

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs

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**THE IMPLEMENTATION OF
ARTICLE 80 TFEU
on the principle of solidarity
and fair sharing of responsibility,
including its financial implications,
between Member States in the field of
border checks, asylum and immigration**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRES**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

THE IMPLEMENTATION OF ARTICLE 80 TFEU

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Abstract

The study assesses the scope and implications of Article 80 TFEU, which relates to the principle of solidarity in the field of Border Checks, Asylum and Immigration. The study analyses primary and secondary sources of European law in order to identify the implications of Article 80 TFEU in terms of obligations and jurisdiction. It also discusses the results of a questionnaire that was administered to senior public officials in the EU, collecting their views on the scope and possible mode of implementation of Article 80 TFEU. The study's conclusions outline some practical solutions for the implementation of new solidarity mechanisms in the field of EU immigration and asylum policies.

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EXECUTIVE SUMMARY

Context and Aims of the Study

Article 80 of the Treaty on the Functioning of the European Union (TFEU), states that:

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.

The purpose of this Study is to identify and assess the implications, scope and perspectives of this new Article 80, and to provide informed ideas and practical leads on possible modes of implementation of this Article. This Study goes beyond past analysis of intra-EU solidarity in the field of asylum and refugee policy and covers additional areas related to border control and irregular migration, trafficking in human beings, immigration and integration.

Contents and Methodology

The *first part* of the report explores the legal implications of Article 80 TFEU and is based on primary and secondary sources of European law. The *second part* addresses the legal and political relevance and feasibility of different proposals for the implementation of Article 80 TFEU. This analysis is organised around two components: identifying the theoretical objectives of, incentives for and obstacles to intra-EU responsibility sharing, and an inventory of possible fields and modes of solidarity and fair sharing of responsibility. The *third part* analyses the results of a questionnaire that was administered (face to face or by telephone) to senior officials in selected Member States, EU institutions, international organisations and NGOs. The *fourth part* concludes the Study and draws on all the key findings of the theoretical and empirical elements of the assignment, outlining some ideas for implementing solidarity mechanisms in the field of European immigration and asylum policies including their application to ongoing border and protection challenges from North Africa.

CHAPTER 1: ANALYSIS OF THE SCOPE OF ARTICLE 80 TFEU

1. Solidarity and co-operation in European Union Law

Solidarity, a regular feature in EU law, plays different roles in different fields, ranging from constitutional-institutional to more substantive functions. The wording of Article 80 TFEU shows that the institutional role of solidarity is at issue in this case: i.e. solidarity between the EU and the Member States, with the aim of enabling all to achieve the Treaty goals. Solidarity is a proactive means of making the Treaty effective, which strengthens economic and social cohesion within the EU.

The Lisbon Treaty has reaffirmed the principle of solidarity. In comparison with Article 10 EC, Article 4(3) TEU introduced two modifications: the idea of 'mutual respect', implying that the institutions must not transgress upon the prerogatives of the other; and the duty of cooperation which applies to tasks that 'flow from the Treaties', thus establishing a more open-ended duty than that arising from fulfilment of Treaty obligations under Article 10 EC.¹

The ECJ has long recognized solidarity, based on mutual trust between the Member States, as a general principle inferred from the nature of the Communities and the principle of loyal cooperation between the EC institutions and the Member States. A duty to cooperate means more than the fulfilment of specific obligations laid down in Community law: it also means taking any necessary short-term measures where the Community has not yet succeeded in establishing legislation in an area that a Treaty has mandated.

The positive obligations under Article 4(3) TEU have important consequences for the field of borders, asylum and immigration. Member States must implement their obligations, following from the TFEU and secondary legislation adopted under it, with binding force, specificity, precision and clarity.² Administrative practices alone are insufficient. Solidarity includes, at a minimum, this duty of cooperation through implementation, policing and penalization of infractions of EU law.

2. The Origins of Article 80 TFEU

Article 80 TFEU originates in discussions in the European Convention, leading to the Draft Treaty establishing a Constitution for Europe, which inspired the Lisbon Treaty.

Solidarity was raised with regard to asylum, refugees and displaced persons in the preparatory working document for Working Group X 'Freedom, Security and Justice'. One of three basic questions in this policy area was:³

It is suggested to enshrine in the Constitutional Treaty the principle of solidarity between Member States implying in particular a fair balance of the burden sharing; Should this principle be drafted as a general principle applying to asylum, immigration and border control policies?

¹ Chalmers, Davies and Monties, *European Union Law* (2010), p. 223-224.

² ECJ, C-159/99, *Commission v. Italy*, (2001) ECR I-4007.

³ Convention Working Group X, Working Document 05, 'Possible ways forward for the working group', p. 3.

The notion of burden sharing was broadened from asylum to the areas of migration and border policy. This was not questioned in discussion; many explicitly welcomed it.

One of the group's recommendations was the establishment of a legal basis to the general principle of solidarity and fair sharing of responsibility.⁴ Most speakers in plenary discussion approved the recommendations on asylum, immigration, border control and visa policies, including the inclusion of a general principle of solidarity amongst the Member States.⁵

The Draft Treaty Establishing a Constitution for Europe and the Lisbon Treaty

The Praesidium proposed the insertion of an article establishing a principle of solidarity:

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 acts of the Union adopted pursuant to the provisions of this Chapter shall contain appropriate measures to give effect to this principle.

The range of amendments suggested indicates the variety of visions of the notion of solidarity. Some called for the *omission* of the solidarity principle: obviously, this was not adopted. Less radically the applicability of solidarity in matters of immigration was questioned, with the suggestion for limitation to border checks and asylum, "as the principle seems impracticable in this specific area" of immigration.⁶

Other suggestions involved noting solidarity as an underlying principle to be reflected by including financial mechanisms in policies where appropriate;⁷ removing the clause "including its financial implications" for fear this would be interpreted as a legal basis for questioning normal EU budget procedures or calling for national financing of Community actions in these fields;⁸ limiting it to financial solidarity,⁹ and explicitly excluding relocation.¹⁰ Some called for a broader description of solidarity.¹¹

Ultimately, Article III-169 of the Draft Treaty Establishing a Constitution for Europe read:

The policies of the Union set out in this Section and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Section shall contain appropriate measures to give effect to this principle.

⁴ Final Report of Convention Working Group X "Freedom, Security and Justice", CONV 426/02 (2 December 2002), p. 4.

⁵ Summary Report of the Plenary Session of the European Convention – 5 and 6 December 2002, CONV 449/02.

⁶ Suggestion for amendment of Article 13 by Poul Schlüter.

⁷ Suggestion for amendment of Article 13 by Mr Hain with the support of Lord Tomlinson; Suggestion for amendment of Article 164 by Mr Hain.

⁸ Suggestion for amendment of Article 13 by Lena Hjelm-Wallén *et al.*

⁹ Suggestion for amendment of Article 13 by Dominique de Villepin.

¹⁰ Suggestion for Amendment of Article 13 by Teija Tiilikainen *et al.*; Suggestion for amendment of Article 164 by Teija Tiilikainen *et al.*

¹¹ Suggestion for amendment of article 13 by Gianfranco Fini.

With the exception of the replacement of the word 'section' by 'chapter' and of 'acts of the Union' by 'Union Acts', this formulation was maintained in the Lisbon Treaty in the new article 63b, that was ultimately renumbered Article 80 TFEU.¹²

3. The scope of Article 80 TFEU

Article 80 TFEU applies to both the Union institutions and the Member States concerning all matters falling within the policy area of borders, asylum and immigration, with solidarity as a general notion and sharing of responsibilities being an expression of solidarity.

For solidarity and sharing of responsibility to be effective, other (legislative or policy) measures must be taken. The notions of 'solidarity' and 'fair sharing of responsibilities' are not defined in terms of their goals or the standards necessary to meet them. A Member State-based approach to understanding them would imply the fair distribution of the burdens consequent to EU borders, immigration and asylum policy. Quantifying fairness is not easy. Member States' needs and interests would be central, but these do not necessarily align with EU policy goals, which themselves also vary over the issue areas.

Solidarity measures are to be included "[w]hen necessary," relating to the principles of subsidiarity and proportionality. One could argue that policymaking in these areas requires double scrutiny: 1) establishing whether or not Union measures are required in the particular field (Articles 77 to 79 TFEU); and 2) determining whether or not Member States will be able to implement them by themselves and whether additional solidarity measures are necessary. The Member States' expected loyalty in implementing EU policy appears not to be sufficient; if solidarity is needed, then Union action may be required.

¹² Article 2, 65) Lisbon Treaty adding a chapter on Policies on border checks, asylum and Immigration to the amended TFEU.

CHAPTER 2: SOLIDARITY FROM THEORY TO IMPLEMENTATION

1. Motivations for sharing of responsibility and solidarity

Both in practice and in studies published to date, solidarity and burden sharing in the area of immigration and asylum have mainly focused on refugees and displaced persons.¹³ States with high numbers of arrivals seek burden sharing for obvious financial, administrative, social and political reasons. Other states could also have rational reasons to participate in a scheme implying that refugees, or the costs for receiving them, would be distributed according to criteria that were (at least partially) independent of national policies. States could see such a system as an **insurance scheme**, stabilising expectations in terms of numbers and costs. Such a system could also help **avoid damaging unilateral action** to reduce burdens, in which Member States enter a downward spiral of increasingly restrictive policies, as closures in one State pass the problems to its neighbour. In a worst case scenario, unilateral action may even involve the reintroduction of internal border controls which could damage refugee protection, potentially destabilise Member States' political systems and, if internal border controls were reintroduced, also undermine EU free movement provisions.

States may also have an interest in cooperating due to broader considerations of **solidarity and mutual cooperation**. In many areas of EU policy, Member States redistribute resources to support those with less wealth or capacity, or those experiencing exogenous shocks: this has been a core part of European cooperation from the outset. Such redistribution is not simply altruistic, but can have a beneficial effect for regional prosperity and security, with positive externalities for all Member States. This also posits refugee protection as an 'international public good': where one country protects refugees generally positive effects are created for other countries.¹⁴

Asylum has historically been seen as ripe for burden sharing because the reception and protection of displaced persons is widely seen as a burden on receiving countries; one that can occur unexpectedly and on a large-scale, and cause acute problems for receiving countries. Geography is pivotal in where protection seekers go, meaning that the reasons for an influx are beyond the control of the receiving country, and the protection of displaced persons is seen as a positive, indeed necessary, act from an ethical and normative point of view, implying that the costs involved cannot and should not be significantly reduced.

These factors make the asylum and forced displacement an obvious candidate for solidarity measures, but that may not necessarily apply to other areas of migration management. If it seems intuitively logical that responsibility sharing should apply to immigration and asylum, a look at the possible mechanisms and criteria reveals complexities.

¹³ Betts, A, Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory. *Journal of Refugee Studies*, 16(3) (2003), 274-296; Boswell, C. (2001). Spreading the "Costs" of Asylum in Europe: Lessons from the UK and German Experience. *Journal of Refugee Studies*, 16(3) (2003), 316-335; Noll, G., Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field. *Journal of Refugee Studies*, 16(3) (2003); 236-252; Thielemann, E. (2003). Between Interests and Norms: Explaining Burden-Sharing in the European Union. *Journal of Refugee Studies*, 16(Special Issue), 253 – 273; Thielemann, E. (2003). Between Interests and Norms: Explaining Burden-Sharing in the European Union. *Journal of Refugee Studies*, 16(3) (2003), 253 – 273; van Selm-Thorburn, J. *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* Amsterdam: Martinus Nijhoff, 1998.

¹⁴ Suhrke, A, Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action. *Journal of Refugee Studies*, 11(4) (1998), 399-400.

2. Types of sharing of responsibility

First: should a sharing system aim to address the **causes** or the **effects** of disparities in the distribution of the burden? A system addressing the causes would try to adjust the factors influencing how the burden gets distributed, create a 'level playing field' across Member States, and lead to a more equitable distribution. A system to address the effects may involve physical dispersal or resettlement of displaced persons or refugees, or financial transfers between countries to compensate those shouldering a higher burden. This has not yet been systematically attempted in intra-EU burden sharing. A burden sharing system may also involve elements of both types of (re)distribution. The European Refugee Fund distributes funds based on the numbers of asylum seekers received (effects), and assists states with less developed facilities for receiving and protecting refugees (causes).

Second: according to which principles or criteria should the burden be shared? Should it be **justice-based** or **outcome-based**? Justice-based systems employ static indicators such as receiving-country GDP, population, or size of territory, to compensate states receiving more than their fair share, as a matter of equity. Outcome-based indicators are more concerned with the consequences of hosting refugees or asylum seekers, such as the repercussions of reception and assistance on stability, or inter-ethnic relations. Many national asylum dispersal systems are primarily concerned with outcome-based considerations: the UK system was introduced to reduce pressures on housing and social services in London.

Many proposals for responsibility sharing systems contain elements of both justice- and outcome-based considerations but the conceptual distinction is important: it has implications for the pattern of distribution chosen, as well as the burden to be distributed.

Third: what sorts of costs, or 'burden', should be included in (re)distributive arrangements? There are **direct**, **indirect** and **intangible costs**. Direct costs are those incurred through the reception of refugees or asylum seekers. Indirect costs are tangible but not directly measurable or explicitly recorded, and borne by the receiving society and public services, e.g. provision of health or education services. Intangible costs are more diffuse e.g. impact on inter-ethnic relations or support for extremist political parties.

Fourth: there is a distinction between **financial redistribution** (pecuniary transfers), or **redistribution in kind** (the dispersal or relocation of refugees and displaced persons). In other areas of migration management one could include the provision of expertise, equipment or personnel to assist in border or internal checks and controls, combating organised crime or developing reception or detention facilities.

Finally, a system can be **one-dimensional** (based on the redistribution of a single, or narrow set of, costs) or **multi-dimensional** (involving the redistribution of a bundle of different costs, possibly across different sectors).

3. Areas of coverage

Asylum has been covered in previous reports,¹⁵ and referred to above. The following focuses on how, if at all, the analysis provided above might apply to border control and immigration.

External border control

Motives for responsibility sharing

Member States may in some cases see cooperation in this area as an insurance scheme, to guard against fluctuations in preferred routes for irregular entry into Member States. However, geography means some Member States will remain relatively unaffected by such fluctuations. The need to avoid damaging unilateral action applies only marginally in the case of border control. However, promoting collective stability through mutual cooperation is likely to be a very important motive for burden sharing in this area. The irregular entry of migrants into a Member State can have considerable knock-on effects for other states.

Types of responsibility sharing

'Responsibility' in this area means the duty to assume the costs related to strengthening external borders (**causes**) or incurred because of weak external borders (**effects**). Any system of solidarity in border management should be targeted at the causes, in other words, it should seek to prevent illegal entry through more robust controls. Arguably, any significant burden sharing of the **consequences** of weak external borders (e.g. burden sharing of the costs of reception, detention or deportation of irregular migrants) would risk reducing the incentives for the beneficiary Member State to step up border controls, and should be avoided except in case of a sudden mass influx of irregular migrants. A responsibility sharing system on borders should be based on both **justice** and **outcomes**: geography causes many of the discrepancies but the goal of burden sharing in this area is not an equitable distribution of costs. Rather, and more importantly, it is about reducing costs.

Most of the costs associated with border management are likely to be **direct**: the deployment of personnel and equipment, and development of infrastructure. There are also a number of **indirect** and **intangible** costs associated with the reception, subsequent treatment, and socio-economic impact of irregular entrants, but these are controversial and may be offset by indirect and intangible benefits associated with receiving larger numbers of irregular migrants.

Mechanisms for sharing costs could be either **financial** or **in-kind**: through a budget line for allocation to Member States facing particularly costly border challenges or through training to border guards, deploying personnel in emergencies (RABITs), or providing equipment. Such forms of transfer are already being developed in the context of Frontex.

¹⁵ EP Study 'What system of burden-sharing between Member States for the reception of asylum seekers?', January 2010, PE 419.620; EC Study "Study On The Feasibility Of Establishing A Mechanism For The Relocation Of Beneficiaries Of International Protection", July 2010, JLS/2009/ERFX/PR/1005 – 70092056.

Immigration policy

Conditions of entry and residence

In the case of **labour migrants**, it seems that national discretion and interest will, and should, hold, and there may be some harmonization of principles, but not of actual decisions on admissions.¹⁶ However, if solidarity is interpreted positively then there could be a goal of a common immigration policy, characterized by efficient management of flows and fair treatment of third country nationals. Solidarity would thus aim at maximising the benefits of immigration. However, this seems a theoretical possibility rather than a practical need.

Family reunification by definition must involve moving to the state in which the family member is residing, thus it could not be the object of a physical dispersal scheme to a different EU state. Moreover, any 'burden' (if the term can be used) should be fairly evenly distributed, thus there can be no mass influx or severe disparities in the **distribution of costs across different countries, and therefore does not seem an** appropriate area for any form of burden sharing.

Rights of third country nationals residing legally in Member States

One could envisage a system of responsibility sharing in the area of rights of third country nationals (TCNs), motivated by two possible factors: concerns to enhance collective stability and improve inter-ethnic relations; and the desire to limit 'country-shopping' by TCNs aiming to enhance their conditions through exercising intra-EU mobility rights. Such a system could be aimed primarily at addressing disparities in rights and benefits for TCNs between Member States, and bringing standards up to a level that promoted integration. The main tool for responsibility sharing would be convergence of legislation *at a higher standard*. There may also be an argument for offering supplementary support for Member States with less developed structures for guaranteeing the rights and benefits of TCNs. Such a system might cover direct costs, with distribution managed through a fund to support targeted programmes. There is no convincing argument for a system of responsibility sharing based on the numbers of TCNs in different Member States, given that such immigrants may bring benefits as well as costs, and that in most cases the decision to allow them to stay was a voluntary act of the host country.

Illegal immigration and unauthorised residence

Article 79(2)(c) TFEU states that measures shall be adopted in the area of illegal immigration and unauthorised residence, including the removal and repatriation of persons residing without authorisation.

The 2008 Return Directive deals with the specific area of *removal and repatriation of unauthorised residents*, setting out procedures regulating the expulsion of irregular immigrants. This is similar to asylum policy instruments, which are concerned to secure minimum standards in terms of treatment and rights. One important difference, however, is that in **return** there is no clear rationale for establishing a 'level playing field': this harmonisation is designed to ensure minimum rights and treatment of returnees, and

¹⁶ One exception to this might be provisions allowing for the free movement of those admitted through such schemes once they have been resident in one Member State for a specified period. See the discussion of free movement of TCNs below.

possibly also to spread good practice between Member States – it is not to ensure a fairer distribution of costs.

Costs in this area might rise through implementation of the Directive: most of the costs incurred are related to more stringent measures, rather than more lenient ones. The most costly aspects of return are raids, detention, and forced removals. More lenient policies – for example less extensive use of detention – would imply reduced costs for Member States. One exception might be measures to ensure that detention facilities were more humane, based on promoting collective goods. Perhaps a fund to develop the infrastructure of detention and removals centre might help improve the treatment of returnees. However, it may be controversial for the EU to be seen to be subsidising the extension of facilities for detention – even if the goal were to render conditions more humane. For this reason, we would doubt the appropriateness of introducing responsibility sharing provisions in the area of return.

The *other aspects of illegal immigration and unauthorised residence* that might be the object of responsibility sharing measures might include various types of internal controls on unauthorised immigrants, such as ID cards and checks, employer sanctions, and measures to prevent unauthorised access to health, education, housing or social services. Employer sanctions have already been the object of a Directive, the Sanctions Directive 2009/52/EC of 18 June 2009, to be transposed by the Member States by 20 July 2011.

Several features make employer sanctions a more plausible candidate for harmonisation than return. First, the goal of the legislation is to increase the level of control exercised by Member States, rather than to set out minimum standards; effective implementation of the Directive may create additional costs for Member States; possibilities for illegal employment are recognised as one determinant of the choice of country for irregular migrants. Therefore a harmonisation of employer sanctions might create a more level playing field between states, thus contributing to a reduction in disparities in the level of irregular migration.

The main argument for responsibility sharing in the area of employer sanctions is to support countries with less developed systems to build capacity and introduce more robust policies and practices. This may apply in particular to ‘new’ immigration countries with more limited experience of internal migration control. It is not clear that similar arguments would apply to other potential measures adopted in the area of internal checks and controls.

Types of responsibility sharing

The ‘burden’ of applying employer sanctions is the costs associated with the enforcement of controls necessitated by common EU legislation. Assuming that a system to share these ‘burdens’ is motivated by the desire to reduce the phenomenon across the EU, then the scheme would be based on consideration of the **effects** of disparities in costs, and would attempt to influence the consequences (not the **causes**) of any disparity in (direct) costs associated with introducing employer sanctions. It would be **outcome-based**, seeking to distribute resources in a way that best achieves the enforcement of employer sanctions in different Member States, through financial transfers, training and sharing of good practice.

Combating trafficking in persons

Both support for victims, and identification/prosecution of perpetrators, might be appropriate areas for responsibility sharing in the area of trafficking in persons. The prevention of trafficking fits the more classic model of collective EU financing of measures falling under external policy. In the cases of both support for victims and prosecution of perpetrators, the main rationale for a system of responsibility sharing would be to meet common EU goals: the humane treatment of the victims of human rights abuse; and a reduction in the level of human trafficking across the EU. There are no plausible arguments for such a system based on insurance, or the goal of reducing country-shopping. Any responsibility sharing of costs for support to victims should be targeted to maximise their welfare. In the case of identifying and prosecuting perpetrators, the criteria for channelling resources should be based on maximising apprehensions and prosecuting perpetrators. However, special consideration may also be given based on certain Member States, either because they are particularly vulnerable to trafficking due to their geographical situation, or because they have less resources or infrastructure to deal with the problem. Thus one can envisage a mixture of outcome- and justice-based criteria for distributing the burden.

In both cases, the costs covered are likely to be direct. Support for victims of trafficking is likely to be provided through financial transfers, targeted at governmental bodies and NGOs. Support to fight perpetrators may take the form of either financial or in kind transfers.

Integration of third country nationals

Integration measures are not an obvious candidate for responsibility sharing, for a number of reasons. However, there may be a good case for solidarity in covering the costs linked to integration programmes as a means of promoting the collective goal of good inter-ethnic relations across the EU. Such a rationale would imply supporting integration programmes in order to achieve the shared goal of social cohesion. A distribution system might also aim to compensate countries facing particular challenges with integration because of a lack of infrastructure or experience, and/or a low GDP per capita.

Such a responsibility sharing scheme would take the form of financial transfers to cover direct costs associated with a range of possible measures and programmes, conforming to guidelines set out by the EU (with scope for variations based on national socio-cultural conditions).

4. Solidarity and responsibility sharing in EU policy

Solidarity and responsibility sharing in asylum, border and migration issues were mentioned in a several contexts prior to the Lisbon Treaty.

