearly, has created considerable labor and demographic problems.³⁹ Italy has an

³⁶ European Commission, ‘Communication from the Commission to the European Parliament and the Council Progress Report on the Implementation of the Hotspots in Greece’ COM (2015) 678 final.

³⁷ Global Detention Project, ‘The EU Hotspot Approach: Hotspots and Plethora of Freedom-Restricting Measures’ <<https://www.globaldetentionproject.org/the-eu-hotspot-approach-blurred-lines-between-restriction-on-and-the-deprivation-of-liberty>> accessed 20 March 2019.

³⁸ Danish Refugee Council, ‘Fundamental Rights and the EU hotspot approach’ (2017).

³⁹ Organizzazione internazionale per le migrazioni, ‘1951-2011: Migration in Italy between past and future’ (Centro studi e ricerche Idos, 2015).

insufficiently funded and uncoordinated asylum system,⁴⁰ given that the asylum process is handled by separate national, regional and private authorities⁴¹ instead of a unique coordinating institution with the burden of managing and optimizing the finances assigned from the national budget.⁴² Moreover, Italy's current apathy toward humanitarian rescue has led the situation to become even more critical. In January 2019, Italy has refused to allow entry to rescue vessels for 12 days, keeping migrants trapped in extreme conditions.⁴³

As far as the situation in Greece was concerned, the UNHCR reported on the “abhorrent” conditions in the Greek hotspots. The report expressed concerns regarding the protection of the most vulnerable groups, in the context of the large number of reports on sexual violence being held against women, due to the fact that women shared living spaces with men and that the level of security was low.⁴⁴ Additionally, the unaccompanied and separated minors represent another vulnerable category of concern. Moreover, the Greek receiving centers had a reduced capacity and could not cover the asylum seekers' needs

⁴⁰ Theodoros Papadopoulos and Antonios Roumpakis ‘Democracy, Austerity and Crisis: Southern Europe and the Decline of the European Social Model’ in Serena Romano and Gabriella Punziano (ed), *The European Social Model Adrift* (Ashgate Publishing, 2015).

⁴¹ UNHCR in collaboration with the Caritas Italiana and others, ‘Rapporto sulla protezione internazionale in Italia’ (2017).

⁴² *ibid.*

⁴³ Alice Tidey, ‘NGO Ship with 47 Migrants Docks in Sicily after Being Stranded at Sea for Two Weeks’ (*Euronews*, 31 January 2019) <<https://www.euronews.com/2019/01/31/ngo-ship-with-47-migrants-docks-in-sicily-after-being-stranded-at-sea-for-two-weeks>> accessed 3 February 2019.

⁴⁴ European Parliament Research Service, ‘Victims of Trafficking in Hotspots’ (2019).

and for this reason a big number of persons have remained without a shelter.⁴⁵ Further, Greece has adopted harsh measures towards the people lodging asylum requests, as its law provides for their detention if this is considered necessary after an individual assessment.⁴⁶ According to the Human Rights Watch report, the detention conditions in these centers were especially poor, where asylum seekers were held in dark, cold cells, with strong odors in the common passages.⁴⁷

Both, Italy and Greece, have faced various challenges with regard to the asylum procedure during the receiving, registration, examination and decisional phases, in which the applicants have been exposed to protection and safety risks. The main issue consisted in their poor reception conditions, that led to the congestion of reception centers and hotspots. Additionally, Greece and Italy lacked a clear coordination structure that would ensure coherent and efficient methods for effectively managing the asylum seekers arrivals. The fragmentation of the asylum mechanism has led to an unsatisfactory assistance of asylum

⁴⁵ AIDA, 'Greece: Asylum Reform in the Wake of the EU-Turkey Deal' (4 April 2016) <<http://www.asylumineurope.org/news/04-04-2016/greece-asylum-reform-wake-eu-turkey-deal>> accessed 5 September 2018.