The 1999 Tampere Conclusions, 2004 'Hague Programme', 2008 European Pact on Immigration and Asylum, and 2009 Stockholm Programme, build on one another and gradually develop solidarity from a focus on asylum to a general principle underpinning border, immigration and asylum matters. Presidencies have likewise expressed their visions for greater solidarity and cooperation.

EU institutions have, since the entry into force of the Lisbon Treaty, given expression to the notion of solidarity. On **border management** measures include further development of the European Patrols Network (EPN); optimizing the use of the European External Borders Fund

to improve the capabilities of border guards and the development of EUROSUR; capacity building; introducing new technology; and further developing the networks of immigration liaison officers posted by Member States in third countries and enhancing their coordination, and cooperation with Frontex. On **asylum**, the Dublin Regulation, issues regarding suspension and the need for 'corrective' or 'emergency' measures including relocation, have all been at the heart of the debate. During early 2011, the focus has turned to arrivals from North Africa, both in terms of border management and on the subject of cooperation to manage an anticipated mass influx of Tunisians, Libyans and others. The Framework Programme on Solidarity and Management of Migration Flows included the creation of four Funds to strengthen solidarity - an External Borders Fund; the prolongation of the European Refugee Fund; a European Integration Fund; and a European Return Fund.

CHAPTER 3: THE STANDPOINTS AND VISIONS OF THE MEMBER STATES, EU INSTITUTIONS AND KEY INTERNATIONAL STAKEHOLDERS

1. Introduction

Two questionnaires¹⁷ formed the basis to interviews with selected public officials. The questionnaires covered the issues arising above under Chapters 1 and 2 addressing the institutional aspects of ensuring solidarity and fair sharing of responsibility, the specific material aspects for policy areas related to border checks, asylum/protection and immigration (regular and irregular) and the financial implications of solidarity.

Nine Member States¹⁸ were selected as presenting a broad portrayal of the varied approaches to solidarity. Interviews were also conducted with officials from the European Commission, the LIBE Committee of the European Parliament, Frontex, UNHCR, IOM and ECRE. There were wide divergences of opinion on almost every question raised.

2. Institutional issues for ensuring solidarity and fair sharing of responsibility

Member State officials distinguish between the **legal** and literal relationship between **Article 80 TFEU and Articles 77 to 79 TFEU**, and **the political and policy** relationship that emerges in reality. European Commission officials suggest a distinction between solidarity in the context of the developing common European immigration and asylum system and solidarity as a response to immediate crises and individual Member State's calls for assistance. At present, solidarity is more a question of the latter responses, and to date it has primarily been a matter of border management and asylum issues.

The legal understanding presents a **limited relationship**: Article 80 on solidarity and responsibility sharing is limited to those matters that arise in Articles 77 to 79, and it could extend the interpretation of those articles. For some solidarity is a general political principle that can and should be used in all areas.

Solidarity is considered to be poorly, or loosely, defined, either deliberately so, or confusingly so. Some see actions as more important; others see the inclusion in legal texts as of primary importance. One official noted that 'solidarity' seems more a moral than a legal concept.

Some officials indicated that the principles in Article 80 TFEU relate only to **EU action**. Italy indicated that anything other than EU action, if explicitly related to Article 80, would be contrary to the Treaty, while Belgian and UK officials indicated that responsibility sharing

¹⁷ See Annexes II and III.

¹⁸ Belgium, Finland, Italy, Latvia, Malta, Poland, the Netherlands, Sweden, The United Kingdom. The list of officials who were interviewed, and/or who submitted written answers to the questionnaire, appears in Annex I. All face-to-face and telephone interviewees spoke as experts, with their own knowledge and opinions naturally influenced by their country's or organization's experiences, but not representing official positions taken by their Member States or agencies. This chapter does not directly cite any interviewee, but reports on comments made, and responsibility for any errors in representation of those comments lies with the authors of this Study.

could be **bi-lateral, multi-lateral or pan-EU**. Finland, Latvia and Poland suggested that Article 80 itself applies only at the EU level but does not exclude bi- or multi-lateral actions between the Member States.

Opinions as to the **obligatory or voluntary nature** of solidarity under Article 80 varied from obligatory to the EU institutions and voluntary for the Member States; to currently voluntary but something that should be obligatory; dependent on the context; or dependent on the definition and the legal/political distinctions.

As to whether there is a **need for solidarity and fair sharing of responsibility to be included in all legislation**, some say that the terms 'whenever necessary' mean that it is not obligatory to include it. Others take a flexible stance, indicating that solidarity should be included, but compensatory measures could be used if agreement can only be reached without it. The Netherlands and UK officials' pragmatic approach is to say that solidarity should be included if it is needed, but that in order to achieve harmonization and solidarity as linked issues, all Member States need to implement all agreements. What might be called the 'frontline' states take a stronger stance: Italy views the principle of solidarity as necessarily informing all EU legislation and national activities, and Malta takes the view that Article 80 requires the inclusion of solidarity.

The role of other international actors is seen by several Member State officials as being very useful and important in the implementation of responsibility sharing and solidarity programmes, policies and projects in practice. In general, with the exception of the specific position of UNHCR, interviewees only envision an advisory role at most for other international actors in the EU policy making process.

Member States and institutions consider there to be a wide range of **tools** that could be used to advance solidarity. A comprehensive approach – or a full tool box is needed for these complex issues, and different tools are needed for different cases or challenges.

That **geography** should be accorded a stronger role in understanding problems and developing tools arose in several interviews. **Legislation, financial programmes, agencies and centralized operations** were also all addressed in the interviews.

Legislation can be viewed as intertwined with solidarity. However, harmonization in and of itself does not mean that there is solidarity – in fact harmonization of legislation could add to the burden for some Member States as they may be required to do more. Whether legislation is an effective tool for solidarity depends very much on what the legislation actually says, and whether it moves quickly enough. Even where legislation is agreed, its **implementation** is often not harmonious, thus solidarity would be enhanced not only by improved legislation but also by better and more coordinated implementation.

Although interviewees were asked about the **costs** of their systems, costs associated with solidarity, the financial benefits or costs seen to date in measures aimed at sharing responsibility and similar questions, none was able to offer specific answers, or even estimates. One Commission official noted that **financial instruments** are the strongest elements of solidarity existing to date, but Member States generally stressed that the sums involved in the various Funds are small; they are more motivational than compensatory; they are insufficient to address needs; and the bureaucracy makes them unattractive. Officials also noted the inter-play in discussions between financial measures and in-kind measures, e.g. relocation. Some felt that solidarity could be expressed through either, and some officials suggested that Member States facing significant influxes appear generally

less interested in receiving money and more interested in practical ways to address the problem.

The **agencies** facilitating pan-EU cooperation or solidarity such as Frontex and EASO are relatively new. Frontex's actions to date are viewed as very promising, and Frontex is also broadly satisfied with the contributions of Member States to its operations and activities. Frontex activities are not legally based on Article 80 TFEU, which only came into being after the establishment of the agency. Operational agencies such as Frontex or the EASO have budgets to which Member States contribute – a cost for solidarity, but not one that any Member State could weigh up against the benefits.

In terms of **centralized operations** the ECRE expert suggested that these would be difficult to envisage, and Member State reactions bore out this view.

3. Border management

The need for solidarity in border management follows from the reality of the Schengen construction and the removal of internal frontiers, meaning that some Member States have greater responsibilities than others – they have longer land or sea borders, more people crossing the borders, more or less 'difficult' non-EU neighbours etc. Those Member States need to continue their border management measures even if they are experiencing a low crossing rate, as migratory routes are subject to constant changes.

For Member States without significant external borders the benefit of the 'frontline' Member States performing effective border management is a reduction in irregular arrivals. The benefits of solidarity on border control issues form a chain: more uniformity in border controls and management means more security on the external frontiers. As a result internal security can be better guaranteed, and the resources that had to be used previously by Member States to control and secure their borders and territory can be used elsewhere. Results can be seen from a process that has been ongoing for some two decades: one benefit for citizens and others legally within the EU/Schengen area is free movement. However, the cost comes for the Member States in the south, which are under ever greater migratory pressure that must be dealt with on behalf of the whole EU.

The implications of Article 80 and solidarity for border management can also be viewed as politically sensitive, and thus this is a difficult policy area. Border issues are difficult to divorce from broader migration and asylum matters. States in need of support suggest that those asked to contribute should not question the system for asylum and migration beyond the border, but should address the actual problems of arrivals at borders, or interceptions prior to arrivals. A short-term programme of assistance in border management could include factors of longer-term conditionality. One could say that this represents a form of 'snowball effect' of practicing solidarity: action in one area gives rise to the need for action in other areas.

Member States are generally satisfied with the coordinating work conducted by **Frontex** to date, certainly within the constraints of its current remit (which is under revision). Frontex provides centralized support and coordinates resources – all currently contributed by Member States although there is a suggestion that Frontex should be able to make its own material acquisitions in future (e.g. ships or helicopters) and put those at the disposal of states in need. Frontex could thus be strengthened as an actor in its own right. At the same time, the agency cannot take on sole responsibility for border management. This is the job of the Member States, albeit one on which Frontex's contributions can build. Those Member

States that have had strong reasons to call on Frontex gave suggestions for improvements: more flexibility in how Frontex works on an operational level; quicker reaction times; greater efficiency; and working in further areas such as documenting the undocumented.

As far as **financial instruments** are concerned, it would appear that in emergency situations the funds available are not sufficient to meet real needs. The **External Borders Fund** provides for fundamental investments (cars, buildings), however personnel is not covered by it, which might be problematic.

4. Asylum and protection

To some degree similar to border cooperation issues, one can argue that in the absence of internal frontiers, measures for dealing with asylum and protection for refugees within the EU, and broader participation in humanitarian protection elsewhere, should necessarily be subject to solidarity.

Practice has revealed significant differences in how Member States handle their international obligations in the area of refugee protection, and in an effort to harmonize and make the situation for asylum seekers and refugees in all Member States more 'equal', four directives have been agreed. Some officials suggested that these measures, if correctly implemented, would be a form of solidarity. However, some of the directives have been more successful than others, and many are implemented in different ways. Implementation might be more central to solidarity than reaching agreement. The good faith of those Member States which are not fulfilling their obligations yet but which are calling for solidarity was questioned by some interviewees.

The broad spread in recognition rates across the EU was noted by one official, and how the differences seem to be related to Member States' differing policies towards third countries, based on issues such as historical or cultural ties and existing (minority) communities, rather than based on systemic issues in implementation of legislation. The Common European Asylum System should mean that an individual asylum seeker would have the same chance to have their protection claim recognized in each Member State. There is a need now to even out the discrepancies in approaches.

Solidarity in emergency cases seems to be somewhat more achievable, particularly when the emergency either faces a number of Member States at the same time or is linked to or part of a globally important humanitarian event.

One measure, the Dublin Regulation, which assigns responsibility to a particular Member State - most often the Member State in which an asylum seeker first arrived - complicates the discussion, since it is not exactly a responsibility sharing measure, but, rather, a responsibility-assigning measure. In its current form, **geography** makes the decisive factor for where major responsibility for asylum seeker claims, procedures, protection and integration lies. Current discussions are thus dominated by the question of whether the Dublin Regulation requires some kind of compensatory 'sharing' mechanism, and if so whether that should be a financial or a practical tool, such as relocation.

Relocation has emerged as the measure of solidarity suggested to compensate for the impacts of the Dublin regulation, as well as for use in emergencies or situations in which a Member State's capacities are exceeded. Interviewees pointed clearly to distinctions between the relocation of asylum seekers (which would be the case for any programme linked to Dublin) and refugees (as in the case of the EUREMA Pilot Project assisting Malta).

Relocation benefits few individuals, seems to be acceptable only as a bi-lateral initiative, rather than a pan-EU obligation, and can cause tensions between Member States.

For some linked to relocation, for others something which could only take place if there were no explicit link to relocation, **joint processing** has been on the agenda for discussion, particularly since the setting out of the Stockholm Programme. There is no consensus on what joint processing would or could be, and it may undermine the fundamental issue of each Member State taking on its own responsibilities in the asylum field. A modified approach, such as conducting interviews, or contributing other resources such as Country of Origin Information or interpreters might gain more traction.

While Member States have mixed views on relocation as an expression of solidarity, an increasing number of Member States, including Belgium, Finland, the Netherlands, Poland, Sweden and the UK, among the officials interviewed, support the expression of global solidarity through **resettlement**, including at the EU level. However, a resettlement programme could fall outside the scope of Article 80.

The European Asylum Support Office is in its infancy and views as to its potential contribution to solidarity in asylum issues varied between hope and scepticism. Member State officials look for various added benefits from the EASO but the budget is relatively limited, and expectations may need to be better managed to avoid disappointment.

On the **financial level**, the European Refugee Fund is the longest standing financial instrument, but Member State officials suggest that the levels of funding offered are insufficient for any real impact and that the level of bureaucracy involved is discouraging. The ERF is not necessarily being used at present to actually stimulate solidarity as such, but to offer collective funding for national projects.

5. Immigration

Immigration seems to be the area in which there has both been least actual movement towards solidarity across the EU, and the lowest level of interest or apparent need for Member States to cooperate. This is certainly the case where legal immigration is concerned. Nonetheless, one interviewee contributed the useful reminder of the linkages between regular migration and other entry channels where individuals are concerned: without commitments, for example through solidarity, to allowing legal immigration, 'unfair' behaviour by some Member States could result in an increased number of asylum seekers, posing challenges to procedural systems and the rights of people who need protection.

The adoption of community norms on **visas** has largely been completed, through regulations rather than directives, with little room to manoeuvre for Member States. Where variations are possible, there is often a clause relating to uniform practice. Any other form of solidarity in this area is unnecessary. Member States can represent one another in consular affairs in third countries, meaning that smaller Member States can make savings. The benefits are not so much financial as political and juridical. Member States are not ready to allow visa decisions to be handled by the Commission or a centralised authority.

From a **financial perspective**, Member States dealing with more visa applications, for example because they have more consular offices in more countries, should not face higher costs because the visa applicants generally pay the administrative fees for the visas.

For Swedish officials, activity related to solidarity in immigration matters focuses on the **removal and return of irregular migrants**, on which there has been progress, including through Frontex operations. There is more impetus towards solidarity in forced return than in stimulating voluntary return. The inclination towards solidarity in forced return might be illustrative of an understanding that solidarity is more easily sought to face or force a negative action than to deal with a positive one.

Amongst the areas of solidarity in returning irregular migrants are **joint flights** and **readmission agreements**. Joint flights bring cost efficiencies, but also open up questions about support in getting documentation for some migrants. On readmission, one official suggested that there is more flexibility in reaching agreements when Member States act alone, while another suggested that the EU collectively has more clout. Return also involves financial aspects, primarily under the Return Fund.

CHAPTER 4: CONCLUSIONS

1. General principles

The definition of 'solidarity' or absence thereof is a theme throughout the Study: there seems to be little agreement on the meaning of solidarity. To what degree explicit agreement on the meaning of this basic principle is necessary to make implementation of Article 80 effective? What part of solidarity requires better definition for all Member States and EU institutions to clearly understand it and agree on its advancement: is it the principle itself; its content; its goals? Is it better to leave some elements of the definition open to the context – both temporal and situational (including aspects such as geography; scope; number of Member States involved in the need for solidarity and extension of it; political etc.)?

A central issue in solidarity is 'trust', which presupposes loyalty. Solidarity is required, because removing internal frontiers means having to trust neighbours – to trust those with external frontiers to manage them well, and to trust those without extensive entry points to the Union to assist appropriately in ensuring the management. Trust that all fellow Member States will adhere to regulations and directives, so that any need for solidarity in asylum, in particular, is based on exogenous factors. A minimal condition for trust is loyalty by Member States in the implementation of the EU policies.

2. Specific policy areas

On **border control**, a responsibility system should be based on concerns about collective stability/prevention and insurance, and should aim primarily to prevent the causes (rather than the consequences) of irregular entry.

Similarly, the distribution principle should be based on reducing levels of irregular entry (and to a lesser extent compensating countries on grounds of equity). It should only cover direct costs related to border management – not subsequent costs of reception, except in cases of sudden influx.

In terms of the financial aspects, solidarity in the area of border controls could involve (a) a Fund, such as a revised Borders Fund or (b) transfers in kind, including capacity building.

In the field of **illegal immigration**, a responsibility sharing system should be based on concerns about the collective goal of reducing irregular migration, especially in 'new' immigration countries with less developed policies and practices on migration control. Arguments that harmonisation will reduce disparities in levels of irregular migration between countries are less convincing.

Responsibility sharing should relate to the costs of bringing up national measures on employer sanctions to conform to EU minimum standards, as set out in the Sanctions Directive, or possible future legislation introducing more stringent measures.)

It is less likely that a responsibility sharing system would be appropriate for other areas of internal control (access to education, health, welfare, etc.) since these are more critical for basic welfare and human rights – and would thus be more problematic to make the object of measures to step up control.

The system of solidarity in this area should cover direct costs incurred by states in implementing sanctions, though it may also be implicitly recognised that there is a broader set of costs associated with reducing the level of irregular employment (though this would not be a legitimate object for compensation).

The system could take the form of redistribution of financial resources to authorities implementing employer sanctions; or “in kind” assistance with capacity building.

On **asylum and protection**, one idea for solidarity is the development, in advance, of schemes which are based on past experience, rather than *ad hoc* case by case solutions. There could be two different solidarity schemes.

Scheme 1 would apply to cases where an asylum system is not working, and a Member State has too many asylum seekers for its capacity, or is not (able to) implement(ing) the directives due to capacity and numerical issues. As a consequence, asylum seekers are making secondary movements leading to the application of the Dublin Regulation, but Dublin returns to the Member State in question become difficult to sustain.

For this type of scenario the Member State in question could call on EASO to assist with processing. Asylum officers from various Member States, under the auspices of EASO, would then process claims according to a pre-agreed EU procedure developed specifically for these cases where officers from various Member States would conduct procedures for the EU as a whole, leading to acceptance or denial of an EU protection status. For people granted status, the ‘host’ Member State would be obliged to take an equivalent number of refugees to their accepted caseload averaged over the previous three years, plus a pre-determined percentage of the remainder (eg 30%). The other Member States involved in the case determination would then accept the remaining 70% according to a pre-agreed distribution key.

Scheme 2 would apply to cases where the asylum system is not in question, but where there are a number of accepted protection seekers who exceed a (small) Member State’s capacity for integration. Under this scheme, a relocation programme such as EUREMA could be applied. However, work would then also be required on developing integration capacity, so that the numbers being relocated could be kept down, and the situation gradually resolved.

These suggested schemes are theoretical at this stage – a starting point for discussion. However, a potential need for solidarity in border management and protection is seen in the developing situation of departures from North Africa, which could require a more speedy solution.

On **combating trafficking in persons**, responsibility sharing should offer support both for victims, and for the identification/prosecution of perpetrators. The third area we have identified in Chapter 2 – that of prevention – fits the more classic model of collective EU financing of measures falling under external policy.

In both cases (victims and perpetrators), the main rationale for responsibility sharing would be to meet common EU goals – humane treatment of the victims of human rights abuse; and of reducing the instance of trafficking across the EU. There are no plausible arguments based on insurance, or the goal of reducing country-shopping. In the case of support for victims, any sharing of costs should be targeted based on the concern to maximise the welfare of victims.

In the case of identifying and prosecuting perpetrators, the criteria for channelling resources should be based on concern to maximise apprehension and prosecution of perpetrators. However, special consideration may also be given based on the challenges and resources faced by the Member State (e.g. particular vulnerability as a transit country because of geographical situation, and low GDP per capita). Thus one can envisage a mixture of outcome- and justice-based criteria for distributing the burden.

In both cases, costs are likely to be direct. At present, the question of supplementary and minimum costs does not arise, but could potentially arise in the case of support for victims of trafficking in comprehensive EU legislation is adopted in the area. Support for victims of trafficking is likely to be provided through financial transfer, targeted at governmental bodies and NGOs. Support in the fight against perpetrators may take the form of either financial or in kind transfers.

On the **rights of third country nationals residing legally in Member States**, the system should be based on concerns about collective stability/inter-ethnic relations; and a desire to limit "country-shopping" for better rights and benefits where third country nationals have more extensive mobility rights. Solidarity in this area of immigration and integration policy should aim primarily to address the causes of disparities in provisions between Member States, and to bring standards up to a level that addresses stability concerns. Thus the main tool would be convergence of legislation (at a higher standard). This is based on similar arguments to those applying to asylum harmonization (create a level playing field, especially given the possibilities of free movement between Member States).

There may be an argument for supplementary support for countries with less developed structures for guaranteeing the rights and benefits of third country nationals. This would cover direct costs, with distribution through a fund (currently the Integration Fund) to support specific programmes.

On **integration of third country nationals**, a responsibility sharing scheme would aim to compensate countries facing particular challenges with integration because of a lack of infrastructure or experience, and/or a low GDP per capita. Such a responsibility sharing scheme would take the form of financial transfers to cover direct costs associated with a range of possible measures and programmes. These possible measures and programmes would conform to guidelines set out by the EU (although with scope for variations based on national socio-cultural conditions).

INTRODUCTION

Context and Aims of the Study

Article 80 of Chapter 2 of Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU), which relates to '*Policies on Border Checks, Asylum and Immigration*', states that:

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.

The purpose of this report, which was commissioned by the European Parliament following a restricted invitation to tender, is to identify and assess the implications, scope and perspectives of this new Article 80, which appears to strengthen the previous Article 63(2)(b) TEC provision which was limited to refugees and displaced persons. The Study aims, in particular, to provide informed ideas and practical leads on possible modes of implementation of Article 80 TFEU in order to make the principle of solidarity in these policy areas effective. Unlike earlier reports exploring issues of intra-EU solidarity in the field of asylum and refugee policy, this Study sets out to extend the analysis to additional areas including border control and irregular migration, trafficking in human beings, immigration and integration.

Contents and Methodology

This *first part* of the report explores the implications of Article 80 TFEU in terms of obligations and jurisdiction for the further development of European immigration, border control and asylum policy and law. This analysis is conducted, first, by studying primary and secondary sources of European law: European legislation and case-law, policy plans, Communications, and doctrinal comments. The purpose of this analysis is to elicit the current situation regarding the negotiated range of powers and responsibilities of the Union and the Member States respectively, with regard to solidarity and the sharing of responsibilities. Particular attention is paid to the transversal role of solidarity as a principle throughout the TFEU, and to the consequences of the multilevel governance approach to asylum and immigration (i.e. the impact of national, international and supranational law).

The *second part* of the Study consists of screening the legal and political relevance and feasibility of different proposals for the implementation of Article 80 TFEU. This analysis is organised around two main components:

The first component consists of identifying the theoretical objectives of, incentives for and obstacles to intra-EU responsibility sharing. In terms of the incentives, economic theory has developed different models for accepting solidarity, ranging from cost-benefit (the relationship between the acceptance of the cost of burden sharing and the expected benefits thereof) to norm-based approaches (equity driven distribution; acceptance of responsibilities to safeguard certain human rights principles).

Secondly, an inventory of possible fields and modes of solidarity and fair sharing of responsibility is drawn up. This builds on existing literature and policy documents at

Member State level (e.g. the demands by Italy and Malta) and at EU level and includes all the key areas of migration and asylum referred to in Articles 77 to 79 TFEU.

The *third part of the report* is on '*The Standpoints and Visions of the Member States, EU Institutions and key stakeholders*'. It analyses the results of a questionnaire that was administered (face to face or by telephone) to senior officials in selected Member States, EU institutions (European Parliament, European Commission and Frontex), international organisations (IOM and UNHCR) and NGOs (ECRE). The questionnaire, which aims to identify the objectives, incentives and obstacles in the Member States with regard to solidarity in immigration, border and asylum policies, addresses both institutional issues (e.g. level of approach and policy tools to be used; use of Union action; degree of national sovereignty) and material issues (the specific domains in which responsibility sharing is necessary and the measures leading to its achievement). It also covers issues of costs and financial implications.

The *fourth part of the report* is on '*Conclusions and ideas on possible ways to implement Article 80 TFEU*'. It draws on all the key findings of the above theoretical and empirical elements of the assignment and outlines some ideas for implementing solidarity mechanisms in the field of European immigration and asylum policies, taking account of the EU legislative framework, the possible mechanisms in responsibility sharing, the financial implications and the visions of the Member States and key EU institutions and stakeholders. This part of the Study also briefly considers the application of solidarity to the ongoing challenges for border management and protection caused by the conflicts in and migration from North Africa.

The report was prepared in January-March 2011. It consisted of an initial phase of desk research and analysis, which focused in particular on the study of primary and secondary sources of European law, including European legislation and case-law, policy plans, Communications, and doctrinal comments. The second phase of the assignment consisted of the administration of a questionnaire to senior officials in selected Member States (Belgium, Finland, Italy, Latvia, Malta, Poland, The Netherlands, Sweden and the United Kingdom), in EU institutions (European Parliament, European Commission and Frontex), and to key stakeholders (IOM, UNHCR and ECRE). Interviews with officials in the EU institutions and with key stakeholders were held face to face in Brussels in February 2011. Interviews with officials in the selected Member States were conducted by telephone during the same period.

The Research Team

The report was prepared by Eurasyllum Ltd following a restricted invitation to tender which was issued by the European Parliament in November 2010. The team established by Eurasyllum consisted of Prof. Dirk Vanheule (Project Director), Dr Joanne van Selm, Dr Christina Boswell, and Solon Ardittis.

1. ANALYSIS OF THE SCOPE OF ARTICLE 80 TFEU

Article 80 of the Treaty on the Functioning of the European Union (TFEU) institutionalises the principle of solidarity in the border control, asylum and immigration policies of the European Union. It states that:

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.

Article 80 TFEU refers to the policies set out in Chapter 2 ('Policies on border checks, asylum and immigration') of Title V of part Three TFEU, containing Articles 77 to 80.

This chapter examines the legal implications of Article 80 TFEU in terms of obligations and jurisdiction for the further development of European immigration, border control and asylum policies.

1.1. Solidarity and co-operation in European Union Law

Solidarity features persistently but diversely in EU law. Malcolm Ross identifies five areas where the Court of Justice has invoked or elaborated upon solidarity to shape the *acquis* of EU law¹⁹. Solidarity plays different roles in these fields, ranging from constitutional-institutional to more substantive functions, as becomes clear from the following table.

Location/Source	Solidarity's role	Expression and significance
Article 10 EC/Article 4 TEU	Active obligations to secure effectiveness of EU law	Applicable to EU and national institutions, especially national courts; transcends 1 st and 3 rd EU pillars; used by the ECJ as foundation for key constitutional principles securing protection of individual rights
Fundamental rights: ECJ case law and EU charter provisions	Value signifier in relation to social rights	Individual access to (and enjoyment of) social justice; e.g. healthcare, public services
Market freedoms	Modifier of market imperative	Rule of reason in relation to justification of obstacles to

¹⁹ M. Ross, 'Solidarity – A New Constitutional Paradigm for the EU' in Ross & Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP, 2010), p. 41.

		single market; recognition of national solidarities and supporting solidarity as an EU concept
EU citizenship	Rights building	Developing equal treatment principle in core citizenship rights; requiring member states to demonstrate financial solidarity towards those EU citizens sufficiently integrated into host society
Competition rules; Articles 81-86 EC/Articles 101-106 TFEU	Boundary marker	Used to explain meaning of 'economic' to define 'undertaking'; solidarity systems excluded from EU competition rules; also invoked as justification for applying ex Art 86(2) to services of general Economic interest and thus not applying the full rigour of competition rules

Institutional solidarity relates to the solidarity expressed between institutions, both at EU and at Member State level. This type of solidarity can take different forms of cooperation and assistance. Solidarity in a more substantive form refers to existing or envisaged schemes of solidarity between individuals, often facilitated through state intervention (e.g. social insurance, financial redistribution through income taxes), which determine the level of integration in society.

As regards Article 80 TFEU, the institutional role of solidarity between Member States is relevant. This follows from the wording of the article: "the principle of solidarity and fair sharing of responsibility, including its financial implications, *between* the Member States". Solidarity in an EU institutional context refers to the solidarity occurring between the European Union and the Member States. Its aim and focus are to enable the Union and the Member States to reach the goals set out in the EU Treaties.

The principle of solidarity is not unknown in EU law. Article 10 EC and, at present, Article 4 TFEU exemplify the levels of activity and commitment which classical solidarity demands. Solidarity is a proactive means of making the Treaty effective: "Solidarity cuts across EU, national and local institutions and across the former EU pillars, thus providing the 'thickest' example of transnational legal bonds performing this kind of unifying role. This is not an attempt at replicating statism with one EU legal order but an accommodation of orders with

solidarity as the essential value and instrument for keeping conflict and difference within manageable bounds".²⁰

The ECJ has long recognized the principle of solidarity, which is based on mutual trust between the Member States, as a general principle inferred from the nature of the Communities. All Member States should contribute to the harmonious development of the Union. Thus the principle of solidarity strengthens economic and social cohesion within the EU. The Court has also recognized the principle of loyal cooperation between the EC institutions and Member States and between the Member States themselves, based on Article 10 EC.²¹

Article 10 EC required Member States, by way of a positive obligation, "to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community". At the same time, the negative obligation in the second paragraph required Member States to "abstain from any measures which could jeopardise the attainment of the objectives of this Treaty". This provision expressed the duty to cooperate in good faith (duty of sincere cooperation), to which the Member States were subject in their dealings with the Community and between themselves; it is the expression of Community solidarity.²² While this provision was chiefly applied to the Member States, the ECJ has also made it clear that the Community institutions were also subject to the duty to cooperate in good faith in their relations both with Member States and with each other.²³

The duty to cooperate entailed more than the fulfilment of specific obligations laid down in a provision of Community law. Even in the absence of such an obligation, a Member State's conduct could constitute a breach under the supplementary requirements recognized by the ECJ. The same applied when their actions would constitute a misuse of powers.²⁴

Hence, this duty of cooperation required that Member States and the Commission cooperate in good faith with institutions of other Member States responsible for implementing Community law. Where the Community was empowered to conduct a particular policy but did not succeed in doing so on account of differences of opinion within the Council, the duty of cooperation in good faith required the Member States to take the necessary temporary and provisional measures. Such measures were of a conservatory nature, in the sense that they had to enable the anticipated Community measures to become effective at a later stage. Similarly, where the Commission had submitted proposals to the Council, the Member States as 'trustees of the common interest', could act only as part of the process of collaboration with the Commission, and could certainly not lay down measures incompatible with the objections, reservations or conditions which might be formulated by the Commission.²⁵

The Lisbon Treaty has reaffirmed the principle of solidarity. Article 2 of the Treaty on the European Union (TEU) states that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice,

²⁰ Ross, *ibid.*, p. 42.

²¹ A. Kaczorowska, *European Union Law* (2008) p. 235.

²² Lenaerts and Van Nuffel, *Constitutional Law of the European Union* (2nd ed.), p. 115.

²³ Lenaerts and Van Nuffel, *ibid.*, p. 116 and the references in note 170.

²⁴ Lenaerts and Van Nuffel, *ibid.*, p. 117.

²⁵ Lenaerts and Van Nuffel, *ibid.*, p. 120-121.

solidarity and equality between women and men prevail'. Article 3 (3) TEU, establishes that the European Union 'shall promote economic, social and territorial cohesion, *and solidarity among Member States*' (emphasis added).

Article 4 (3) TEU is the successor to Article 10 EC and rephrases the duty of cooperation. Chalmers, Davies and Monties compare this notion with the 'fidelity principle' in the United States, i.e. the requirement that each level and unit of government must act to ensure the proper functioning of the system of governance as a whole.²⁶ Under Article 4(3) TEU, the Union and the Member States shall, "[p]ursuant to the principle of sincere cooperation (...), in full mutual respect, assist each other in carrying out tasks which flow from the Treaties". The Member States "shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union". Furthermore, the Member States "shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

The provision applies both to Member States and to the EU institutions which must cooperate with national bodies to secure the full effectiveness of EU law.²⁷ In comparison with Article 10 EC, Article 4(3) TEU introduces two modifications: the idea of 'mutual respect', implying that the institutions must not transgress upon the prerogatives of the other; and the duty of cooperation applies to tasks that 'flow from the Treaties', thus establishing a more open-ended duty than the duty arising from fulfilment of Treaty obligations under Article 10 EC.²⁸

This 'fidelity provision' carries both negative and positive obligations.²⁹ Under the negative obligation, EU institutions must not simply refrain from taking measures that conflict with substantive EU laws, but they must also refrain from adopting measures which obstruct the effectiveness of EU policies in more indirect ways. Member States are under a duty to abstain from any measure which could frustrate the realisation of the objectives in the common action. The positive obligation is to take a number of measures that contribute to the realisation of Union policies: securing legal certainty for EU law, actively policing EU law, penalising infringements of EU law and notifying the Commission if they have any problems applying or enforcing EU law.

Chalmers *et al.* emphasize that Article 4(3) TEU extends beyond that of an overarching provision and draws all relevant institutions into the job of effectively sustaining Union policy: 'It sets out the expectations of what a state must be capable of to sustain the obligations of membership. It sets out responsibilities of comity but, above all, it sets out expectations about the commitments and resources that states must both have and commit – be these effective judicial systems, proactive, well-resourced, non-corrupt policing or a clear and universal rule of law – for membership of the European Union.'³⁰

When applied to the field of border checks, asylum and immigration, the positive obligations under Article 4(3) TEU already have an important number of consequences. The duty of securing legal certainty for EU law requires Member States to implement their obligations, following from the TFEU and the secondary legislation adopted thereunder, with

²⁶ Chalmers, Davies and Monties, *European Union Law* (2010), p. 223.

²⁷ TECJ, C-2/88, Zwartveld (1990) TECR I-3365.

²⁸ Chalmers, Davies and Monties, *European Union Law* (2010), p. 223-224.

²⁹ Chalmers, Davies and Monties, *European Union Law* (2010), p. 224-225.

³⁰ Chalmers, Davies and Monties, *European Union Law* (2010), p. 225.

binding force and with specificity, precision and clarity.³¹ Mere administrative practices are not sufficient. Moreover, EU law must be actively policed and it must be ensured that all appropriate measures are adopted to guarantee the full scope and effect of EU law, with respect to fundamental rights and liberties. Infringements of EU law must furthermore be penalized; the ensuing penalties must be effective, proportionate and dissuasive. Solidarity includes, at a minimum, this duty of cooperation through implementation, policing and penalization of infractions of EU law. For solidarity to exist and EU policy in matters of border checks, asylum and migration, to be effective, Member States must be encouraged to fulfil their obligations under the TFEU.

Furthermore, it follows from Article 4(3) TEU that the Union and the Member States assist each other in carrying out tasks which flow from (Articles 77 to 79 of) the TFEU. This implies that the Union and Member States have a duty of assistance towards one another in matters of border checks, asylum and immigration, regardless of specific obligations flowing from the TFEU. This principle of sincere cooperation is an obligation guiding the conduct of the Union and the Member States.

1.2. The Origins of Article 80 TFEU

Article 80 TFEU is a newly created treaty provision that did not exist in previous EU law. The sharing of responsibility was included, in a rather embryonic form and only with regard to asylum, in ex Article 63(2)(b) EC. Under this provision the Council was to adopt, within a period of five years after the entry into force of the Treaty of Amsterdam, measures on refugees and displaced persons including 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons'.

The origins of Article 80 TFEU are to be found in the discussions within the European Convention, leading up to the Draft Treaty establishing a Constitution for Europe. This draft treaty was eventually the inspiration for the Lisbon Treaty.

The Discussions within the Convention Working Group

The discussions within the Convention were prepared in Working Groups. Working Group X 'Freedom, Security and Justice' examined possible amendments in the area of border control, asylum and immigration. In a preparatory working document on possible ways forward for this working group, the issue of solidarity was raised with regard to asylum, refugees and displaced persons. One of three basic questions in this policy area, that could be addressed, was the following:³² *'It is suggested to enshrine in the Constitutional Treaty the principle of solidarity between Member States implying in particular a fair balance of the burden sharing; Should this principle be drafted as a general principle applying to asylum, immigration and border control policies?'* Thus, the notion of burden sharing or, in a more positive formulation,³³ responsibility sharing,³⁴ which has been an issue typical for

³¹ ECJ, C-159/99, *Commission v. Italy*, (2001) ECR I-4007.

³² Convention Working Group X, Working Document 05, 'Possible ways forward for the working group', p. 3. See in the same sense Working Group, X Working Document 34, 'Raum der Freiheit, der Sicherheit und des Rechts' Beitrag von Prof. Jürgen Meyer, p. 3 who deemed that the recognition of this principle was necessary to meet the Tampere objectives.

³³ See Convention Working Group X, Working Document 15, Comments by Mrs Evelin Lichtenberger, Member of the Convention on the Working document 05 "Possible ways for the Working Group", p. 2: 'First of all it is important to realize that neither refugees nor immigrants are burdens and that, instead, they are welcome in the European Union; it is therefore misleading, in this context, to speak of burden-sharing.'

answering needs for protection and asylum, was broadened to the other two areas of migration and border policy that come within EC jurisdiction.

In later discussions this broadening up of the solidarity principle was not put into question. Often based on particular needs, this idea was welcomed:

- 'Pressures at our future external borders will increase and all Member States have the responsibility to protect it. The new Treaty should recognise this objective and provide the measures to promote solidarity and a fair burden sharing – but not only with regard to financing. We need to be aware that some new Member States will have a long border with third countries. (...) I would like to draw your attention to the EP Resolution concerning the implications of EU enlargement for the co-operation in the field of JHA which says, ... *the responsibility for controlling the EU's external borders cannot simply be left to the most northerly, easterly, southerly or westerly member States but must be borne, both technically and financially, on a Community basis*' (original emphasis);³⁵
- 'There will continue to be pressures at our external borders. We need mutual trust in the ability of all Member States to protect the external border, and should accept that this is a common responsibility. It is important, therefore, that we are able to offer assistance to Member States which, because of their geographical position, are particularly vulnerable to the threat of illegal immigration. There therefore needs to be a Treaty basis for measures to promote solidarity between Member States. This is already found in the Treaty in relation to refugees and displaced persons, but the concept needs to be extended to management of the external border';³⁶
- 'In addition to this harmonisation, it is clear that building mutual confidence also requires actions to promote cooperation, information exchange and training. Mechanisms for financial solidarity, e.g. in relation to the control of the common external border, could also be envisaged. In the longer term, it may be necessary to consider the development of a common European border guard';³⁷
- 'In general, the affirmation of a principle of solidarity, including financial solidarity, between the Member States in the areas of immigration, asylum and external border control, must also be approved, because it conforms with the

³⁴ Compare with Convention Working Group X, Working Document 20, Comments to WD 05 by Mr Ben Fayot, Member of the Convention, p. 3, as regards asylum, refugees and displaced persons: 'Given the failure of the Amsterdam Treaty in this field, it will be appropriate to use co-decision with QMV in the Council and to enshrine in the Constitutional Treaty the principal of solidarity, aiming at promoting the *solidarity sharing* instead of burden sharing.' (original emphasis) In the draft report of the working group, the two terms 'burden' and 'responsibility' sharing were included as alternatives; see Convention Working Group X, Working Document 18 Rev 1, Revised Draft Final Report, p. 5.

³⁵ Convention Working Group X, Working Document 31, Letter by Prof. Dr. Mihael Brejč, Vice-President of the National Assembly of Slovenia, Alternate Member of the European Convention', pp. 2-3.

³⁶ Convention Working Group X, Working Document 22, Comments by Baroness Scotland of Asthal and Mr. Antti Peltomäki, Alternate Members of the Convention, to the WD 05, p. 4.

³⁷ Convention Working Group X, Working Document 14, Paper by M. Antonio VITORINO, Commissioner, Member of the Convention, 'Towards A Single Treaty For The Delivery Of The Area Of Freedom, Security And Justice?', pp. 14-15.

community logic and will guarantee a fair distribution of efforts made by all Member States'.³⁸

In its final report of 2 December 2002, the Working Group made a number of recommendations. One of the recommendations in the field of 'Asylum, refugees and displaced persons' was the recognition of a general principle of solidarity and fair sharing of responsibility: "While acknowledging the responsibilities of the Member States, to enshrine in the Treaty the principle of solidarity and fair sharing of responsibility (including its financial implications) between the Member States, applying as a general principle to the Union's asylum, immigration and border control policies. A specific legal basis should enable the adoption of the detailed policies necessary to give effect to this principle".³⁹

In the plenary discussion on this report the large majority of speakers approved the recommendations concerning asylum, immigration, border control and visa policies, promoting the formulation of more general legal bases, the application of qualified-majority voting and co-decision, and the inclusion in the Treaty of a general principle of solidarity amongst the Member States.⁴⁰

The Draft Treaty Establishing a Constitution for Europe and the Lisbon Treaty

The Praesidium proposed the insertion of an Article 13 (later renumbered to III-164 and ultimately becoming Article III-169 in the Draft Treaty), establishing a principle of solidarity: "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 acts of the Union adopted pursuant to the provisions of this Chapter shall contain appropriate measures to give effect to this principle".

A number of amendments were suggested. These suggestions give an indication of the variety of visions on the notion of solidarity.

Some of these amendments called for the *omission* of the solidarity principle. One amendment was inspired by a conviction that the Community should not have competence in the field of asylum and migration, a matter to be left to bilateral or multilateral action between Member States.⁴¹ Other suggestions, that were more in line with the existing jurisdiction of the Union in matters of migration and asylum, nevertheless proposed that solidarity should not be mentioned. Unenforceability of a notion of solidarity was a reason for such a suggestion: "General phrases such as 'solidarity' (or 'loyal cooperation') are imprecise and impossible to interpret judicially. Although solidarity does hold legal meanings in certain jurisdictions, this is not the case under Common Law".⁴² Others believed that the explicit reference of an obligation of solidarity in the policy area of border control, asylum and immigration was superfluous. One suggestion for amendment, for instance, noted that including a solidarity clause was unnecessary: the basis for solidarity follows from the general Treaty provisions and applies to all Union policies; it is not necessary to mention it in the area of Justice and Home affairs. Special provisions on

³⁸ Convention Working Group X, Working Document 13, Observations de M. Jacques FLOCH, Membre de la Convention, sur le document de travail 05 du 6 novembre 2002 "Pistes de réflexion pour le Groupe de travail", p. 5.

³⁹ Final Report of Convention Working Group X "Freedom, Security and Justice", CONV 426/02 (2 December 2002), p. 4.

⁴⁰ Summary Report of the Plenary Session of the European Convention – 5 and 6 December 2002, CONV 449/02.

⁴¹ Suggestion for amendment of Part Two Article 12 by Timothy Kirkhope MEP.

⁴² Suggestion for amendment of Article 13 by David Heathcoat-Amory and The Earl of Stockton.

solidarity can be introduced through secondary legislation.⁴³ Obviously, none of these proposed amendments were adopted.

To a less radical degree, a partial omission of certain policy areas from the applicability of the solidarity principle was defended. The applicability of the solidarity principle in matters of immigration was questioned, with the suggestion for limitation *ratione materiae* to border checks and asylum, "as the principle seems impracticable in this specific area" of immigration.⁴⁴

Whether solidarity is a governing principle that commands policy or more an underlying principle that is reflected in policy, was put in question by a suggestion for amendment that held that the Union policies "shall *reflect* the principle of solidarity and fair sharing of responsibility" (emphasis added). The acts adopted shall where necessary contain appropriate measures "which may include financial provisions, to assist in securing a fair sharing of responsibility between Member States".⁴⁵ These suggestions for amendments respected the recommendation that the principle of responsibility sharing should be enshrined in the Treaty. Yet at the same time their drafters warned that the intention of this insertion "is (...) presumably not that the European Union budget should bear the entire cost of Member States' asylum and immigration systems, or to develop a mechanism for sharing the full costs between the Member States, which would not be realistic. The Union's role is to promote solidarity."⁴⁶ Further suggestions for amendments proposed removing the clause "including its financial implications" from the article, out of concern that the article would be interpreted as a legal basis questioning the normal EU budget procedures or as calling for national financing of Community actions in the fields of border control, asylum and migration⁴⁷ or without any explanation.⁴⁸

Some of the proposed amendments related to the *nature of the solidarity* to be given. It was stated that solidarity was to be limited to financial solidarity.⁴⁹ This was motivated by the observation that at that time, the principle of balancing of the efforts agreed upon by the Member States was foreseen in cases of mass influx of asylum seekers and in the objective of an integrated external border management. This had already been translated into the creation of a European Refugee Fund. According to the drafter of the amendment, a concept of financial solidarity was prevalent and the clause had to be formulated in such explicit terms.

Others believed that the principle of solidarity "should first and foremost be implemented through Community Funding and voluntary joint operation between the Member States. Forced physical redistribution of asylum seekers who have already arrived in the territory of a Member State shall be excluded."⁵⁰

⁴³ Suggestion for amendment of Article 13 by Joschka Fischer; Suggestion for amendment of Article III-164 by Joschka Fischer.

⁴⁴ Suggestion for amendment of Article 13 by Poul Schlüter.

⁴⁵ Suggestion for amendment of Article 13 by Mr Hain with the support of Lord Tomlinson; Suggestion for amendment of Article 164 by Mr Hain.

⁴⁶ Suggestion for amendment of Article 164 by Mr Hain.