⁴⁶ Council of Europe 1259 Meeting, 'Submission of The Greek Council for Refugees to the Committee of Ministers of The Council of Europe in the Case of M.S.S. V. Belgium & Greece (Appl. No 30696/09) and Related Cases' (7-9 June 2016) (Submission of The Greek Council for Refugees)

⁴⁷ Human Rights Watch, 'Greece: Inhumane Conditions at Land Border' (July 2018) <<https://www.hrw.org/news/2018/07/27/greece-inhumane-conditions-land-border>> accessed 21 March 2019.

seekers, which at its turn contributed to the violation of their fundamental rights.

Given the dysfunctionality of hotspots, and of the CEAS, the European Commission was keen to introduce a solidarity mechanisms that would distribute asylum seekers more evenly across the EU. This resulted in the adoption of the two emergency Relocation Decisions,⁴⁸ that were devised to transfer persons in need of international protection, from Italy and Greece to other Member States, where their requests for international protection were processed.

The relocation mechanism had a valuable role among EU policies, as it aimed to fortify the solidarity and sharing of responsibility among the EU Member States, while alleviating the migratory pressure on the frontline Member States.⁴⁹ Yet, many Member States refused to accept people coming into their territory who have arrived elsewhere within the EU. The Slovak Republic, Hungary, Poland and Czech Republic have strongly opposed the adoption of the Relocation Decisions, essentially wishing to obstruct the “sharing” of asylum seekers, and thus refusing to take part to the relocation programs.⁵⁰

⁴⁸ 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 [2015] OJ L248/80; 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 [2015] OJ L239/146.

⁴⁹ UNHCR, ‘UNHCR Calls for the EU Relocation Scheme to Continue’ (2017) <<https://www.unhcr.org/news/press/2017/9/59ca64354/unhcr-calls-eu-relocation-scheme-continue.html>> accessed 22 March 2019.

⁵⁰ Ulrike Brandl, ‘Chances for More Solidarity in the Reform of the Common European Asylum System’ (2017) 14US-China Law Review 795.

In this context, it is worth mentioning the position of the Court of Justice of the European Union (CJEU) with regard to the application of solidarity as a legal principle of CEAS. In September 2017, the Court dismissed the two actions for annulment of the Relocation Decisions filed by the Slovak Republic and Hungary. According to the CJEU, the principle of solidarity and fair-sharing shall be respected in the same manner by all other Member States despite some States' refusals to participate in the relocation programs.⁵¹ In its judgement, the CJEU operated as a promoting authority to the important role assigned to the solidarity principle, thus strengthening this principle in the EU migration policy. Through this judgement, CJEU gained the necessary platform to make an important statement with regard to the necessity of a fair-distribution mechanism.

5. Possible solutions to address the CEAS shortcomings

In conformity with the EU primary legislation and according to the interpretation of the term, the principle of solidarity is inherent to the supporting foundation of the CEAS. Nevertheless, as it was previously underlined, the attempts of CEAS to fairly allocate asylum seekers demonstrate a poor resemblance to a fair-sharing burden mechanism. In this context, there can be suggested various modifications that could enhance the level of solidarity within the Member States and solve the reception and allocation issues of the States with flawed asylum systems.

International scholars believe that the distribution of asylum seekers shall be always a voluntary decision on the both sides of the asylum seeker and of the

⁵¹ Slovak Republic and Hungary v Council, para 293.

receiving State. If the voluntary element is neglected, integration difficulties may appear, which could cause secondary movements or return to the State where protection was initially accorded.⁵² In this line, the element of “irregular entry” from the Dublin Regulation could be replaced with an effective mechanism that would allow asylum seekers to select their State of asylum. This approach would also increase asylum seekers’ trust in the Common European asylum System, and therefore their compliance with it.

The well-functioning of reception and distribution systems, as well as the protection of asylum seekers’ fundamental rights, is closely related to the means of access to asylum. In line with this, the implementation of the Temporary Protection Directive might be considered a valuable solution, as it offers protection to those “who have had to leave their country or region of origin, or have been evacuated ... and are unable to return in safe and durable conditions because of the situation prevailing in that country.”⁵³ The Temporary Protection Directive does not offer asylum seekers the status of refugee, it just sets a temporary and restricted group of arrangements for exceptional cases caused by massive arrivals of foreigners.