⁴⁷ Suggestion for amendment of Article 13 by Lena Hjelm-Wallén *et al.*

⁴⁸ Suggestion for amendment of Article 13 by G.M. de Vries and T.J.A.M. de Bruijn.

⁴⁹ Suggestion for amendment of Article 13 by Dominique de Villepin: 'Les politiques de l'Union visées au present chapitre et leur mise en oeuvre sont régis par le principe de solidarité *financière* entre les Etats membres' (emphasis added).

⁵⁰ Suggestion for Amendment of Article 13 by Teija Tiilikainen *et al.*; Suggestion for amendment of Article 164 by Teija Tiilikainen *et al.*

Dutch members of the Convention called for the deletion of the words 'including its financial implications' because "the Netherlands does not agree with the proposal on financial solidarity, especially where external border controls are concerned."⁵¹

Yet another suggestion accepted the principle of allocating financial burdens between all Member states, but believed that it could be better defined by replacing 'including its financial applications' by 'appropriate burden sharing'.⁵²

Some amendments also called for a broader description of solidarity. One suggestion for amendment called for the possibility for the Council to adopt specific Union measures to alleviate the burdens of Member States that are confronted with a situation of unforeseen influx of third country nationals.⁵³ Additionally it was suggested to include a reference to burden sharing in Article 12 (on immigration policy), stating that the Union adopts a common immigration policy based on the equal and united sharing/distribution of burdens.⁵⁴

Ultimately, Article III-169 of the Draft Treaty Establishing a Constitution for Europe, read: "The policies of the Union set out in this Section and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Section shall contain appropriate measures to give effect to this principle."

With the exception of the replacement of the word 'section' by 'chapter' and of 'acts of the Union' by 'Union Acts', this formulation was maintained in the Lisbon Treaty in the new article 63b, that was ultimately renumbered Article 80 TFEU:⁵⁵ "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."

Conclusions

Publicly available documents on the drafting of the Draft Treaty Establishing a Constitution for Europe and the Lisbon Treaty do not contain a comprehensive and explicit definition of the notions of 'solidarity' and 'sharing of responsibility'.

⁵¹ Suggestion for amendment of Article 164 by G.M. de Vries and T.J.A.M. de Bruijn.

⁵² Suggestion for Amendment of Article 13 by Figel *et al.*

⁵³ Suggestion for amendment of article 13 by Gianfranco Fini. Similarly: Suggestion for amendment of Article 12 of Hain with the support of Lord Tomlinson.

⁵⁴ Suggestion for amendment of Article 12 by Gianfranco Fini. There are also other examples of measures of burden sharing included in other, substantial, provisions. See for instance the Suggestion for amendment of Article 12 of Hain with the support of Lord Tomlinson, who proposed to include, as an objective of a common European asylum system, 'facilitating the resettlement in the Union where appropriate of persons found to be in need of international protection' and 'reducing differences in asylum procedures and reception conditions in the Member states which result in an inequitable distribution of applicants for asylum'. He also called for the introduction of a provision stating that the legislation thus adopted 'shall be complemented by effective operational co-operation co-ordinated by the committee established under Article 5, and effective administrative co-operation in accordance with Article 7.' See also Suggestion for amendment of Article 10 by Meglena Kuneva, suggesting the creation of a Common European Border Guard Service "in line with the principle of financial solidarity" in Article 13.

⁵⁵ Article 2, (65) Lisbon Treaty adding a chapter on Policies on border checks, asylum and Immigration to the amended TFEU.

On the basis of the documents presented in the Convention Working Group and the suggestions for amendments, some conclusions can nevertheless be made about the scope and content of article 80 TFEU.

The inclusion of the principle was considered to be important for the realisation of Union policies in the field of border management, asylum and immigration. Notwithstanding the fact that solidarity is a core characteristic of the European Union and that the EU institutions and the Member States are expected to cooperate in the realisation of the Union's policies, the drafters of Article 80 TFEU considered that its explicit incorporation at a minimum re-states the importance of the principle in this field or can even have added value. The principle may not be ignored in policy development and implementation.

Doubts were raised on the legal enforceability of the principles of solidarity and sharing of responsibility. A proposed amendment to strike the principles from the Draft Constitution was, however, not adopted. It is difficult to conclude from this whether, in the opinion of the drafters, the principles are enforceable or not. This will depend on the interpretation of the provisions, according to classical doctrine on the direct effect of Union law. Even in the absence of enforceability, the principles remain the guiding lines in the development and implementation of Union policy in this area.

Solidarity and responsibility sharing could apply, possibly, to all matters coming under border, asylum and immigration management. Although the roots can be traced to older notions of 'burden sharing' in asylum law, and their relevance for border management was explicitly acknowledged, the drafters accepted the principles to be generally applicable. Suggestions for amendments to limit solidarity to more specific matters in the policy area of border management, asylum and migration, were not adopted.

The nature of solidarity and the responsibilities to be shared is broader than that of the distribution of financial burdens that follow from border management, asylum and immigration policies. The idea of financial burden sharing was probably perceived as one of the most obvious ways to show solidarity and share responsibility, but is certainly not the only course to achieve this goal. Other forms of cooperation, material support and even Union action are possible.

Concerns were raised about the final allocation of the financial expenses connected with the putting into effect of solidarity and sharing of responsibilities, including the financial implications. Some argued that the inclusion of financial obligations does not entail that the EU's budget will need to carry all the financial implications.

1.3. The scope of Article 80 TFEU

Article 80 TFEU applies to all matters falling within the policy area of border checks, asylum and immigration. It is a specification of the more general principle of solidarity and, connected thereto, cooperation on which the European Union is founded. Solidarity seems to be the more general notion; sharing of responsibilities is an expression of this solidarity.

The provision applies to both the Union institutions and the Member States. The principles expressed therein are governing principles for the development of EU policy, at Union level.

However, these principles are also highly relevant at the level of implementation, where the actions of Member States are highly interdependent and imply the need for cooperation. Taken together with the Member States' general obligation for cooperation, the absence of

solidarity and responsibility sharing at Member State level may go against the states' obligations under article 80 TFEU. This will be the case when such lack of solidarity also encompasses a violation of a more specific duty flowing from secondary EU legislation.⁵⁶ But even beyond those cases, there may be instances where national policy measures and practices in matters of border management, asylum and immigration outside the strict implementation of EU law, may be in conflict with the idea of solidarity and sharing of responsibility.⁵⁷

Related to this issue is the question of enforceability and direct effect. For solidarity and sharing of responsibility to be effective, other measures (legislative or policy) must be taken. It is questionable whether the solidarity and sharing of responsibilities clauses have a direct effect. The extent to which they could play a role in legal litigation remains to be seen. Drawing a comparison with the more general duties of cooperation (ex Article 10 TEC), the ECJ has stated that this provision does not have direct effect in itself, but it can be used as an additional argument where the Member State in question is alleged to have breached an unconditional and sufficiently precise obligation.⁵⁸

As regards their contents, the notions of 'solidarity' and 'fair sharing of responsibilities' are not defined in terms of their goals or the standards necessary to meet them. Different approaches can be used to try to determine the exact meaning of the concepts. A Member State based approach would imply that the distribution of burdens following from the development and implementation of EU borders, immigration and asylum policy, happens in a fair way. While it may not be easy to quantify fairness, the emphasis would be on the Member States' needs. However, national needs and interests do not necessarily align with the policy goals set at the EU-level. This tension will be most visible in matters of asylum, where the EU's policy goals to offer protection may conflict with Member States' interests in limiting the number of asylum seekers, recognized refugees and persons in need of subsidiary protection on their territory. When determining what is fair in terms of sharing of responsibilities and what type of solidarity is to be expected, the criteria used by the Union and by individual Member States may be very different. Member States might for instance call for solidarity and sharing of responsibilities to achieve better and more proficient border control, whilst not taking on their own responsibilities or showing solidarity when it comes to offering protection to asylum seekers.

Given the fact that Article 80 TFEU applies to the policies adopted under Chapter 2, the policy goals set out in that Chapter should be taken into consideration to determine levels of solidarity and fairness in responsibility sharing. However, even then, the policy goals in managing borders, controlling immigration and offering asylum are very different, while in practice measures in one policy area, can have an impact on the implementation of policy in another area. Solidarity and responsibilities should be examined transversally, throughout the policy areas mentioned in articles 77 to 79 TFEU. From that perspective, attention should also be given to Article 67(2) TFEU, stating that the Union – constituting an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States – “shall ensure the absence of internal border controls for persons and shall frame a *common policy* on asylum, immigration and external border control, based on *solidarity* between Member States,

⁵⁶ A commonly mentioned example is the refusal of some Member States to take fingerprints of irregularly moving immigrants.

⁵⁷ One could for instance ask if a general regularization campaign goes against the principles of solidarity and fair sharing of responsibility.

⁵⁸ Lenaerts and Van Nuffel, *Constitutional Law of the European Union* (2nd ed.), p. 116.

which is *fair towards third-country nationals*" (emphasis added). Therefore a common policy that is based on solidarity should remain fair towards third-country nationals.

Apart from the formulation of solidarity as a guiding principle in policy development and implementation, Article 80 TFEU also includes the provision that "[w]hen necessary, the Union acts adopted pursuant to (...) Chapter [2] shall contain appropriate measures to give effect to this principle". The insertion of the term 'necessary' relates to two more fundamental principles of EU law, subsidiarity and proportionality.

Under the subsidiarity principle, as laid down in Article 5(3) TEU, the Union should only act "if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". The subsidiarity principle applies to the adoption of border, asylum and immigration policies and measures under Articles 77 to 79 TFEU. If the implementation of such policies requires additional solidarity measures, then Article 80 can be invoked to adopt such measures. One could thus argue that policymaking in the areas of border management, asylum and immigration requires a double scrutiny: 1) establishing whether or not Union measures are required in the particular field (Articles 77 to 79 TFEU); and 2) determining whether or not Member States will be able to implement them by themselves and whether additional solidarity measures are necessary. The Member States' expected loyalty in implementing EU policy appears not to be sufficient; if solidarity is needed, then Union action may be required.

Moreover the solidarity measures to be taken must be proportional. Under the principle of proportionality in Article 5(4) TEU, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". Proportionality requires that "a measure must be appropriate and necessary to achieve its objectives.(...) [I]t is necessary to establish whether the means it employs to achieve the aim correspond to the importance of the aim and whether they are necessary for its achievement."⁵⁹ Given the wide variety of interpretations of what can be understood by solidarity, as Chapter 3 below will illustrate, and the varying degrees of intensity by which the Court of Justice scrutinizes measures under the proportionality principle, it is very difficult to predict when a measure is proportionate.

A final question with regard to Article 80 TFEU relates to its relevance for EU competence. While there is an explicit reference to the policy goals and measures set out in Articles 77 and 79 TFEU, it could be worthwhile investigating if Article 80 TFEU also applies to measures that may, strictly speaking, not fall under Articles 77 to 79 TFEU. One should also ascertain whether solidarity and fair sharing of responsibilities applies to other policy areas (e.g. external relations) that may affect policies on border management, immigration and asylum.

⁵⁹ T. Tridimas, *The General Principles of EU Law* (Oxford University Press: 2006), p. 139.

2. SOLIDARITY FROM THEORY TO IMPLEMENTATION

2.1. Motivations for sharing of responsibility and solidarity

Studies on solidarity and burden sharing in the area of immigration and asylum have mainly focused on refugees and displaced persons.⁶⁰ Indeed, the concept of 'burden sharing' has a long vintage in relation to refugee protection. The preamble of the 1951 Convention relating to the Status of Refugees states that granting asylum 'may place unduly heavy burdens on certain countries', which implies the need for 'international cooperation'. West Germany had engaged in a policy of burden-sharing even before then, dispersing refugees between its different Länder in proportion to population size.⁶¹ Other countries, including Austria, Belgium, Denmark, the Netherlands, Sweden and the UK have introduced more or less comprehensive systems for dispersing asylum seekers. Debates on burden-sharing in the EU date from the early-mid-1990s, in the context of ensuring a fair burden of effort in receiving asylum seekers and those seeking temporary protection.

What has been the rationale for such burden sharing schemes? Clearly, for those countries facing a disproportionately high level of inflows or costs related to refugees, there is a self-interested motivation to cooperate. A burden sharing system would imply relieving these countries of some of the financial, administrative, social and political costs associated with receiving refugees and protection seekers. Thus, for example, Germany's 1994 proposal on burden sharing of those in need of temporary protection sought to ensure a more equitable distribution of displaced persons between Member States, based on the GDP, population and size of territory of each receiving country. Not surprisingly, those Member States that would expect to receive more refugees through such a scheme were reluctant to commit themselves to the proposal.

However, there are a number of possible reasons why even states standing to "lose" from such an agreement may nonetheless have rational reasons to cooperate.

First, such systems can serve as a type of *insurance scheme*⁶², stabilising expectations about how many refugees a country might expect to receive, or what costs it might expect to bear. If we analyse patterns of protection-seeking across EU states over the past two decades, it is clear that there is significant fluctuation in which countries receive the most protection seekers and refugees. For example, Austria received more than 27,000 asylum seekers at the peak of the Bosnian conflict in 1991, but two years later was receiving less than 5,000. Inversely, France received around 17,400 applications in 1996, compared to 61,000 in 2004. This implies that even if a country is receiving relatively less protection

⁶⁰ Betts, A, Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory. *Journal of Refugee Studies*, 16(3) (2003), 274-296; Boswell, C. (2001). Spreading the "Costs" of Asylum in Europe: Lessons from the UK and German Experience. *Journal of Refugee Studies*, 16(3) (2003), 316-335; Noll, G., Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field. *Journal of Refugee Studies*, 16(3) (2003); 236-252; Thielemann, E. (2003). Between Interests and Norms: Explaining Burden-Sharing in the European Union. *Journal of Refugee Studies*, 16(Special Issue), 253 – 273; Thielemann, E. (2003). Between Interests and Norms: Explaining Burden-Sharing in the European Union. *Journal of Refugee Studies*, 16(3) (2003), 253 – 273; van Selm-Thorburn, J. *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* Amsterdam: Martinus Nijhoff, 1998.

⁶¹ Schwarz, T, The Reception of Refugees in the Federal Republic of Germany: An Example of a Decentralized System, *Refugees in the Region*, Cardiff, 1999.

⁶² Thielemann, E., Between Interests and Norms: Explaining Burden-Sharing in the European Union. *Journal of Refugee Studies*, 16(3) (2003), 253 - 273.

seekers now, it may well receive more in the future, making it sensible to adopt a precautionary principle and sign up to a burden sharing system.

The second possible motive relates to the need to *avoid damaging unilateral action* to reduce burdens. If individual states are attempting to reduce their share of unwanted influx, they are likely to introduce measures to make it more difficult for protection seekers to enter or reside in their territory, or be granted protection. Insofar as such measures are successful in one state, neighbouring countries may well find themselves shouldering an increased burden. This may lead to a downward spiral of increasingly restrictive policies. In a worst case scenario, unilateral action may even involve an individual state reintroducing internal border controls to limit inflows from a neighbouring country. Such a dynamic would be damaging for refugee protection, and also potentially destabilising for the political systems of Member States, which would be engaged in a continual series of policy reforms. Measures reintroducing internal border control would also undermine EU free movement provisions.

A burden sharing system might therefore be seen as a means of reducing the incentives for this sort of downward spiral. Such a system would imply that the distribution of refugees – or the costs of receiving them – would be determined according to criteria that were (at least partially) independent of national policies. This would reduce incentives to amend domestic provisions on asylum reception, protection or border control. It may also enhance the protection of refugee rights, by introducing minimum standards for reception or protection.

This type of downward spiral argument has become more relevant as travel between EU states has become easier. The abolition of controls on internal movement between Member States clearly facilitates irregular flows, thus raising concerns about possible 'country shopping' between EU states. Indeed, fears that states would respond by ratcheting down their asylum provisions in a competitive bid to deter migrants have been one of the factors behind the move towards a common asylum policy and common asylum system.

A third reason why states may have an interest in cooperating relates to broader considerations of *solidarity and mutual cooperation*. In many areas of EU policy, Member States redistribute resources to support those with less wealth or capacity, or those experiencing exogenous shocks. Such systems have been a core part of European cooperation from the outset, bringing stability to vulnerable countries or regions within the Union. Such redistribution is not simply altruistic, but can have a beneficial effect for regional prosperity and security, with positive externalities for all Member States. Again, this type of argument may be strengthened by the abolition of internal controls on movement between Member States: it can be surmised that increased possibilities for irregular movement between states can negatively affect regional stability in general, by increasing the risks of nefarious practices of smuggling, trafficking and other forms of cross-border organised crime.

This third rationale for burden sharing implies that refugee protection is an 'international public good': where one country protects refugees, this creates generally positive effects for other countries.⁶³ The enhanced security and stability created by protection constitutes a collective benefit to all countries in the region of destination.

⁶³ Suhrke, A, Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action. *Journal of Refugee Studies*, 11(4) (1998), 399-400.

These arguments have all been invoked in the context of EU discussions on solidarity and burden sharing of protection seekers. They have underpinned proposals on both physical burden sharing (or dispersal) and financial burden sharing (notably the European Refugee Fund). How far might such arguments be applicable to possible sharing of responsibilities towards other categories of migrants and/or other aspects of migration management?

It should be stressed at the outset that asylum has historically been seen as an appropriate area for burden sharing because of certain features of refugee situations. The reception and protection of displaced persons is generally seen as a burden on receiving countries, and one that can occur unexpectedly and on a large-scale, following conflict or generalised violence. Such cases of influx may be seen as generating quite acute problems for receiving countries. Moreover, it is usually assumed that the largest levels of inflows are directed to countries that are geographically proximate or accessible, and/or have a history of receiving migrants from that region. In this sense, the fact that one country bears a particularly high burden is to a large extent beyond the control of that country, thus justifying the provision of assistance from other states. Finally, the protection of refugees and displaced persons is seen as a positive, indeed necessary, act from an ethical and normative point of view. This implies that the costs involved cannot and should not be significantly reduced, again implying the desirability of some system for sharing costs (rather than eliminating them).

All of these factors make the area of asylum and forced displacement an obvious candidate for solidarity measures, in a way that may not necessarily apply to other areas of migration management.

2.2. Types of sharing of responsibility

While it may be intuitively logical that some form of sharing of responsibilities should apply to the area of immigration and asylum, once we start disentangling possible mechanisms and criteria, the issue becomes far more complex. For a start, we need to consider the core aims of such a system. In this respect, it is worth asking two questions.

First, should a sharing system aim to address the *causes* or the *effects* of disparities in the distribution of the burden? A system designed to address the causes of disparities would attempt to adjust the factors influencing how the burden gets distributed in the first place. For example, EU harmonization of asylum policy can be seen as a system for addressing the causes of inequitable distribution, through creating a 'level playing field' of provisions across Member States. The assumption here is that countries with relatively generous asylum systems attract more asylum seekers, implying that a convergence of laws in this area would lead to a more just distribution. This type of 'preventive' measure has been termed 'indirect burden sharing' in some of the literature, in the sense that it leads indirectly to a more equitable distribution.⁶⁴

Systems to address the causes of disparities, or indirect burden sharing, should be contrasted with systems designed to redistribute the effects, or consequences, of

⁶⁴ It should be noted that much of the literature on the factors influencing choice of country for asylum seekers and displaced persons casts doubt on the importance of national asylum policies as a determining factor. Instead, there is evidence that existing migrant networks and a history of colonial or other ties with sending countries are far more important determinants. See Hatton, T. J, *The Rise and Fall of Asylum: What Happened and Why?* *The Economic Journal*, 199(535) (2009), 183-213; Koser, K., & Pinkerton, C, *The Social Networks of Asylum Seekers and the Dissemination of Information about Countries of Asylum*. London: Home Office Research, Development and Statistics, 2002; Thielemann, E, *Does Policy Matter? On Governments' Attempts to Control Unwanted Migration*. *Center for Comparative Immigration Studies Working Paper*, 112, 2004.

inequitable distributions of costs. These latter systems may involve physical dispersal or resettlement of displaced persons or refugees, or they may involve financial transfers between countries to compensate those shouldering a higher burden. Physical dispersal or resettlement systems have never been systematically applied to intra-EU burden sharing, though the Kosovo Humanitarian Evacuation Programme did involve a voluntary scheme for dispersing displaced persons among EU states.⁶⁵

A burden sharing system may also involve elements of both types of (re)distribution. The European Refugee Fund, for example, distributes funds based on the numbers of asylum seekers and displaced persons received (effects), as well as assists states with less developed facilities for receiving and protecting refugees (causes).

The second type of consideration concerns the criterion of distribution, or the principle according to which the burden should be shared. Burden sharing may be based on two types of consideration: *justice based* or *outcome-based*. Justice-based systems will typically base distribution on static indicators such as receiving-country GDP, population, or size of territory. The idea is to compensate countries receiving more than their fair share, as a matter of equity. By contrast, outcome-based indicators are more concerned with the consequences of hosting refugees or asylum seekers, such as the repercussions of reception and assistance on stability, or inter-ethnic relations. Many national asylum dispersal systems are primarily concerned with the latter, outcome-based consideration. For example, the UK dispersal system was introduced primarily to reduce pressures on housing and social services in the London area. Some international resettlement schemes are also explicitly designed to alleviate ethnic tensions in the region of origin – such as the evacuation of Kosovar refugees from the Former Yugoslav Republic of Macedonia.

Many proposals for burden sharing systems contain elements of both justice and outcome based considerations. However, it is important to keep in mind the conceptual distinction, as it has implications for the pattern of distribution chosen, as well as the burden to be distributed. For example, if the main goal of a burden sharing system is to alleviate pressure on inter-ethnic relations, then it makes sense to minimise the burden faced by especially vulnerable or instable countries, even if they are not receiving the largest number of refugees. Moreover, in such a case financial transfers would not be appropriate: the system would need to introduce some form of physical burden sharing. By contrast, a system based on considerations of justice would redistribute costs in accordance with some calculation of the “burden” involved (e.g. number of refugees, GDP and population of the receiving country), and it may achieve burden sharing through financial compensating.

Once these two aspects are resolved, the choice of burden sharing system will need to determine what sorts of costs, or ‘burden’ should be included in (re)distributive arrangements. Here, we can distinguish between *direct, indirect and intangible costs*. Direct costs cover those costs directly incurred through the reception of refugees or asylum seekers. Indirect costs are tangible but not directly measurable costs, covering a range of costs borne by the receiving society and public services, such as provision of health or education services that are not explicitly recorded or measured. Finally, intangible costs cover more diffuse costs such as impact on inter-ethnic relations or support for extremist political parties.

Within the category of direct costs, a further distinction must be made between *minimum and ‘voluntary’, or supplementary costs*, involved in the reception of asylum-seekers.

⁶⁵ See Selm, J van, *Kosovo's Refugees in the European Union* (London: Continuum, 2000).

Minimum costs are those that are required in order to conform to EU legal instruments on asylum, while voluntary ones represent supplementary provisions that have been unilaterally adopted by the Member State concerned. This may be more relevant for an area such as asylum, in which there is a substantial *acquis* covering most areas of relevant policy.

A further distinction can be made between *financial* redistribution, or *redistribution in kind*. Financial redistributions obviously involve pecuniary transfers. In the context of asylum and forced displacement, redistribution in kind typically involves the dispersal or relocation of refugees and displaced persons. However, in other areas of migration management one could include the provision of expertise, equipment or personnel to assist in border or internal checks and controls, combating organised crime or developing reception or detention facilities.

Finally, we can distinguish systems according to the range of costs to be redistributed: specifically, whether the system is *one-dimensional* or *multi-dimensional*. Some systems may be based on the redistribution of a single, or narrow set of costs (one-dimensional); while others may involve the redistribution of a bundle of different costs, possibly across different sectors (multi-dimensional).⁶⁶

2.3. Areas of coverage

Articles 77 to 79 TFEU set out a number of areas for cooperation, focused on three main fields: management of external borders, asylum and protection, and immigration policy. The area of asylum has been covered in previous reports.⁶⁷ The following analysis will therefore focus on how, if at all, the analysis provided above about asylum might apply to the other areas covered. It will focus on both motives for responsibility sharing and different types of mechanism. It will explore how these considerations might potentially be applied to measures within the areas of external border control and immigration policy.

2.3.1. External border control

Many of the measures covered in Article 77 TFEU cover regulations, with few or no resource implications (beyond the legal/administration costs of codifying regulations in domestic legislation, and implementing them in bureaucratic and law enforcement procedures). The main exception to this is 'any measure necessary for the gradual establishment of an integrated management system for external borders' (Article 77(2)(d) TFEU). We shall therefore focus the discussion on this area of an integrated system for managing external borders.

Motives for responsibility sharing

What might be the motivation for solidarity and responsibility sharing in this area? First, Member States may in some cases see such cooperation as an insurance scheme. The preferred routes for irregular entry into Member States have shown considerable fluctuation over the past decades. Certain routes may become popular quite suddenly, because of growing awareness by migrants and smugglers that there is a weak link in border control

⁶⁶ Thielemann, E, *The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach*. Stockholm: Swedish Institute for European Policy Studies (2008).

⁶⁷ EP Study 'What system of burden-sharing between Member States for the reception of asylum seekers?', January 2010, PE 419.620; EC Study "Study On The Feasibility Of Establishing A Mechanism For The Relocation Of Beneficiaries Of International Protection", July 2010, JLS/2009/ERFX/PR/1005 – 70092056.

(for example, entry to Austria and Germany from CEE for a short time after the fall of the iron curtain in 1989; entry into the UK via the Channel Tunnel in 2000-2003; or entry into Spain via Ceuta and Melilla in Summer 2004). Entry via such routes may subsequently decline, as enforcement agencies step up border controls. More generally, the choice of route for crossing external borders into Member States is heavily influenced by migrant networks, which diffuse information to family, friends and contacts in places of origin about possible ways of entering the EU.⁶⁸ It is also influenced by the services offered by smugglers and traffickers whose job it is to facilitate illegal entry.⁶⁹ For these reasons, it is possible that Member States not currently facing a significant burden in the area of external border control may accept that it is worth investing in cost sharing because they may face similar problems in the future.

This argument may apply to countries potentially subject to border control challenges, but there are clearly a number of states that will remain relatively unaffected by such fluctuations because of their geographical position. Countries without external land borders (Austria, Czech Republic, Luxemburg), and those with more easily manageable sea borders (for example the Nordic countries), may have less incentives to buy into an insurance logic.

The second possible motivation of avoiding damaging unilateral action applies only marginally in this case. While there are clear humanitarian and human rights reasons for avoiding a downward spiral in standards of refugee protection, such considerations do not apply to external border control. Indeed, Member States will be keen to encourage more stringent and robust measures in this area. To be sure, there may be human rights issues raised by introducing more restrictive measures, for example where border control measures potentially jeopardise principles of non-refoulement or involve excessively harsh detention measures. But on the whole, the goal of external border management is to limit irregular entry, not to ensure protection. Moreover, any unilateral measures to tighten external border control will not jeopardise intra-EU movement. Thus there is not particular risk of undermining free movement principles, of the sort flagged in the case of unilateral measures to prevent asylum 'country- shopping'.

The third motivation we mentioned was that of promoting collective stability through mutual cooperation. This is likely to be a very important motivation for burden sharing in the area of external border management. The irregular entry of migrants into a Member State can have considerable knock-on effects for other states, especially given the ease of onward movement within the EU. Thus, for example, northern European states such as Germany and the UK have considerable interest in assisting southern European states in enhancing border control, given the possibility that migrants may enter Italy or Spain and then travel on to seek employment in Germany or the UK.

We have therefore identified a potentially strong motivation to cooperate to enhance collective stability, as well as a potential interest to cooperate as part of an insurance scheme. What types of responsibility sharing might best promote these two goals?

⁶⁸ See Elrick, T., & Ciobanu, O, Migration Networks and Policy Impacts: Insights from Romanian-Spanish Migrations. *Global Networks*. (2009); and Koser, K., & Pinkerton, C, *The Social Networks of Asylum Seekers and the Dissemination of Information about Countries of Asylum*. London: Home Office Research, Development and Statistics, 2002.

⁶⁹ Koslowski, R, The Mobility Money Can Buy: Human Smuggling and Border Control in the European Union. In P. Andreas & T. Snyder (Eds.), *The Wall Around the West: State Borders and Immigration Controls in North America and Europe* (pp. 203-218). Lanham, Md: Rowman and Littlefield (2002).

Types of responsibility sharing

First, we should clarify what we mean by ‘responsibility’ in this area. We can understand responsibility as the duty to assume certain burdens linked to border control. Such burdens may either be related to the costs of strengthening external borders; or to the costs created by weak external borders. It seems clear that any system of solidarity in border management should be primarily targeted to addressing the former aspect, i.e. the *causes* rather than the effects of disparities in border control. In other words, it should seek to prevent illegal entry through more robust controls. Arguably, any significant burden sharing of the *consequences* of weak external borders (e.g. burden sharing of the costs of reception, detention or deportation of irregular migrants) would risk reducing the incentives for the beneficiary Member State to step up border controls. There will be exceptions to this. For example, in case of a sudden mass influx of irregular migrants there may be good grounds for providing collective emergency support to contribute to the costs of setting up reception centres. However, in most cases, the focus should be on the prevention of entry through reinforcing border controls rather than remedial action to help Member States address the consequences of illegal entry.

Should such a responsibility sharing system be based on considerations of justice or outcomes? The likely response is that it should comprise a mixture of both. Member states face different levels of challenges in controlling their external borders, and much of this variation is a function of geographical factors beyond their control. Therefore it seems reasonable that other Member States should help them shoulder the costs, for reasons of general solidarity. However, the goal of burden sharing in this area is not simply to ensure an equitable distribution of a given level of costs, but – more importantly – to reduce these costs. This distinguishes external border control from the area of refugee protection. As we saw, in the case of refugees, states are obliged to offer a certain level of protection in conformity with human rights standards and refugee law. Thus burden sharing aims to re-allocate a given, and largely irreducible, level of burden. In the area of irregular border-crossing, responsibility sharing should primarily be oriented to achieving a reduction in the level of irregular entry. Thus it should first and foremost be seen as an outcome-oriented system, though taking into account considerations of equity.

The next question concerns the types of costs to be redistributed. Might these be direct, indirect or intangible costs? Most of the costs associated with border management are likely to be direct. They involve the deployment of personnel and equipment, and the development of border control infrastructure, all of which costs are likely to be audited by the relevant authorities. Clearly, there are a number of indirect and intangible costs associated with the reception, subsequent treatment, and socio-economic impact of irregular entrants once they are on the territory of a Member State. We would suggest that such costs are excluded from a responsibility sharing system, as they involve addressing the consequences, rather than the causes, of irregular entry. Moreover, the question of the calculation of costs of irregular migrants is immensely controversial, given the potential economic incentives in many sectors to employ workers on an irregular basis. Thus there may also be indirect and intangible benefits associated with receiving larger numbers of irregular migrants. This consideration renders the inclusion of such indirect and intangible costs highly complex and problematic.

The distinction between minimum and supplementary (‘voluntary’) costs does not appear to be relevant in this area. Even assuming the existence of common minimum standards or procedures for external border control, any supplementary measures adopted unilaterally by a Member State should be seen as necessary and desirable. Given the immense

challenges in ensuring robust border control, it is simply not plausible that a country could be expending superfluous resources in this area, beyond what was necessary to prevent illegal entry.

Mechanisms for sharing costs could be either financial or in kind. Financial redistribution might involve developing a budget line for allocation to Member States facing particularly costly border management challenges (in terms of deployment of personnel, training, purchasing equipment, or developing infrastructure). However, Member States have also shown a willingness to share costs in kind, for example through providing training to border guards, making personnel available for deployment in emergencies (RABITs), or providing equipment. Such forms of transfer are already being developed in the context of Frontex.

To summarise these considerations, a system for responsibility sharing in the area of external border management could be motivated by concerns about collective stability and the desire to prevent irregular migration into the EU as a whole; and for some Member States, it may also be motivated by the need for an insurance system. Such a system would logically be aimed at preventing the causes of irregular entry, rather than compensating Member States for its consequences. Similarly, the distribution principles governing such a system would be based primarily on the goal of reducing levels of irregular entry, rather than compensating countries on grounds of equity. It would probably make sense for the system to cover only direct costs related to border management, excluding costs related to the subsequent reception or processing of irregular migrants. However, there may be an exception in the case of sudden influx, where some support for reception and processing might be envisaged. Finally, distribution might be pecuniary or involve in kind transfers.

2.3.2. Immigration policy

Article 79 TFEU states that the EU shall develop a common immigration policy, covering the management of migration flows, treatment of third country nationals, and measures to prevent and combat illegal immigration and trafficking.

Conditions of entry and residence

Article 79(1)(a) TFEU implies some harmonization of the criteria for admission and stay of legally resident migrants. Possible categories of migrant covered include those entering for the purpose of employment or self-employment (labour migrants), and those entering for the purpose of family union or reunion.

In the case of *labour migrants*, Article 79(5) TFEU clearly states that the provisions do not affect the right of Member States to determine the volumes of admission of third country nationals. Thus we can assume that any convergence of conditions may relate to criteria of admission (such as the existence of occupational shortages or demand for seasonal labour), but that Member States will be at liberty to interpret and apply these criteria in decisions about admission and residence. Indeed, this has been the case with the "Blue Card" scheme agreed by the Council in May 2009, which sets out common conditions for the entry and stay of high-skilled migrants, but leaves decisions on admissions to individual Member States. This implies some harmonization of principles, but not of actual decisions on admissions.⁷⁰

⁷⁰ One exception to this might be provisions allowing for the free movement of those admitted through such schemes once they have been resident in one Member State for a specified period. See the discussion of free movement of TCNs below.

More importantly, it is not clear how labour migration could be the object of responsibility sharing measures, given that the decision to admit third country nationals for this purpose is generally in the economic interests of the receiving country. Unlike in the case of asylum or irregular migration, Member States accept labour migrants because they consider it will benefit certain sectors of their labour market or increase human capital. Arguably, it could instead be the object of benefit-sharing: given that immigrants with certain types of skill are often in high demand in Member States, one could hypothetically imagine a system to distribute the benefits of hosting such third country nationals between Member States. However, it seems highly implausible that such a scheme could be acceptable either to Member States or to immigrants themselves. Member states that successfully attract, for example, engineers or ICT specialists, are unlikely to sign up to a scheme that would disperse such immigrants to other countries. And the specialists themselves clearly must have the right to choose voluntarily their country of destination. For these reasons, we do not consider labour migration to be an appropriate area for burden sharing.

However, the issue becomes different when the terms 'solidarity' and 'responsibility sharing' are looked at independently of the notion of burden sharing, whereby burden usually has a negative connotation (imposition of onus; negative consequences of a failing policy, etc.). Solidarity can also be interpreted in a more positive way, as requiring a duty of cooperation to reach a common goal. The goal here is the common immigration policy, characterized by efficient management of flows and fair treatment of third country nationals. Solidarity would thus aim at a maximisation of the above mentioned benefits of immigration of third country nationals. This would include both positive and negative duties. Positive duties require collaboration in creating an immigration context in conformity with the policy goals set by the Union. For instance, when attracting highly skilled workers to the Union, Member States could engage in joint recruitment campaigns, taking into account domestic labour markets, the European preference principle and the impact on the countries of origin. Negative duties would require Member States to refrain from taking measures that may distort migration flows to and within the European Union. This would prohibit taking national measures that make migration to one Member State far more attractive and would cause negative effects on other Member States in attracting these immigrants. While it is theoretically possible to conceive solidarity in these terms, the practical, legal and political feasibility of the negative duties can be put into question. Practically, it would require measuring the effects (and distorting effects) of immigration measures. Legally, for such a violation of the principle of solidarity to be established, a set of binding rules on legal immigration – from which a Member State would have deviated – would be required (e.g. exact working conditions, wages, social benefits, etc.). Such is not yet the case in labour migration and it can be questioned – both legally and politically – to what extent such scheme could be adopted.

Family reunification refers to the relocation of third country nationals to an EU state for the purpose of marriage or to reunite with immediate family members. By definition, (re)union with other family members must involve moving to the territory of the country in which the family member is residing, thus it could not be the object of a physical dispersal scheme to a different EU state. Moreover, we can expect that any 'burden' (if we can term it as such) associated with the entry of persons to join spouses or family will be fairly evenly distributed across the immigrant population – any one person can only have one spouse and a limited number of parents and children. Thus admission for the purpose of family reunification does not raise concerns about mass influx or severe disparities in the distribution of costs across different countries, so does not seem an appropriate area for any form of burden sharing.

Rights of third country nationals residing legally in Member States

Article 79(2)(b) TFEU states that the Union shall adopt measures on the definition of the rights of third-country nationals residing legally in a Member State, including conditions governing free movement and residence in other Member States. An expansion of these rights may in principle create additional costs for host countries. Moreover, the liberalisation of conditions for free movement and residence in another EU country could create both costs and benefits to the receiving country. Let us consider the implications of both of these sets of provision, to see if they might warrant some sort of responsibility sharing scheme.

The *rights of third country nationals* legally resident in Member States have already been the object of legislation on the rights of long-term residents (2003 Directive). The Directive sets out various social and legal rights accruing to those who had been legally resident for more than five years in one Member State, including rights to education, employment and social protection and services. It also included a right to free movement under certain conditions (see below). Insofar as this legislation, or any future legislation extending the scope or subjects of these rights, implies additional costs for Member States, then arguably one could imagine a responsibility sharing arrangement for ensuring compensation to those countries most affected. However, the Directive does not have radical implications for the national policies and practices of Member States, so is unlikely to create significant *additional* costs for Member States. Indeed, it is unlikely that states would agree to terms that were substantially more generous than those currently granted by individual countries. Moreover, such rights would by definition accrue to those legally present because of a prior decision of the host country. A substantial proportion of those would have been granted residence status as a voluntary act of the host country, in many cases in recognition of their economic benefits. Thus it is difficult to see how an expansion of the rights of these third country nationals should or could generate claims for redistribution of resources by countries with a relatively larger number of migrants.

There are two exceptions to this. First, it may be that countries with less developed structures for realising the rights of third country nationals might claim some form of support from other Member States. The motivation for responsibility sharing in such a case would be the third argument outlined above, that of solidarity and cooperation to countries in need of support. Indeed, the provision of such support could be seen as a collective public good for the EU: it might help promote human rights and good inter-ethnic relations in Member States with less experience in long-term integration of immigrants. If this argument is accepted, then there may be a case for considering some form of responsibility sharing to underpin the realisation of the rights of third country nationals, based on the host country's capacity to guarantee such rights. We shall explore possible forms such a system might take in the discussion below.

The second exception might be where there were severe disparities in the level of rights afforded to third country nationals, *and*, importantly, possibilities for the free movement of third country nationals. In this case, one could imagine a responsibility sharing logic similar to that underpinning harmonization of asylum provisions: namely, a convergence of rights to avoid 'country-shopping' by third country nationals, some of whom might want to relocate to a country that offered more generous political, social or economic rights.

This brings us to the question of the *rights of free movement for third country nationals*. Currently these rights are fairly circumscribed, but it is possible that future legislation will expand these provisions to facilitate more extensive mobility of third country nationals. This

would imply that immigrants legally resident in one country could relocate to another Member State and access social services, education or employment in that country. Such free movement might create both costs and benefits for host countries. In terms of benefits, it is possible that migrants with sought-after skills and qualifications, or those able to fill occupational shortages, would be welcomed by their new host countries. For example, an ICT specialist who entered Germany through the Blue Card scheme and then decided to move on to France might generate benefits to France (and a loss to Germany). On the costs side, legal residents who are not seen as an economic benefit – for example because they do not have suitable skills or qualifications, or might have above average dependency on welfare or social services – might be considered a burden to the new host country. Thus an increase in the free movement of third country nationals could imply both costs and benefits to host countries.

One useful angle for analysing this question is to consider what motives third country nationals might have for moving from one EU country to another. A first possible motivation is economic, typically the availability of employment in another Member State. Such mobility would not usually be considered a financial burden for the receiving country, though it is possible that large-scale mobility of labour migrants might create social or political tensions. Given the EU's emphasis on promoting the free movement of workers between Member States, it is difficult to see how such economically motivated intra-EU mobility could be seen as problematic, and thus an object for responsibility sharing. A second motivation for third country nationals to move within the EU might be related to social or welfare conditions in another country, such as better access to education, health or welfare support. This second motivation might imply more costs for receiving states. As mentioned above, the provision of more generous rights or benefits could potentially create a form of 'country shopping' similar to that which is perceived to occur in the area of asylum. This latter scenario might make free movement of third country nationals an area for solidarity and responsibility sharing. In the next section, we discuss what sorts of schemes might be appropriate.

Types of responsibility sharing

In the case of the rights of third country nationals, the 'burden' in question can be defined as the costs associated with providing rights and support to long-term immigrants (currently defined as those residing in an EU state for more than 5 years). As we saw, any criterion for allocating support should not be based on the numbers of third country national resident, for two reasons. First, the presence of many of these third country nationals may be beneficial to the host country (especially in the case of those with high human capital or sought after occupational skills). Thus the number of third country nationals in itself reveals little about the costs associated with hosting them. And second, unlike in the case of refugees or illegal residents, the fact that they are long-term legal residents implies a voluntary decision by the state to grant them residence. Thus with some exceptions (such as family reunion), the state has taken a decision to authorise residence, and should to a large extent be held responsible for this decision. This implies that a responsibility sharing system should not be based on the *effects* of disparities in costs associated with third country nationals.

Might such a system deal with the *causes* of such disparities? In other words, could one justify a system that provided resources to counter the factors leading to any imbalance in the costs associated with the rights of third country nationals? As mentioned above, such considerations may be relevant in the case of expanded mobility rights for third country nationals. One of the possible causes of disparities in costs was related to divergent rights

and support for long-term residents provided in different Member States, which might incentivise mobility of third country nationals between Member States. Insofar as third country nationals move to another Member State because of better social or welfare provisions, for example, this might create additional costs for the new host country. In such cases, there may be an argument for introducing measures to address the causes of such disparities. This would imply a harmonisation of provisions between Member States to ensure similar levels of rights and support for third country nationals.

The case for a convergence of standards is strengthened by a second argument: the need to support countries with less developed support structures in hosting third country nationals. Again, following the typology established earlier, this is essentially a consideration of *outcome* rather than justice. The idea is that ensuring the good treatment of long-term resident third country nationals is a collective good for all Member States, which can help promote internal stability and healthy inter-ethnic relations. Thus there is a good collective justification for a harmonization of the rights of third country nationals. Such harmonization should aspire to bring up standards of treatment of third country nationals in 'new' immigration countries to conform to countries with better developed systems of rights and benefits. As we have argued, this would not only further collective security goals, but it might also prevent the onward movement of third country nationals seeking better conditions.

Both arguments clearly support an (upward) convergence of standards. Thus the onus would be on legislation to harmonise rights in areas such as employment, education, health, welfare, and civil and political rights, including those concerning citizenship acquisition.

In addition to legislative harmonisation, EU states might consider some system to allocate support to countries with less developed provisions for supporting third country nationals. Such redistribution might potentially cover both direct costs (e.g. costs of providing welfare support), and indirect costs (e.g. extension of general health or education entitlements to third country nationals). Clearly, the provision of funds to cover indirect costs would be more controversial, as expenditure would not be open to audit. Thus it might be more appropriate to stick to the narrow category of direct costs.

One way of distributing support would be through financial payments. For example, it might be appropriate to establish a fund similar to the ERF, with governments or registered NGOs applying for funds to support programmes targeted to improve the rights of third country nationals.

To summarise the discussion, one could envisage a system of responsibility sharing in the area of rights of third country nationals, which was motivated by two possible factors: concerns to enhance collective stability and improve inter-ethnic relations; and the desire to limit 'country-shopping' by TCNs aiming to enhance their conditions through exercising intra-EU mobility rights. Such a system could be aimed primarily at addressing disparities in rights and benefits for TCNs between member states, and bringing standards up to a level that promoted integration. Thus the main tool for responsibility sharing would be convergence of legislation *at a higher standard*. There may also be an argument for offering supplementary support for countries with less developed structures for guaranteeing the rights and benefits of TCNs. Such a system might cover direct costs, with distribution being managed through a fund to support targeted programmes. There is no convincing argument for a system of responsibility sharing based on the numbers of TCNs in different

Member States, given that such immigrants may bring benefits as well as costs, and that in most cases the decision to allow them to stay was a voluntary act of the host country.

Illegal immigration and unauthorised residence

Article 79(2)(c) TFEU states that measures shall be adopted in the area of illegal immigration and unauthorised residence, including the removal and repatriation of persons residing without authorisation.

The more specific area of *removal and repatriation of unauthorised residents* has already been dealt with in the Return Directive (2008), which sets out procedures regulating the expulsion of irregular immigrants. These include setting a maximum period of detention (6 months), a maximum period over which a returnee can be banned from entering the host country (5 years), standards on the treatment of families and children, provisions for financing an individual's return, and conformity with the principle of non-refoulement. These standards represent a minimum threshold, which Member States are obliged to respect in carrying out removals. Individual states may introduce standards which are more liberal than those set out in the Directive. In this sense, the legislation is similar to instruments in the area of asylum policy, which are concerned to secure minimum standards in the treatment and rights of asylum seekers.