The essential element for its application is the existence of a mass influx of displaced people.⁵⁴ The meaning of the “mass influx” persists in being unsettled and left to the organizational margin of discretion. Additionally, the

⁵²Guild, Costello, Garlick and Moreno-Lax (n 25) 19.

⁵³ 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 [2001] OJ L212/12 (Temporary Protection Directive), art 2(c).

⁵⁴ Temporary Protection Directive, art 2(d).

temporary protection mechanism provided by the Directive, is only triggered by a Council Decision adopted with a qualified majority of votes.⁵⁵

In order to achieve the Directive's effective application, there is the need to clarify what constitutes a "mass influx".⁵⁶ The application of the Temporary Protection Directive would be facilitated by the modification of the definition of "mass influx", that would allow to have clearer numerical or qualitative grounds, triggering the Directive's application. Further amendments could also include the adjustment of the procedure requiring a qualified majority of votes for the application of the temporary protection scheme with the ordinary legislative procedure.

Additionally, this study suggests that the simple act of removing or suspending carrier sanctions might contribute to the arrivals of asylum seekers on safe means of travel. In this situation, it is highly unlikely that they would pay smugglers for a dangerous and uncertain service, thus ending their business.⁵⁷ Asylum seekers, would be able to arrive in EU by secure means, such as trains or ferry boats, that would be less expensive and more secure than risking their lives.

Serious attention should also be given to the adoption of various distribution keys that would allow to allocate asylum seekers more evenly, and thus to enhance the protection of their fundamental rights. The purpose of the distribution key - particularly whether it will be used to distribute financial resources or people - plays a relevant role, as the circumstances for distributing

⁵⁵ Temporary Protection Directive, arts 4, 5.

⁵⁶ Guild, Costello, Garlick and Moreno-Lax (n 25) 19.

⁵⁷ Guild, Costello, Garlick and Moreno-Lax (n 25) 28.

people and an effective financial support are both needed to develop a fair distribution of asylum seekers and the Member States' protection capacity. The means of access to asylum play an important role also in the process of distribution of persons. If there were secure and legal access for those seeking international protection, arrivals could have been dispersed across EU airport, land-borders and ports. Accordingly, some of the current responsibilities, that particularly fall on the coastal Member States would be considerably reduced.⁵⁸

As regards the financial burden sharing issue, the Dublin Regulation needs a provision establishing the methods in which the allocation of financial would be rigorously programmed, transparent and monitored in order to address the situations of big migratory pressure. A possible option of achieving it could be through the arrangement of a faster and more efficient decision making process during the reception phase and would contribute to the minimization of the time spent in the reception centres.⁵⁹

Additionally, a part of the financial resources of the EU Asylum, Migration and Integration Fund (AMIF)⁶⁰ could be directed to assist the livelihoods and financial autonomy of the asylum seekers and refugees, thus

⁵⁸ Elspeth Guild and Sergio Carrera, 'Rethinking Asylum Distribution in the EU: Shall We Start with the Facts?' (*Centre for European Policy Studies*, 2016) <<https://www.ceps.eu/publications/rethinking-asylum-distribution-eu-shall-we-start-facts>> accessed 16 March 2019.

⁵⁹ Harriet Gray, 'Surveying the Foundations: Article 80 TFEU and the Common European Asylum System' (2013) 34 *Liverpool Law Review* 175.

⁶⁰ Regulation (EU) 516/2014 of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJL 150/168.

solving the imbalances created by substantial arrival numbers and limited receiving capacity. This might be reached through enlarging the resources for emergency measures when planning future budgets in order to ensure that there are enough funds in order to deal with heavy migratory pressure. If the costs of registering and offering travel assistance would be borne by a central fund, then allowing asylum seekers to move on, the problem of smuggling practices and irregular entries would be also diminished.

Another option may be the development of a specialized fund within the EU's budget meant to assist the Member States by supporting the costs that cannot be covered by their national budgets, nor by any existing EU fund, in order to fulfil the obligations under the asylum acquis. The financial aid, if properly managed and controlled, can both encourage and help Member States to fulfil their legal obligations under the CEAS, and run effective asylum mechanisms.