One important difference, however, is that in the area of return there is no clear rationale for establishing a 'level playing field'. While the harmonisation of asylum provisions was at least in part designed to approximate asylum rules and reception conditions across Member States in order to discourage country-shopping, this logic is unlikely to apply in the case of return. There is no available evidence to suggest that irregular migrants are influenced by national provisions on detention or removal when they decide which EU country to move to. Thus any disparity in national policy and practice on return is unlikely to have an effect on the distribution of irregular migrants across different Member States. As a corollary, the logic of introducing harmonisation to avoid unilateral action to deter migrants does not appear to apply in this case. The implication is that harmonisation in this area is designed to ensure minimum rights and treatment of returnees, and possibly also to spread good practice between Member States – not to ensure a fairer distribution of costs.

Might there be a motivation for some sort of responsibility sharing of the costs accrued in implementing return? Given that one of the goals of harmonisation is to ensure respect for certain minimum standards, it may be that implementing the Directive creates additional costs for some Member States. Interestingly, though, in the area of return most of the costs incurred are related to more stringent measures, rather than more lenient ones. The most costly aspects of return relate to the carrying out of raids, detention, and forced removals. More lenient policies – for example less extensive use of detention – would imply reduced costs for Member States.

One exception might be measures to ensure detention facilities were more humane. If one accepts that Member States are going to employ such measures to facilitate the removal of unauthorised migrants, then there may be an argument for investing resources in ensuring such facilities meet certain standards – especially in cases where they accommodate families and children. The logic for such a responsibility sharing system would be based on the motivation of promoting collective goods – i.e. a humane, human rights-respecting policy on removal across the Union. The Return Directive was criticised by a number of non-Member States for being overly harsh and even xenophobic. Perhaps a fund to develop the infrastructure of detention and removals centre might help improve the treatment of

returnees. Having said this, it may be controversial for the EU to be seen to be subsidising the extension of facilities for detention – even if the goal were to render conditions more humane. For this reason, we would doubt the appropriateness of introducing responsibility sharing provisions in the area of return.

Leaving aside the issue of removal and repatriation, are there *other aspects of illegal immigration and unauthorised residence* that might be the object of responsibility sharing measures? This area of policy might include various types of internal controls on unauthorised immigrants, such as ID cards and checks, employer sanctions, and measures to prevent unauthorised access to health, education, housing or social services. Of these, employer sanctions have already been the object of a Directive, the Sanctions Directive 2009/52/EC of 18 June 2009, to be transposed by the Member States by 20 July 2011. The Directive has three main elements: employers will be subject to a number of new administrative obligations that need to be fulfilled before recruiting any third country nationals; non-compliance will lead to punitive measures, financial sanctions and criminal penalties with harmonized procedures; and each Member State will be required to carry out inspections, based primarily on a risk assessment, and regularly identify the sectors of activity in which the employment of illegally staying third-country nationals is concentrated on their territory.

There are a number of features that make employer sanctions a more plausible candidate for harmonisation than return. First, the goal of the legislation is to increase the level of control exercised by Member States, rather than to set out minimum standards. In this sense, it aims to encourage states to devote more resources to this area of migration control, rather than implying they exercise more restraint (and thus fewer resources, as was the implication of the Return Directive). Effective implementation of the Directive may create additional costs for Member States. Moreover, possibilities for illegal employment are recognised as one determinant of the choice of country for irregular migrants. Thus it may be argued that a harmonisation of employer sanctions might create a more level playing field between states, thus contributing to a reduction in disparities in the level of irregular migration between states.

It is not clear that similar arguments would apply to other potential measures adopted in the area of internal checks and controls. For example, the exclusion of unauthorised migrants from various social or welfare services is far more controversial than exclusion from employment, since it may threaten the basic welfare of migrants. Access to health, education and welfare may be considered to be more basic human rights than access to employment (especially insofar as they affect the rights of children). As in the case of the Return Directive, it is likely that any EU measures to exclude access to such provisions would take the form of minimum conditions to guarantee humane treatment and respect for human rights of migrants, rather than measures to maximise the enforcement of exclusion.

Given these caveats, the next sections will focus on the narrower area of employer sanctions, and consider what motivations states might have for entering into responsibility sharing arrangements, as well as the form such arrangements might take.

Motivations for responsibility sharing in the area of employer sanctions

We saw that there may be an argument for harmonising legislation in this area as a means of avoiding 'country shopping'. The idea here is that irregular migrants may be attracted to work in Member States with more lenient policies on employer sanctions. Thus

harmonisation would create a more level playing field, potentially evening out disparities in the levels of irregular migration between countries. This appears to be a plausible argument on paper, but in practice it is unlikely that employer sanctions would have a very significant impact on the illegal labour market in Member States. Certain Member States' labour markets are characterised by a high degree of informality, and there are strong, entrenched interests militating against the enforcement of employer sanctions.⁷¹ Arguably, there are a number of 'new' immigration countries with less developed policies in this area, and in these countries more robust EU legislation may make a real difference to practice in certain sectors of the economy. In general, though, we would be sceptical that common measures on employer sanctions would make any significant difference to the distribution of irregular migrants between Member States. This argument is further reinforced by research suggesting that migrant networks and colonial/bilateral relations are the most significant factors in determining migrants' choice of country (see discussion above). A final consideration is that measures to combat illegal employment should not be targeted at responsibility sharing between countries, but rather at reducing or eliminating the burden. As such, it seems inappropriate to see harmonisation of employer sanctions as a means of redressing disparities in the level of illegal migration between countries: the goal should be to reduce the overall level, rather than spread it out.

Having said this, there may be a 'collective goods' argument for solidarity in this area. Certain Member States may be struggling to develop effective policies and practice in the area of employer sanctions, and would benefit from some form of solidarity from other Member States to support their efforts. Again, this might apply more to the 'new' immigration countries, which do not have developed systems for the control of irregular migration, which is a relatively new phenomenon. In these cases, Member States with more experience of this form of migration control may see advantages to allocating resources to capacity-building in these countries. Such capacity-building may be seen as a way of generally reducing incentives for irregular migrants, especially those transiting via central and east European countries. Research suggests that many irregular migrants enter countries on the eastern borders of the EU in order to move on to western Member States. However, many of these migrants end up living and working in the 'transit' country, either as a staging post or as a final destination. Thus measures to strengthen employer sanctions in CEEs might be seen as a good means of reducing the incentives for would-be migrants to enter the EU via these countries.

Finally, might such a system be valued as an insurance system? There is less evidence to support this rationale for responsibility sharing. Unlike in the case of asylum or irregular entry, there is little to suggest that there are significant and unexpected fluctuations in the level of irregular employment in different countries over time. Fluctuations in countries of destination for displaced persons or illegal migrants may vary dramatically depending on episodes of armed conflict, or changes in preferred smuggling routes. By contrast, the phenomenon of irregular employment is likely to shift only gradually, in response to economic conditions and enforcement. Thus Member States will not generally be concerned to sign up to collective provisions as a form of insurance.

In short, we suggest that the main argument for responsibility sharing in the area of employer sanctions is to support countries with less developed systems to build capacity

⁷¹ See Baldwin-Edwards, M., & Arango, J, Where Free Markets Reign: Immigrants in the Twilight Zone. In M. Baldwin-Edwards & J. Arango (Eds.), *Immigrants and the Informal Economy in Southern Europe* (pp. 1-15). London: Routledge (1999); Sciortino, G, Between Phantoms and Necessary Evils: Some Critical Points in the Study of Irregular Migrations to Western Europe. *IMIS-Beitraege*, 24, 17-43 (2004).

and introduce more robust policies and practices. This may apply in particular to 'new' immigration countries in which there is more limited experience with internal migration control.

Types of responsibility sharing

In the context of employer sanctions, the 'burden' in question comprises the costs associated with the enforcement of controls necessitated by common EU legislation. This should be distinguished from a system aimed at burden sharing of the costs of illegal immigration per se (which, indeed, may well be better characterised as economic benefits rather than costs⁷²). The costs associated with introducing tougher employer sanctions may be incurred both by the authorities (in terms of keeping records on employers, implementing checks and raids, and possible imprisonment of those prosecuted), and by employers (costs of checks on employees). There are also additional economic costs associated with reducing the possibilities of employing cheap, flexible labour in certain sectors (though these economic benefits of illegal employment are not generally acknowledged as legitimate reasons for tolerating illegality in European countries).

Assuming that a system to share these 'burdens' is motivated by the desire to reduce the phenomenon across the EU, then the scheme would be based on consideration of the effects of disparities in costs. In other words, it would attempt to influence the consequences (rather than causes) of any disparity in costs associated with introducing employer sanctions. At the same time, such a system would be outcome-based rather than justice-based. The logic would be to distribute resources in a way that best achieves the outcome of ensuring the enforcement of employer sanctions in different Member States.

What sort of costs might be covered? As we saw, states face various direct costs in enforcing employer sanctions, linked to data collection and analysis, and especially the cost of deploying law enforcement personnel to check premises. Indirect costs might include the costs of prosecution and incarceration of those convicted. There are a number of indirect and intangible costs that might accrue to employers, including costs of checking on documentation, costs incurred by delays in finding appropriate employees, and – potentially – the costs associated with being prevented from employing cheaper and more flexible (illegal) labour. As mentioned, these latter economic costs to firms may be substantial, but they are rarely considered a legitimate reason to desist from enforcing employer sanctions. Nonetheless, such considerations might be borne in mind implicitly in considering the possible costs associated with the enforcement of employer sanctions, especially for Member States with a below average GDP per capita. On the whole, though, the direct costs incurred by governments in enforcing sanctions would be the most obvious candidates for a burden sharing scheme.

As regards minimum and supplementary/voluntary costs, it would probably be appropriate to limit responsibility sharing to cover minimum costs associated with implementing EU legislation. This would render a system more transparent and legitimate, with less scope for Member States to claim compensation for costs that might be considered superfluous.

Might redistribution take the form of financial transfers, and/or assistance in kind? One could envisage a combination of both. Financial transfers might be a means of

⁷² Jahn, A., & Straubhaar, T, A Survey on the Economics of Illegal Immigration. *South European Society and Politics*, 3(3), 16-42 (1998).

compensating states for costs associated with data systems and personnel required to implement more stringent checks and controls. Unlike in the areas of asylum and rights of third country nationals, such costs are likely to be borne primarily (and probably exclusively) by state institutions, rather than the voluntary or private sector. Moreover, any involvement of NGOs or private companies is likely to be closely regulated by the state. Thus unlike in the case of the ERF, it is unlikely that non-state actors could apply for funds. Rather, any financial transfers would be made directly to the authorities concerned. Transfers in kind might take the form of training or sharing good practice.

In short, a system to promote solidarity in dealing with illegal immigration and unauthorised residence might be motivated by the collective goal of reducing irregular migration, especially in 'new' immigration countries with less developed policies and practices on migration control. Such a system could plausibly cover the area of employer sanctions, with some form of responsibility sharing to support Member States conforming to EU minimum standards (as set out in the Sanctions Directive, or possible future legislation introducing more stringent measures). Such a system is less likely to be appropriate for other areas of internal control (such as access to education, health or welfare) since these are more critical for basic welfare and human rights. It might therefore be more problematic to make these areas the object of measures to step up migration control. A system for sharing responsibility in the area of employer sanctions could cover the direct costs incurred by Member States in implementing sanctions, though it may also be implicitly recognised that there are a broader set of costs associated with reducing the level of irregular employment. Measures could take the form of redistribution of financial resources to authorities implementing employer sanctions; or assistance in kind for capacity building.

Combating trafficking in persons

The next possible area for responsibility sharing is contained in Article 79(2)(d) TFEU which deals with combating trafficking in persons, in particular women and children. This is an area already dealt with in the Action Plan of 2005, which addressed measures to improve the understanding of human trafficking and its dimensions, prevent trafficking, reduce the demand, more efficient investigation and prosecution, protection and support of victims, safe return and reintegration. This clearly covers a wide range of measures. The plan suggests prioritising the following actions in the short term:

- the establishment of National Rapporteurs, especially for monitoring purposes;
- the creation or improvement of national mechanisms for the identification of and referral to victim support services;
- the creation or improvement of child protection systems;
- the provision of support, including financial, to non-governmental organisations (NGOs) active in the field;
- the organisation of training for relevant stakeholders;
- the improvement of coordination of investigations and prosecutions;
- The further development of cooperation on anti-trafficking measures with the EU's external partner countries.

One initial important distinction is between those measures targeted at supporting and protecting the victims of trafficking, those aimed at preventing the phenomenon, and those targeted at identifying, investigating and prosecuting the persecutors. These three dimensions of protection, prevention and prosecution are likely to imply the need for quite divergent rationales and mechanisms for a responsibility sharing system.

First, measures on the protection of victims of trafficking include identifying victims and providing support services, including via NGOs working in the field and through training for stakeholders. Clearly, the resources devoted to such measures will vary as a proportion of the scale of human trafficking in the country concerned. Thus Member States hosting a large number of trafficking victims are likely to face higher costs, related to the provision of protection, support and assistance.

Moreover, protection needs of victims should not be looked at solely within the boundaries of Member States. The delivery of a residence permit to a victim may well secure his or her needs in terms of residence, but may be insufficient to guarantee personal safety. Suitable protection from the perpetrators of human trafficking might require, for instance, resettlement of the victim to another Member State. The realisation of such a scheme requires solidarity between the Member States.

Measures on the prevention of trafficking are not elaborated in the Action Plan in any detail. However, one could foresee such measures potentially being targeted at both host countries and countries of origin. Host countries might tackle the root causes of trafficking through addressing the demand for prostitution, for example. Stepping up regulation of the sex industry might potentially reduce the incentives for traffickers to import migrants for the purposes of prostitution. Such measures might raise considerations parallel to those discussed in the section on employer sanctions, above. Measures in countries of origin can target potential victims of trafficking through providing information on the risks of entering into arrangements with potential smugglers or traffickers. Such measures could be collectively supported by Member States, but are unlikely to be obvious candidates for more elaborate responsibility sharing arrangements. Rather, they would take the form of more classic cooperation with third countries. Solidarity between Member States would take a very indirect form, via their general contributions to the EU budget.

The third area concerns the control-oriented aspects of combating trafficking, including measures to enhance monitoring through national rapporteurs, improved coordination of investigations and prosecutions, and better cooperation with third countries. The costs of monitoring, investigations and prosecutions of traffickers are likely to be highest in those countries with a large number of victims of trafficking, but also in those countries serving as a transit for trafficking. Thus we might expect countries with more porous external borders to the east and south to be especially affected.

The following section will consider possible motives and mechanisms for responsibility sharing systems in the areas of protection of victims, and control/prosecution of perpetrators.

Motivations for responsibility sharing

First, we shall consider motivations for responsibility sharing to redistribute the costs associated with the protection of victims of trafficking. Unlike in the case of asylum and irregular migration, there is no obvious insurance motivation for cooperation in this area. As in the case of illegal employment, we can assume that the determinants of the levels of trafficking for the purpose of exploiting workers does not fluctuate dramatically or unexpectedly. Instead, the scale of trafficking to a particular Member State destination is more likely to be a function of the demand for such labour (notably prostitution) in host countries, and is likely to vary depending on more sluggish structural factors, such as host society culture and behaviour and the regulation of the sex industry. Thus there is no

strong argument for a responsibility sharing system to redistribute costs based on the need to cushion states against unexpected increases in the problem.

The notion that responsibility sharing should involve a harmonisation of legislation in order to prevent country shopping does not apply in the case of measures to protect victims of trafficking. Such provisions will not affect the decisions made by traffickers or their victims on the preferred country of destination.

The main motivation for responsibility sharing in the costs of protection and support for victims would be the logic of solidarity to promote collective goods: in this case, ensuring the humane treatment of victims of grave human rights abuse. It should be considered as being in the interests of all Member States to ensure adequate protection and support for victims across the EU.

The motivations for burden sharing in controlling trafficking turn out to be remarkably similar. As mentioned above, it is improbable that Member States will face huge fluctuations in the scale of the problem over time, so there is no obvious motivation based on the need for an insurance system. Moreover, if we accept that the reasons for different levels of trafficking in Member States are linked to structural factors, then it is equally unlikely that a harmonisation of standards will significantly influence the choice of destination of traffickers. Thus states are unlikely to sign up to a process of policy convergence in order to create a 'level playing field', as was the case with asylum.

Instead, we can expect that the main motivation for responsibility sharing in combating trafficking would be to reduce the overall problem for the EU. Again, as in the case of sharing the costs of protecting victims, the logic would be one of pursuing collective EU goals to the shared benefit of all Member States.

Types of responsibility sharing

Any support provided to Member States for the costs of protecting and assisting the victims of trafficking would, by definition, be oriented to addressing the effects, rather than the causes, of trafficking.⁷³ And it would be designed to achieve certain outcomes – i.e. protection and support of victims – rather than being allocated to Member States as a matter of equity. Following the typology established earlier, then, the criteria for responsibility sharing would be designed to mitigate the effects of trafficking, and to promote certain shared outcomes.

The main costs associated with enhancing protection and support for victims of trafficking would include housing and welfare support, counselling, and possibly witness protection schemes, as well as travel and reintegration into places of origin. It is likely that most of these costs would be directly audited. Exceptions might be the costs of allowing access to general health services, though these costs are likely to be relatively low compared to the direct costs incurred.

There is to date a lack of developed EU legislation on standards for the protection and assistance of victims of trafficking, and thus the issue of voluntary or minimum costs does not arise in this case. However, one could foresee a future scenario in which the EU had elaborated a comprehensive set of minimum standards in the treatment of victims of

⁷³ The prevention of trafficking would be subject to a different set of measures.

trafficking. Under such a scenario, it might make sense to focus responsibility sharing on meeting the minimum costs associated with implementing the relevant legislation.

The form of transfer of costs is likely to be financial, rather than in kind. All Member States are likely to have staff and services within the state and/or voluntary sector equipped to provide support and advice for victims of these sorts of human rights abuse. And insofar as additional skills may be needed (e.g. language skills), then the main issue will be providing finances to fund the relevant training. As in the case of the ERF, any transfer of funds may be directed to both state bodies and NGOs working in the area.

As concerns responsibility sharing of the costs of combating trafficking, again, efforts would be directed towards addressing both causes and effects. The goal of identifying, investigating and prosecuting the perpetrators of trafficking is designed both to punish those who have carried out these crimes, to prevent them from pursuing such activities in the future, and, hopefully, to provide a deterrence to other traffickers. The criteria for distributing any costs associated with such activities should also be determined on a mixture of outcome-based considerations, and ones of justice. Regarding outcomes, as we saw, the main rationale for responsibility sharing in this area would be to reduce the overall level of the problem. Thus support should be directed in such a way as to maximise the chances of securing this outcome of an overall reduction. However, it is also clear that some Member States face particular costs in the fight against trafficking, partly for reasons beyond their control. In particular, those countries with external borders to the east or south, and especially those with lower than average GDP per capita, might be expected to face a particularly heavy burden, and thus might be considered as entitled to greater support as a matter of equity.

The types of costs that might be redistributed in the area of combating trafficking would include: intelligence gathering and monitoring activities by law enforcement agencies; police checks, raids and apprehensions; prosecution of perpetrators; costs of deportation or incarceration following prosecution. Most of these are likely to be direct costs.

The distinction between minimum and supplementary costs does not seem to arise in this case. Police and judicial activities to identify and prosecute criminals require sufficient expenditure to achieve a successful conviction. There is limited scope for a Member State to indulge in unnecessary or 'voluntary' expenditure that might go beyond an expected norm.

Transfers could take the form of either financial payments or assistance in kind. The former might involve transfers to state authorities to help finance policing or judicial costs. The latter might take the form of capacity building to assist police and judicial systems in countries with less experience of tackling trafficking. One might also consider the transfer or loan of specialists on particular aspects of trafficking or particular trafficking networks, between Member States.

We can summarise these considerations as follows. Both support for victims, and identification/prosecution of perpetrators, might be appropriate areas for responsibility sharing in the area of trafficking in persons. The third area we identified – that of prevention – fits the more classic model of collective EU financing of measures falling under external policy. In the cases of both support for victims and prosecution of perpetrators, the main rationale for a system of responsibility sharing would be to meet common EU goals: the humane treatment of the victims of human rights abuse; and a reduction in the level of human trafficking across the EU. There are no plausible arguments for such a

system based on insurance, or the goal of reducing country-shopping. In the case of support for victims, any responsibility sharing of costs should be targeted to maximise the welfare of victims. In the case of identifying and prosecuting perpetrators, the criteria for channelling resources should be based on concern to maximise apprehension and the prosecution of perpetrators. However, special consideration may also be given based on the challenges and resources faced by certain Member States, either because they are particularly vulnerable to trafficking because of their geographical situation, or because they have less resources or infrastructure to deal with the problem. Thus one can envisage a mixture of outcome- and justice-based criteria for distributing the burden.

In both cases, the costs covered are likely to be direct. At present, the question of supplementary and minimum costs does not arise, but could potentially arise in the case of support for victims of trafficking if comprehensive EU legislation is adopted in the area. Support for victims of trafficking is likely to be provided through financial transfer, targeted at governmental bodies and NGOs. Support in the fight against perpetrators may take the form of either financial or in kind transfers.

Integration of third country nationals

The last area we cover is that of the integration of third country nationals. Article 79:4 TFEU states that the EU may 'establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories'.

The concept of integration is notoriously slippery, but is typically understood to include measures in the following areas:

- Anti-discrimination, and countering racism/xenophobia;
- Social, economic and political rights of third country nationals;
- Successful participation in labour market, education, health systems;
- Language ability; and
- Social interaction and civic participation.⁷⁴

Clearly, measures in these areas imply a number of upfront costs for Member States, associated with enforcing legislation, funding language training, social projects in communities, and so on. Such costs will not necessarily be proportionate to the number of long-term third country national residents. The challenges associated with immigrant integration are likely to vary depending on a range of other factors, such as the human/cultural capital of immigrants, the history of migration and integration of particular migrant groups into the host country, and the attitudes of host country nationals towards immigrants. For example, countries with very limited experience of immigrant integration may have relatively small numbers of third country nationals to integrate, but face obstacles linked to host society attitudes. In other cases, countries may have been receiving large numbers of immigrants for decades, but face deeply entrenched problems linked to the social and geographical segregation of particular groups. For these reasons, it is very difficult to assess how far there are any "disparities" in the costs for Member States associated with integration.

One possible alternative way of thinking about responsibility sharing is in terms of potential additional costs created by implementing EU measures on integration. We saw earlier that

⁷⁴ See, for example, Handbook on Integration (2004).

implementing provisions on the rights of third country nationals might create costs for Member States. And insofar as the EU develops further harmonisation of policy – for example in the area of language training or citizenship classes, education programmes or projects to promote social interaction – then we might expect the accrual of additional costs. However, it should be stressed that at present, Member States are reluctant to envisage measures to harmonise national approaches. Instead, the emphasis has been on information exchange of good practice, for example through the National Contact Points on Integration, and on funding for national projects through the INTI programme. Indeed, Article 79.4 TFEU notes that measures to promote integration will exclude “any harmonisation of the laws and regulations of the Member States”.