In order to aid Member States to meet their obligation under CEAS and to ensure normative solidarity all over the EU, there is the need to establish a body securing the enforcement of the European asylum acquis. In this context, EU lawmakers shall give serious reflection to the creation of a centralized EU agency entrusted with decision-making powers. The European Commission has proposed a reform (the "Dublin IV" proposal) to the present Dublin system in which it has set the priority to reorganize the European Asylum Support Office.⁶¹ The Commission, as well as scholars specialized in the field, suggest

⁶¹ Commission, 'Proposal for a Council and Parliament regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for

the adoption of several reforms meant to facilitate the implementation and functioning of a prosperous EU Asylum Agency.

Specifically, the future institution necessitates to be empowered with the competence to inspect and supervise the asylum process in Member States. Experts suggest that the most suitable way to achieve it would be through the appointment of intermediary officers between the institution and the Member States meant to carry out periodic inspections. In order to have a whole picture of national asylum systems, the institution would also assess the reception conditions of the Member States, offer guidance for operation and establish time limits for addressing potential issues.⁶²

Also, the newly established body would need to be empowered with the prerogative to gather and analyze information and offer guidance regarding the standards of qualification for asylum status, so the Member States will be able to follow it during the application of asylum procedure.⁶³ In case in which some Member States would face high migratory pressure, the future institution would require the capacity to offer operational and technical aid to the affected States.⁶⁴

international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM (2016) 270 final.

⁶² The Expert Council of German Foundations on Integration and Migration Research Unit 'EASO Reloaded: Can the New EU Asylum Agency Guarantee a Standardized System of Protection?' (2018) <https://www.stiftung-mercator.de/media/downloads/3_Publikationen/2018/Juni/SVR_EU_Asylum_Agency.pdf> accessed 29 August 2018.

⁶³ Arne Niemann and Natascha Zaun, 'Introduction: EU Refugee Policies in Times of Crisis' (2017) 56 *Journal of Common Market Studies* 3.

⁶⁴ European Parliament Research Service, 'Addressing Migration in the European Union' (2017) 25.

The higher level of autonomy of an EU delegated body would ensure a better fulfillment of the obligations assumed under CEAS, and therefore, would lead to a higher degree of solidarity in between the Member States.⁶⁵ Still, during the implementation of a future reform, the EU lawmakers need to take into account that the Member States non-compliance with the EU asylum law and the lack of solidarity are consequences of - or at least greatly facilitated by - the CEAS legal gaps. Therefore, in order to establish an effective asylum system and a high level of rights protection within EU, the reorganization of EASO shall take place within a wider reform of the entire CEAS.⁶⁶

6. Conclusion

The current migration crisis may be understood as the migration policy crisis, inasmuch as the lack of a definite asylum policy, including methods of collaboration among Member States, has brought to an unproportioned burden sharing system and therefore to the delay of asylum seekers' rights protection.

The current CEAS arrangements have been proved to be unsuitable with the reality of the massive numbers of people entering the European Union. The troubled incompatibility between CEAS and the asylum seekers arrivals is the cause of a deep legal imbalance expressed by a high level of discretion accorded to the Member States and by the lack of EU-level monitoring mechanism that would assess the Member States' asylum capacity and performance. Moreover, the above-mentioned drawbacks have made the asylum seekers protection

⁶⁵ *ibid.*

⁶⁶ Ariadna Ripoll Servent, 'A New Form of Delegation in EU Asylum: Agencies as Proxies of Strong Regulators' (2017) 56 *Journal of Common Market Studies* 83

mechanism inefficient, which at its turn has caused violation of their fundamental rights.

Taking into account the fact that the European Union did not manage to carry out a consolidated scheme meant to regulate the massive arrivals of asylum seekers, serious flaws in the system linked with this issue are a reasonable aftermath. In order to ensure an effective operation of the CEAS, there is the need to practically implement the principle of solidarity and burden sharing among EU Member States, which necessitates a strong political will and a common point of view at least on the most stringent issues. Only when these conditions will be respected there will be possible a higher level of cooperation between Member States that will automatically lead to a proportionate burden sharing and, consequently, to a higher level of protection of asylum seekers rights.