For these reasons, it seems appropriate to limit the discussion to solidarity in promoting better integration in Member States – rather than a system of responsibility sharing based on numbers of third country nationals, or costs associated with implementing EU legislation.

Motivations for responsibility sharing

As we mentioned above, there is no clear sense in which the ‘burden’ associated with integrating third country nationals can be said to be disproportionately distributed across Member States. Indeed, it is very difficult to quantify how great the costs of integration might be in any given Member State. Moreover, these costs are unlikely to fluctuate unexpectedly or on a large scale, as they are created by a combination of structural social problems and levels and type of immigration over the preceding decades. And even if such fluctuations are perceived to occur – for example where a focusing event such as a riot reveals quite serious problems with integration – it is not evident that such “costs” can be rectified through a transfer of resources from other Member States. For these reasons, a burden sharing system is unlikely to be seen as an insurance scheme for Member States.

It is possible that responsibility sharing in this area could be valued as a means of creating a level playing field in national provisions across the EU. In the discussion of the rights of third country nationals, we saw that more generous provision on labour market access or other rights, combined with possibilities for free movement, could potentially encourage ‘country shopping’ by third country nationals. Similarly, if a particular host country is known to have particularly intolerant attitudes towards Muslim migrants, for example, then it is possible that third country nationals might be keen to move to another EU country. Thus assuming an expansion of mobility rights for long-term resident third country nationals, there may be a stronger argument for responsibility sharing in order to even out disparities in integration conditions across Member States.

The problem with this harmonisation logic is that any policy interventions at EU or national level are unlikely to have a direct and tangible effect on integration processes. Indeed, integration is notoriously difficult to ‘steer’ through legal and policy instruments. Thus it is problematic to expect that an upwards convergence of standards on, for example, anti-discrimination, will make a significant difference to the welfare of migrants to the extent that it would alter their decisions on which country to live in.

What about the third possible motive of promoting collective public goods? This appears to be a more plausible argument for EU responsibility sharing of the costs associated with promoting integration. As we saw in the discussion of the rights of third country nationals, supporting the welfare of immigrants and promoting good inter-ethnic relations can be seen as a shared good for all EU Member States. This is especially pertinent given possible ‘spill

over' effects between Member States in terms of integration challenges. For example, public expressions of anti-Muslim sentiment can have repercussions across national borders, as can rioting by migrant or anti-migrant groups. In this sense, integration problems in one country can have a ripple effect, implying an incentive for joint action to address problems.

Types of responsibility sharing

Given that the primary rationale for responsibility sharing is to promote collective goods, what sort of mechanisms might be most appropriate for realising this goal? As we have seen, the 'burden' in this context can be understood as the costs of introducing measures and programmes to promote integration. Countries facing particularly severe integration challenges may need to invest more resources to achieve these goals. However, as we saw, the causes of any disparities in these challenges are very difficult to ascertain; they may be linked to particular historical and structural social conditions, as well as the level and type of immigration. Thus it would not make sense to target a responsibility sharing system to address the causes of disparities. Instead, such a system would be designed to channel resources to addressing the *effects* of disparities in costs, in the form of costs currently faced by states in introducing measures to promote integration of those already resident.

Such a system might be based on a combination of justice and outcome-based considerations. Outcomes are relevant insofar as one of the key goals of responsibility sharing would be to achieve immigrant integration across EU Member States as a shared good. Thus the system would aim to promote certain integration outcomes.

However, such considerations might be usefully balanced against those of justice, or equity: ensuring that countries facing especially high costs receive additional support in meeting these. Thus countries with a lower GDP per capita or with a low knowledge/experience base on integration policies may benefit from targeted support.

Given that common policies in this area are not very developed, it would seem inappropriate for such a system to cover only required costs linked to EU measures. However, it is likely that any support for integration programmes would need to follow certain shared EU guidelines about appropriate measures, for example as set out in the Handbook on Integration and other EU documents.

Would such a scheme cover direct, indirect and/or intangible costs? Assuming burden sharing took the form of a fund to support integration programmes (similar to INTI), then it would make sense to cover direct costs that can be audited and accounted for in the budgets associated with particular projects.

The scheme would be likely to focus on financial transfers, rather than transfers in kind. To be sure, there is considerable scope for the sharing of expertise and experience between Member States in the area of integration policy. However, integration measures are generally considered to be closely linked to the specific socio-cultural context of host countries. As such, it may be considered intrusive to promote training or staff transfers to spread good practice on integration between Member States. Governments are likely to prefer to share good practice through multilateral exchanges where officials contribute ideas on an equal basis.

To summarise, integration measures are not an obvious candidate for responsibility sharing, for a number of reasons outlined above. However, there may be a good case for

solidarity in covering the costs linked to integration programmes as a means of promoting the collective goal of good inter-ethnic relations across the EU. Such a rationale would imply supporting integration programmes in order to achieve the shared goal of social cohesion. A distribution system might also aim to compensate countries facing particular challenges with integration because of a lack of infrastructure or experience, and/or a low GDP per capita.

Such a responsibility sharing scheme would take the form of financial transfers to cover direct costs associated with a range of possible measures and programmes. These possible measures and programmes would conform to guidelines set out by the EU (though with scope for variations based on national socio-cultural conditions). In the longer-term, it is possible that Member States might support some forms of policy convergence (beyond what is being adopted in the areas of anti-discrimination and rights of TCNs). In that case, Member States might think about (upward) harmonisation of certain provisions as a means of creating a level playing field between states regarding the standard of treatment afforded to TCNs.

2.4. Solidarity and responsibility sharing in EU policy

This section will examine the ways in which issues of solidarity and responsibility-sharing have been acknowledged in EU policy. However, within the confines of this study it is not possible to go into an in-depth analysis of every solidarity measure proposed.

2.4.1. Solidarity and responsibility sharing in policy instruments

Although the explicit reference to solidarity and fair sharing of responsibilities in all areas of migration policy in the TFEU is of a recent nature, the notions have been mentioned and used prior to the adoption of the Lisbon Treaty.

Tampere Conclusions (1999)

The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union, making full use of the possibilities offered by the Treaty of Amsterdam. The challenge of the Amsterdam Treaty was to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. This required the Union to develop common policies on asylum and immigration, while taking into account the need for consistent controls on external borders to prevent illegal immigration and to combat those who organise it and commit related international crimes. The European Council acknowledged that these common policies must be based on principles which are both clear to EU citizens and also offer guarantees to those who seek protection in or access to the European Union.

One of the aims set out was that of 'an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity'.⁷⁵

The Council also considered that co-operation should not be limited to the EU level, between Member States, but that it is "essential that in these areas the Union should also develop a capacity to act and be regarded as a significant partner on the international

⁷⁵ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 4.

scene. This requires close co-operation with partner countries and international organisations, in particular the Council of Europe, OSCE, OECD and the United Nations.”⁷⁶

Specifically with regard to a common asylum and migration policy, the notions of cooperation, solidarity, taking on of responsibilities and their sharing, have appeared on several occasions.

- “Migration policy requires a comprehensive approach addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. The Council held that ‘[t]o that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.”⁷⁷
- The European Council urged the Council of Ministers “to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States” More specifically, the European Council believed that consideration should be given to making some form of financial reserve available in situations of mass influx of refugees for temporary protection. The Commission was invited to explore the possibilities for this.⁷⁸
- The European Council further acknowledged the need for approximation of national legislations on the conditions for admission and residence of third country nationals, “based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin”. Decisions thereon “should take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin”.⁷⁹
- The European Council called for the development of a common active policy on visas and false documents, “including closer co-operation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices”.⁸⁰
- Finally, the European Council called “for closer co-operation and mutual technical assistance between the Member States’ border control services, such as exchange programmes and technology transfer, especially on maritime borders, and for the rapid inclusion of the applicant States in this co-operation”.⁸¹

⁷⁶ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 8.

⁷⁷ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 11.

⁷⁸ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 16.

⁷⁹ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 20.

⁸⁰ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 22.

⁸¹ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para. 24. In that context, it welcomed the memorandum of understanding between Italy and Greece to enhance co-operation between the two countries in the Adriatic and Ionian seas in combating organised crime, smuggling and trafficking of persons.

The level of solidarity and responsibility sharing envisaged in these conclusions was modest: Member States were expected to co-operate or contribute in the development of particular aspects of policy. The formulation was a little stronger concerning displaced persons and border control.

The Hague Programme (2004)

The multiannual 'Hague Programme', adopted at the European Council of 4 and 5 November 2004, set out 10 priorities for the Union with a view to strengthening the area of freedom, security and justice in the period of 2005-2009.⁸²

The programme was based on a pragmatic approach and built on ongoing work arising from the Tampere programme, action plans and an evaluation of first generation measures. The Council explicitly acknowledged that "[i]t is also grounded in the general principles of subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States".

In the area of asylum, migration and border policy in general, the Council reiterated the need for a comprehensive approach involving all stages of migration, including the root causes of migration, entry and admission policies and integration and return policies. It stated that the second phase of development of a common policy in the field of asylum, migration and borders, which began on 1 May 2004, "should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between Member States: technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation."⁸³

This formulation seems to imply that solidarity and fair sharing of responsibility include financial solidarity but also closer practical cooperation among the Member States. Solidarity would be seen as broader than merely a redistribution of burdens.

With regard to more specific policy areas, the solidarity notion – taken in its broader meaning of burden sharing and cooperation - is explicitly or implicitly present at several occasions:

- As far as the Common European Asylum System was concerned,⁸⁴ the Council invited the Commission 'to present a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union. Furthermore a separate study, to be conducted in close consultation with the UNHCR, should look into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards'.

Equally, the Council and the Commission were invited 'to establish (...) appropriate structures involving the national asylum services of the Member States with a view to facilitating practical and collaborative cooperation'. Thus

⁸² The Hague Programme for strengthening freedom, security and justice in the European Union as approved by the European Council at its meeting on 5 November 2004, 16054/04, JAI 559.

⁸³ *Ibid.*, para. 1.2.

⁸⁴ *Ibid.* para. 1.3.

Member States would be assisted, *inter alia*, in achieving a single procedure for the assessment of applications for international protection, and in jointly compiling, assessing and applying information on countries of origin, as well as in addressing particular pressures on the asylum systems and reception capacities resulting, *inter alia*, from their geographical location. 'After a common asylum procedure has been established, these structures should be transformed, on the basis of an evaluation, into a European support office for all forms of cooperation between Member States relating to the Common European Asylum System.'

The European Council invited the Commission 'to earmark existing Community funds to assist Member States in the processing of asylum applications and in the reception of categories of third-country nationals'.

- In the field of legal migration and the fight against illegal employment,⁸⁵ the European Council emphasized that the determination of volumes of admission of labour migrants is a competence of the Member States. The Council invited the Commission "to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005."
- The European Council underlined 'the need for greater coordination of national integration policies and EU initiatives in this field. In this respect, the common basic principles underlying a coherent European framework on integration should be established.' The European Council invited Member States, the Council and the Commission 'to promote the structural exchange of experience and information on integration, supported by the development of a widely accessible website on the Internet.'⁸⁶
- As far as the external dimension of asylum and migration was concerned,⁸⁷ the European Council expressed "its utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally. It calls upon all States to intensify their cooperation in preventing further loss of life." The Council acknowledged "the need for the EU to contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage". Countries in regions of origin and transit will be encouraged in their efforts to strengthen the capacity for the protection of refugees. In this regard the European Council calls upon all third countries to accede and adhere to the Geneva Convention on Refugees.
- In the development of a return and re-admission policy⁸⁸ the European Council called for, *inter alia*, "closer cooperation and mutual technical assistance; launching of the preparatory phase of a European return fund; common integrated country and region specific return programmes; the establishment of a European Return Fund by 2007 taking into account the evaluation of the preparatory phase".

⁸⁵ *Ibid.* para. 1.4.

⁸⁶ *Ibid.* para. 1.5.

⁸⁷ *Ibid.* para 1.6.2.

⁸⁸ *Ibid.* para 1.6.4.

- A very explicit reference to solidarity is to be found in the European Council's statements on border checks and the fight against illegal immigration:⁸⁹ "The European Council stresses the importance of swift abolition of internal border controls, the further gradual establishment of the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union. In this respect the need for solidarity and fair sharing of responsibility including its financial implications between the Member States is underlined." The European Council welcomed the establishment of the European Agency for the Management of Operational Cooperation at the External Borders, on 1 May 2005. The control and surveillance of external borders fall within the sphere of national border authorities. However, in order to support Member States with specific requirements for control and surveillance of long or difficult stretches of external borders, and where Member States are confronted with special and unforeseen circumstances due to exceptional migratory pressures on these borders, the European Council invited "the Council to establish teams of national experts that can provide rapid technical and operational assistance to Member States requesting it, following proper risk analysis by the Border Management Agency and acting within its framework; (...) the Council and the Commission to establish a Community border management fund by the end of 2006 at the latest".

Solidarity, seen as cooperation, was called upon when the European Council invited Member States "to improve their joint analyses of migratory routes and smuggling and trafficking practices and of criminal networks active in this area, inter alia within the framework of the Border Management Agency and in close cooperation with Europol and Eurojust. (...) In this connection, the European Council welcomes initiatives by Member States for cooperation at sea, on a voluntary basis, notably for rescue operations, in accordance with national and international law, possibly including future cooperation with third countries."

- The European Council underlined the need for further development of the common visa policy:⁹⁰ "Common visa offices should be established in the long term, taking into account discussions on the establishment of a European External Action Service. The European Council welcomes initiatives by individual Member States which, on a voluntary basis, cooperate at pooling of staff and means for visa issuance." The Council invited the Commission to propose the necessary amendments to further enhance visa policies and to submit a proposal on the establishment of common application centres focusing inter alia on possible synergies linked with the development of the VIS.

In May 2005, the Commission presented an action plan in which the aims and priorities of the Programme were translated into concrete actions.⁹¹ The extent to which The Hague Programme was implemented at EU and Member State level was analysed in the Commission's Evaluation of June 2009.⁹² This analysis also contains some references to

⁸⁹ *Ibid.* para. 1.7.1.

⁹⁰ *Ibid.* para 1.7.3.

⁹¹ See Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final.

⁹² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Justice, Freedom And Security In Europe Since 2005: An Evaluation Of The Hague Programme And Action Plan, COM(2009) 263 final.

solidarity and sharing of responsibility in the different areas of border, asylum and immigration policy.

- With regard to the Common European Asylum System⁹³ the Commission stated that the CEAS “is a powerful statement of our values, our respect for human dignity and our commitment to shared responsibility”. The Commission further observed that “[o]perational experience has consistently pointed to the need for practical cooperation, and in the proposed establishment of the Asylum Support Office the EU sought a coherent and efficient means of responding to these challenges.”
- Maximising the economic benefit of legal migration under The Hague Programme was accompanied by concerted efforts to combat illegal migration and those who profit from human smuggling and trafficking.⁹⁴ The Commission observed that “[i]llegal migration is not increasing in the EU as a whole, but Mediterranean Member States are shouldering an increasing share of the burden. Particularly worrying is the number of people arriving after dangerous sea crossings.”
- In the area of border management⁹⁵ the Commission referred to Frontex, the agency for coordinating border control cooperation between Member States, as the instrumental response to border crossings and management.
- In its conclusions on lessons learned and themes for consideration⁹⁶ the Commission stated the need for joined-up thinking and action: “The big issues facing Europe, whether short term crises or long term trends, demand joined-up planning and action. Justice, freedom and security are each of relevance to all individual aspects of the Hague Programme. Consistency across the various policy areas is essential, not only within the traditional sphere of justice and home affairs activity, but also across the whole range of Community policies.’ Furthermore, ‘Member States, the Council and the Commission need to work together to strengthen partnerships with third parties. Continuity and consistency between internal and external European justice, freedom and security policies are essential to produce results and to meet the challenges posed by globalisation. The EU needs to anticipate challenges rather than wait for them to reach our borders, and it should promote standards, such as those for data protection, which can be regarded internationally as examples worth following. The external dimension of JLS policies needs to be fully integrated and coherent with EU external action and policies such as development cooperation.”

European Pact on Immigration and Asylum (2008)

In the European Pact on Immigration and Asylum,⁹⁷ endorsed by the European Council in October 2008, the European Council redirected the EU’s immigration and asylum policy. The Pact states the boundaries of solidarity and sharing of responsibility, to be expected from the European Union and its Member States: “The European Union, however, does not have the resources to decently receive all the migrants hoping to find a better life here.

⁹³ *Ibid.* para. III.1.3.

⁹⁴ *Ibid.* para III.1.4.

⁹⁵ *Ibid.* para. III.1.5.

⁹⁶ *Ibid.* para V.

⁹⁷ Council, European Pact on Immigration and Asylum, 13440/08.

Poorly managed immigration may disrupt the social cohesion of the countries of destination. The organisation of immigration must consequently take account of Europe's reception capacity in terms of its labour market, housing, and health, education and social services, and protect migrants against possible exploitation by criminal networks".

Member States are required to take into account the new challenges created by the creation of a common area of free movement: "One Member State's actions may affect the interests of the others. Access to the territory of one Member State may be followed by access to the others. It is consequently imperative that each Member State take account of its partners' interests when designing and implementing its immigration, integration and asylum policies." The Pact considers "that the time has come, in a spirit of mutual responsibility and solidarity between Member States and of partnership with third countries, to give a new impetus to the definition of a common immigration and asylum policy that will take account of both the collective interest of the European Union and the specific needs of each Member State".

More concrete translations can be found in the policy matters envisioned in the respective policy areas. In the field of legal immigration, the European Council "calls on Member States to implement an immigration policy that is both managed, particularly with respect to all labour market needs, and concerted, given the impact it may have on other Member States." Thus also in the field of legal immigration, some type of solidarity is expected.

In matters of illegal immigration "each Member State shall recognise the return decisions taken by another Member State." The development of "cooperation between Member States, using, on a voluntary basis and where necessary, common arrangements to ensure the expulsion of illegal immigrants (biometric identification of illegal entrants, joint flights, etc.)" is foreseen.

Although the European Council recalled that each Member State is responsible for the controls on its section of the external border, "[t]hat control, giving access to a common area of free movement, is exercised in a spirit of joint responsibility on behalf of all Member States. Conditions for (...) Those Member States whose geographical location exposes them to influxes of immigrants, or whose resources are limited, should be able to count on the effective solidarity of the European Union."

To that end, the European Council agreed to:

- (a) invite Member States and the Commission to mobilise all their available resources to ensure more effective control of the external land, sea and air borders;
- (b) generalise the issue of biometric visas as from 1 January 2012 at the latest, as a result of the Visa Information System (VIS), immediately improve cooperation between Member States' consulates, pool resources as far as possible and gradually set up, on a voluntary basis, joint consular services for visas;
- (c) give the Frontex agency, with due regard for the role and responsibilities of the Member States, the resources to fulfil its mission of coordinating the control of the external border of the European Union, to cope with crisis situations and to undertake, at the request of Member States, any necessary operations, whether temporary or permanent, in accordance, in particular, with the Council conclusions of 5 and 6 June 2008. In the light of the results of an evaluation of the agency, its role and operational resources will be strengthened and a

decision may be taken to create specialised offices to take account of the diversity of situations, particularly for the land border to the East and the sea border to the South: creating such offices should on no account undermine the unity of the Frontex agency. Ultimately, the possibility of setting up a European system of border guards may be examined;

- (d) give fuller consideration, in a spirit of solidarity, to the difficulties of those Member States subjected to disproportionate influxes of immigrants and, to that end, invite the Commission to submit proposals (...).

In the area of asylum, specific measures of solidarity included in the Pact are:

- the establishment of a European support office with the task of facilitating the exchange of information, analyses and experience among Member States, and developing practical cooperation between the administrations in charge of examining asylum applications. That office will not have the power to examine applications or to take decisions but will use the shared knowledge of countries of origin to help to bring national practices, procedures, and consequently decisions, into line with one another;
- the establishment of procedures, in the case of crisis in a Member State faced with a massive influx of asylum-seekers, to enable the secondment of officials from other Member States to help that State and the demonstration of effective solidarity with that State by mobilising existing EU programmes more rapidly. For those Member States which are faced with specific and disproportionate pressures on their national asylum systems, due in particular to their geographical or demographic situation, solidarity shall also aim to promote, on a voluntary and coordinated basis, better reallocation of beneficiaries of international protection from such Member States to others, while ensuring that asylum systems are not abused. In accordance with those principles, the Commission, in consultation with the Office of the United Nations High Commissioner for Refugees where appropriate, will facilitate such voluntary and coordinated reallocation. Specific funding under existing EU financial instruments should be provided for this reallocation, in accordance with budgetary procedures.

In its Conclusions on the follow-up to the European Pact on Immigration and Asylum of 3 June 2010, the Council identified the progress made and identified areas where more intensive and focused efforts both of the EU and the Member States are needed and solidarity plays a role:⁹⁸

- a well-managed labour migration policy, in keeping with national labour-market requirements and the principle of EU preference, can play an important role in filling labour shortages and meeting demographic challenges. Therefore, the Member States and the Commission should, while respecting Member States' competences for managing their labour markets and, where appropriate, in cooperation with third countries, continue to improve labour matching and skills recognition, in line with action to promote a comprehensive labour migration policy;

⁹⁸ Council Conclusions on the follow-up to the European Pact on Immigration and Asylum (10674/10).

- the fight against illegal immigration, smuggling of and trafficking in human beings in all its dimensions needs to be intensified in a spirit of joint responsibility and solidarity. Effective return and readmission of illegally staying third-country nationals, in particular through adequate agreements and cooperation with key countries of origin and transit are main priorities. Member States and Frontex should continue to strengthen practical cooperation, *inter alia* through the use of joint flights and return operations organized and co-financed by Frontex and by ensuring the availability of resources to be used in concrete joint operations, when needed.
- In the field of asylum, the focus should be on completing the ongoing legislative discussions on a Common European Asylum System with the aim of its establishment in 2012 and strengthening practical cooperation in the EU to ensure a better and more coherent application of legislation. In this context, the objective must be to ensure people in need of international protection access to asylum procedures legally safe and efficient, based on high protection standards which at the same time are capable of preventing abuse. Hence, the Council invites all stakeholders to provide full support for the earliest possible start of operations of EASO. In order to exercise solidarity with Member States facing specific and disproportionate pressure on their asylum systems, better relocation of beneficiaries of international protection, on a voluntary and coordinated basis, and other solidarity measures, such as financial aid, technical assistance and the support of EASO should be promoted, based on ongoing analysis. All actors should explore the allocation of the necessary resources and means in order to pave the way for an effective implementation of the European resettlement programme.

The Stockholm Programme (2009)

The Stockholm Programme⁹⁹ adopted by the Council in December 2009, sets out the European Union's (EU) priorities for the area of justice, freedom and security for the current period 2010-14. Building on the achievements of its predecessors the Tampere and Hague programmes, it aims to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens.

The Programme sets out a number of political priorities. In matters of migration, "[a]ccess to Europe for businessmen, tourists, students, scientists, workers, persons in need of international protection and others having a legitimate interest to access the Union's territory has to be made more effective and efficient. At the same time, the Union and its Member States have to guarantee security for their citizens. Integrated border management and visa policies should be construed to serve these goals."

Solidarity and responsibility are explicitly mentioned under the political priority "A Europe of responsibility, solidarity and partnership in migration and asylum matters":¹⁰⁰

'The development of a forward-looking and comprehensive Union migration policy, based on solidarity and responsibility, remains a key policy objective for the Union. Effective implementation of all relevant legal instruments needs to be undertaken and full use should be made of relevant Agencies and Offices operating in this field.

⁹⁹ Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens, *OJ C* 115, 1, 04/05/2010.

¹⁰⁰ *Ibid.* para 1.1.

Well-managed migration can be beneficial to all stakeholders. The European Pact on Immigration and Asylum provides a clear basis for further development in this field. Europe will need a flexible policy which is responsive to the priorities and needs of Member States and enables migrants to take full advantage of their potential. The objective of establishing a common asylum system in 2012 remains and people in need of international protection must be ensured access to legally safe and efficient asylum procedures. Moreover, in order to maintain credible and sustainable immigration and asylum systems in the Union, it is necessary to prevent, control and combat illegal immigration as the Union faces increasing pressure from illegal migration flows, and particularly the Member States at its external borders, including at its Southern borders in line with the conclusions of the European Council of October 2009.'

This description appears to confirm the broader understanding of the notion of solidarity in asylum and immigration: the realisation of the policy goals is to be achieved through a variety of effective implementation, use of agencies and offices, taking into account the priorities and needs of Member States and with attention to the pressures, especially acute in some Member States, following from illegal migration flows.

The Stockholm Programme also explicitly acknowledges the importance of the external dimension of the Union's policy in the area of freedom, security and justice, underlining *"the need for increased integration of these policies into the general policies of the Union"*. This integration may also call for the need of solidarity and responsibility sharing in the external policy.

The Stockholm Programme enumerates the tools which are, in general, important for the multiannual programme to be implemented successfully.¹⁰¹ These tools also indicate at the necessity of more cooperation and solidarity in the implementation of EU policy:

- mutual trust between authorities and services in the different Member States and decision-makers as the basis for efficient cooperation in this area;
- increased attention to the full and effective implementation, enforcement and evaluation of existing instruments;
- development of new legislative initiatives only after verification of the respect for the principles of proportionality and subsidiarity, a thorough preparation, including prior impact assessments, also involving identifying needs and financial consequences and using Member States' expert;
- systematic European Training Schemes offered to all persons; although Member States have the primary responsibility in this respect, the Union must give their efforts support and financial backing and also be able to have its own mechanisms to supplement national efforts.

More specifically with regard to particular policy areas, the Programme includes the following elements of solidarity and sharing of responsibility.

- Trafficking in human beings requires the Union to develop a consolidated Union policy against trafficking in human beings "aiming at further strengthening the commitment of, and efforts made, by the Union and the Member States to prevent and combat such trafficking. This includes building up and strengthening partnerships with third countries, improving coordination and

¹⁰¹ *Ibid.* para. 1.2.

cooperation within the Union and with the mechanisms of the Union external dimension as an integral part of such a policy".¹⁰²

- In the area of integrated management of the external borders, the European Council called for the further development of integrated border management, including the reinforcement of the role of Frontex in order to increase its capacity to respond more effectively to changing migration flow. The European Council looked forward to the continued development of the European Border Surveillance System (Eurosur) in the Southern and Eastern borders, with a view to putting in place a system using modern technologies and supporting Member States, promoting interoperability and uniform border surveillance standards and to ensuring that the necessary cooperation is established between the Member States and with Frontex to share necessary surveillance data without delay.¹⁰³ The European Council also invited Member States and the Commission to explore how the different types of checks carried out at the external border can be better coordinated, integrated and rationalised with a view to the twin objectives of facilitating access and improving security.
- As for visa policy, sharing of responsibilities could be encouraged through an intensification of regional consular cooperation by means of regional consular cooperation programmes which could include, in particular, the establishment of common visa application centres, where necessary, on a voluntary basis.¹⁰⁴ The Commission was invited to present a study on the possibility of establishing a common European issuing mechanism for short term visas.

The heading 'A Europe Of Responsibility, Solidarity And Partnership In Migration And Asylum Matters' underlines the importance of responsibility and solidarity in this issue:

The European Council calls for the development of a comprehensive and sustainable Union migration and asylum policy framework, which in a spirit of solidarity can adequately and proactively manage fluctuations in migration flows and address situations such as the present one at the Southern external borders. Serious efforts are needed to build and strengthen dialogue and partnership between the Union and third countries, regions and organisations in order to achieve an enhanced and evidence-based response to these situations, taking into account that illegal immigrants enter the Union also via other borders or through misuse of visa. An important objective is to avoid the recurrence of tragedies at sea. When tragic situations unfortunately happen, ways should be explored to better record and, where possible, identify migrants trying to reach the Union.

The European Council recognises the need to find practical solutions which increase coherence between migration policies and other policy areas such as foreign and development policy and trade, employment, health and education policy at the European level. In particular, the European Council invites the Commission to explore procedures that to a greater extent link the development of migration policy to the development of the post-Lisbon Strategy. The European Council recognises the need to make financial resources within the Union increasingly flexible and coherent, both in terms of scope and of applicability, to support policy development in the field of asylum and migration.

¹⁰² *Ibid.* para. 4.2.

¹⁰³ *Ibid.* para. 5.1.

¹⁰⁴ *Ibid.* para. 5.2.

A number of more concrete goals were enumerated:

- A concerted policy in keeping with national labour-market requirements: the opinion that the Union should encourage the creation of flexible admission systems that are responsive to the priorities, needs, numbers and volumes determined by each Member State and enable migrants to take full advantage of their skills and competence. In order to facilitate better labour matching, coherent immigration policies as well as better integration assessments of the skills in demand on the European labour markets are carried out. These systems must have due regard for Member States' competences, especially for managing their labour markets, and the principle of Union preference.¹⁰⁵
- in matters of integration the Commission is invited to support Member States' efforts through the development of a coordination mechanism involving the Commission and the Member States using a common reference framework, which should improve structures and tools for European knowledge exchange.¹⁰⁶
- The Union and the Member States should intensify the efforts to return illegally residing third-country nationals. Necessary financial means should be allocated for this purpose.¹⁰⁷ Member States should put into full effect the Union provisions pursuant to which a return decision issued by one Member State is applicable throughout the Union and the effective application of the principle of mutual recognition of return decisions by recording entry bans in SIS and facilitating exchange of information. Furthermore, Member States which face specific and disproportionate pressures can receive voluntary assistance from the Commission, Frontex and Member States, in order to ensure the effectiveness of their return policies towards certain third countries. Increased practical cooperation between Member States, for instance through the regular chartering of joint return flights, financed by Frontex, also contributes to reaching these goals.

The most explicit references to solidarity in the Stockholm Programme relate to asylum, within a common area of protection and solidarity.¹⁰⁸ The Programme distinguishes between the notions 'common area of protection' and 'sharing of responsibilities and solidarity between the Member States.

The former aims at a higher degree of harmonisation. The EASO will be 'an important tool in the development and implementation of the CEAS and should contribute to strengthening all forms of practical cooperation between the Member States. Therefore the Member States should play an active role in the work of the EASO.'¹⁰⁹ The Commission was invited to finalise its study on the feasibility and legal and practical implications of establishing joint processing of asylum applications.

"Sharing of responsibilities and solidarity between the Member States"¹¹⁰ in asylum matters is seen in a more narrow sense, as an answer to the burdens of particular pressures:

¹⁰⁵ *Ibid.* para. 6.1.3.

¹⁰⁶ *Ibid.* para. 6.1.5.

¹⁰⁷ *Ibid.* para. 6.1.6.

¹⁰⁸ *Ibid.* para. 6.2.

¹⁰⁹ *Ibid.* para. 6.2.1.

¹¹⁰ *Ibid.* para. 6.2.2.

Effective solidarity with the Member States facing particular pressures should be promoted.

This should be achieved through a broad and balanced approach. Mechanisms for the voluntary and coordinated sharing of responsibility between the Member States should therefore be further analyzed and developed. In particular as one of the keys to a credible and sustainable CEAS is for Member States to build sufficient capacity in the national asylum systems, the European Council urges the Member States to support each other in building sufficient capacity in their national asylum systems. The EASO should have a central role in coordinating these capacity-building measures.

Hence, the European Council invited the Commission to examine the possibilities for:

- developing the above mentioned mechanism for sharing responsibility between the Member States while assuring that asylum systems are not abused, and the principles of the CEAS are not undermined;
- creating instruments and coordinating mechanisms which will enable Member States to support each other in building capacity, building on Member States own efforts to increase their capacity with regard to their national asylum systems;
- using, in a more effective way, existing Union financial systems aiming at reinforcing internal solidarity;
- the EASO to evaluate and develop procedures that will facilitate the secondment of officials in order to help those Member States facing particular pressures of asylum seekers.

Furthermore, the external dimension of asylum is not to be neglected: "Promoting solidarity within the Union is crucial but not sufficient to achieve a credible and sustainable common policy on asylum. It is therefore important to further develop instruments to express solidarity with third countries in order to promote and help building capacity to handle migratory flows and protracted refugee situations in these countries."¹¹¹

The Commission's Action Plan

In its Action Plan 'Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme' the Commission provided a roadmap for the implementation of political priorities set out in the Stockholm Programme for the area of justice, freedom and security between 2010-2014.¹¹² The Commission put "solidarity and responsibility at the heart of our response. (...) During the next few years focus will be on consolidating a genuine common immigration and asylum policy. (...) [I]t is more necessary than ever to develop these policies, within a long-term vision of respect for fundamental rights and human dignity and to strengthen solidarity, particularly between Member States as they collectively shoulder the burden of a humane and efficient system".

¹¹¹ *Ibid.* para. 6.2.3.

¹¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme, COM(2010) 0171 final.

Presidencies' visions

The Belgian and the subsequent four Presidencies – Hungary, Poland, Denmark and Cyprus - issued a Common Statement on Immigration and Asylum on 30 November 2010.¹¹³

In matters of *asylum* the presidencies stated that it is “vital to ensure a common area of protection that is based on mutual trust between Member States. For this, each Member State has a responsibility to fully implement the current EU acquis.”

A higher degree of harmonization of legislation is required. The implementation of measures of solidarity in the revised Dublin regulation, in the form of a suspension mechanism, was controversial among Member States. A new emergency mechanism to be proposed by the Commission should allow the Council to have a greater influence on the decision, the period should be restricted in time and the new mechanism, should only be activated when a Member State has implemented the acquis and is facing extreme pressure due to unforeseen circumstances.

To progress in this area, not only legislative initiatives, but also enhanced practical cooperation and solidarity mechanisms contribute. In this regard, the Belgian Presidency observed that “[h]igh expectations exist concerning the establishment of the EASO, which is expected to contribute to the further development of the practical cooperation between asylum systems and bodies in charge of asylum in Member States to allow greater alignment between their practices as well as to provide the necessary support to and increasing the capacities of the most exposed and vulnerable national systems.” Additionally EASO should also focus on training support, information on countries of origin and increasing capacities as well as strengthen the external dimension of EU asylum policy.

The Belgian Presidency emphasized that “the efforts in the field of migration and asylum can be jeopardized by the malfunctioning of just one of the links in the chain. For this reason it is of the utmost importance that we continue to show genuine solidarity to support those Member States under particular pressure.” A crucial precondition therein is that support be given “provided the asylum acquis is being respected by all. For the Common European Asylum System to work effectively any solidarity mechanism will have to be met with a clear commitment from the Member States involved to further develop and improve their asylum system, including their procedures in first instance and during appeal, their reception and integration capacities and also their strategies for returning failed applicants.”

2.4.2. Other expressions on solidarity and sharing of responsibilities

After the entering into force of the Lisbon Treaty, EU institutions have been called upon to express themselves on the relevance of the notions of solidarity and sharing of responsibilities and the meaning of Article 80 TFEU. While the following excerpts are not comprehensive for all discussions, they exemplify some of the ongoing debates.

Border management

In its meeting of 25 and 26 February 2010, the JHA Council adopted 29 measures for reinforcing the protection of external borders and combating illegal immigration.¹¹⁴ Five of these measures related to solidarity¹¹⁵:

¹¹³ Common Statement by Belgium, Hungary, Poland, Denmark and Cyprus on Immigration and Asylum, 17223/10.

Concerning solidarity and the integrated management of external borders by the Member States, the Council has agreed:

17. To request Frontex and the Member States concerned to further develop the European Patrols Network (EPN) in order to generalize bilateral joint maritime patrols, in particular between neighbouring Member States at the southern and eastern maritime borders, taking into account the experience gained on joint police patrols in the context of the Prüm Decision, and to ensure the full integration of the EPN in the EUROSUR network.
18. To encourage Member States to optimise the use of the European External Borders Fund annual programmes for the period 2007-2013 to improve the capabilities of their border guards and the development of EUROSUR, including through the creation and development of the single national coordination centres, and considering the specific situation of the Member States.
19. To promote solidarity with the Member States facing particular pressures through capacity building and practical cooperation in the areas of asylum, migration and border control, building on their own responsibility in these areas, and in line with the relevant European Council Conclusions
20. With regard to the introduction of new technology at the external borders, to stress the need for further coordination, integration and rationalisation of the different types of checks and the need to ensure the interoperability of the systems concerned, and to use cost/benefit criteria for any decision on establishing new systems.
21. To further develop the networks of immigration liaison officers posted by Member States in third countries and to enhance their coordination, cooperating with Frontex as necessary.'

On 14 March 2011 the Council of Ministers established the legal basis for practical work on this last point by amending the rules concerning the Immigration Liaison Officers (ILOs) network to permit cooperation between Frontex and the ILOs. The amendments agreed promote the exchange of information and experience through a secure web-based system called ICONet (Information and Coordination Network for Member States/ migration management services), and make the use of Community funds possible. In addition, the networks will adapt their reporting system to ensure that the European Parliament is properly informed of their activities.¹¹⁶

Asylum

In its 2009 resolution on a common immigration policy for Europe¹¹⁷ the European Parliament expressed that it “[d]eeply regrets the fact that Member States have demonstrated insufficient solidarity in the face of the growing challenge of immigration”. It

¹¹⁴ JHA Council.

¹¹⁵ See also Commission Staff Working Document on the fulfilment of the 29 measures for reinforcing the protection of the external borders and combating illegal immigration adopted at the Justice and Home Affairs, Council meeting, held on Brussels on 25 and 26 February 2010, SEC(2010) 1480 final of 26 November 2010.

¹¹⁶ See COUNCIL OF THE EUROPEAN UNION *PROVISIONAL VERSION* PRESS RELEASE, 3075th Council meeting, Brussels, 14 March 2011:
http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/119886.pdf

¹¹⁷ European Parliament resolution of 22 April 2009 on a Common Immigration Policy for Europe: Principles, actions and tools (2008/2331(INI)), P6_TA(2009)0257.

called “for an urgent review of the Framework Programme on Solidarity and Management of Migration Flows for the period 2007-2013 and its four financial instruments so that they may reflect new realities arising from increasing migratory pressures and be used to address urgent needs, such as in the case of situations of mass migratory influxes” (at 77).

Noting the commitments made by Member States in the European Pact on Immigration and Asylum in relation to the need for solidarity, the Parliament “welcomes in particular the inclusion of a voluntary burden-sharing mechanism which enables the intra-EU reallocation of beneficiaries of international protection from Member States which are faced with specific and disproportionate pressures on their national asylum systems, due in particular to their geographical or demographic situation, to other Member States, and calls on the Member States to implement these commitments”. Yet, voluntary solidarity was considered not to suffice, as the Parliament “insists (...) on the introduction of binding instruments” and “calls on the Commission to implement this mechanism forthwith and to propose immediately a legislative initiative to establish such a mechanism at European level on a permanent basis” (at 78).

With regard to the Dublin mechanism, “the recast of the Dublin regulation and the proposed provisions for a mechanism to suspend Dublin transfers if there are concerns that Dublin transfers could result in applicants not benefiting from adequate standards of protection in the responsible Member States, in particular in terms of reception conditions and access to the asylum procedure, as well as in cases where these Dublin transfers would add to the burden on those Member States which are faced with specific and disproportionate pressures due, in particular, to their geographical or demographic situation” were welcomed (at 79). Here too, the necessity of a binding instrument was stressed: “these provisions would turn out to be a political statement rather than an effective instrument to seriously support a Member State without the introduction of a two-fold binding instrument for all Member States”.

More recently, in 2011, in a reaction to the European Court of Human Rights’ judgement in *M.S.S. v. Greece and Belgium*¹¹⁸ on the violation of the European Convention of Human Rights in the reception and transfer of asylum seekers under the Dublin Regulation, the European Parliament debated on the state of the European asylum system and immediate EU measures in support of Italy and other Member States affected by exceptional migratory flows.¹¹⁹ Commissioner Malmström called for negotiations between the EP and the Council on the revision of the Dublin Regulation to start and expressed hope for a balanced compromise, including an emergency mechanism for suspension of transfers in exceptional situations.

In their reactions, MEPs called for support to be given to Greece and Italy in view of the humanitarian crises they were facing at that time. They stressed that this was clearly a ‘European issue’ and that Italy and Greece carried a disproportionate burden of asylum seekers compared to the rest of the Member States. They further acknowledged the need for an improved Europe-wide asylum system and called for solidarity, cooperation and good communication among EU Member States on immigration challenges and for effective support for Greece and other Member States facing an extraordinary influx of people.

¹¹⁸ ECtHR 21 January 2011, *M.S.S. v. Greece and Belgium*, n° 30696/09.

¹¹⁹ See Council, Note on the European Parliament plenary session in Strasbourg on 15 February 2011: Joint debate on the state of the European asylum system, after the recent decision of the European Court of Human Rights, and immediate EU measures in support of Italy and other Member States affected by exceptional migratory flows, 6788/11.

In the second part of the debate, on immediate EU measures in support of exceptional migratory flows in Italy, Commissioner Malmström recalled the high numbers of Tunisian migrants entering Italy. Assistance to Italy could be provided from various sources, including financial assistance from the European Refugee Fund and the European Border Fund as well as expertise from Frontex and the European Asylum Support Office. She stressed that not only did the current situation have to be dealt with swiftly, but that the EU should also address issues such as the possibilities for legal migration to the EU, support for economic development in Tunisia and activities to generate jobs, in particular in the southern regions of Tunisia, as well as assistance for the country in its transition towards democracy. She said that Tunisia should patrol its own borders efficiently and take back those migrants who had come to the EU but were not in need of international protection.

MEPs called for urgent action in response to a humanitarian emergency. One member proposed a Marshall Plan for Tunisia and Egypt in exchange for their full cooperation in blocking further mass exoduses of their populations, the deployment of a Frontex RABIT mission, and immediate repatriation of people who did not qualify for international protection. He also proposed that the Commission should implement Article 80 of the TFEU which clearly stated that immigration policy was based on the principle of solidarity and just sharing of responsibilities. Other MEPs agreed that the Treaty spoke of shared responsibilities in immigration issues and that no Member State should be left on its own, or called for more operational powers to be given to Frontex and Europol in immigration issues, for burden sharing between Member States and for emergency financial assistance for Italy.

In her concluding remarks Commissioner Malmström repeated the Commission's readiness to assist Italy in this emergency situation by all means at its disposal. She agreed that the sharing of the immigration burden was indeed a European responsibility that required European solutions.

2.4.3. [Solidarity and sharing of responsibility in practice: Framework Programme on Solidarity and Management of Migration Flows \(2007-2013\)](#)

The Framework Programme on Solidarity and Management of Migration Flows was designed to improve management of migratory flows at the level of the European Union and to strengthen solidarity between Member States.¹²⁰

It has four dimensions. The first concerns integrated management of external borders, with the setting up of an External Borders Fund. The second concerns asylum policy, with the prolongation of the European Refugee Fund. The third concerns the social, civic and cultural integration of Non-EU Member Country nationals, with the setting up of a European Integration Fund. The fourth concerns the fight against illegal immigration and the return of third country nationals residing illegally in the EU, with the setting up of a European Return Fund.

The External Borders Fund (EBF) was established by Decision 574/2007/EC of the European Parliament and of the Council of 23 May 2007. It has a financial envelope of 1.820 million euro for the period 2007-2013. The fund has four objectives:

¹²⁰ See Communication from the Commission to The Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013, Brussels, COM(2005) 123 final.

- Efficient administrative organisation, as well as checks, surveillance tasks and registration mechanisms at external borders;
- Efficient management of flows of persons at external borders and, in particular, effective consultation of the sis and vis information systems;
- Uniform implementation of eu legislation;
- Enhancing the activity of consular services.

The European Refugee Fund (ERF) III was established by Decision 537/2007/EC of the European Parliament and of the Council of 23 May 2007. It has a financial envelope of 614 million euro for the period 2008-2013. The fund is targeted at persons having refugee status as defined by the Geneva Convention of 28 July 1951 or enjoying a form of temporary or subsidiary protection, or who are being resettled in a Member State. Persons who have applied for refugee status or for one of these forms of protection are also included.

The European Integration Fund (EIF) was established by Decision 2007/435/EC of the Council of 25 June 2007. It has a financial envelope of 825 million euro for the period 2007-2013. The EIF finances national, transnational and EU level actions that are intended to facilitate the integration of non-EU country nationals in the host countries, targeting recent arrivals in particular.

The European Return Fund (ERF) was established by Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007. It has a financial envelope of 676 million euro for the period 2008-2013. The fund is aimed at persons enjoying (or applying for) international or temporary protection and those illegally resident in a European Union (EU) country.

3. THE STANDPOINTS AND VISIONS OF THE MEMBER STATES, EU INSTITUTIONS AND KEY INTERNATIONAL STAKEHOLDERS

3.1. Introduction

Interviews and a questionnaire were employed in order to identify the objectives of Member States and relevant organizations in discussions and the practice of solidarity and fair sharing of responsibility, as well as the incentives to increased activity in this area.

Given the time constraints of the study, nine Member States were selected as collectively giving a broad portrayal of the varied approaches to solidarity, representing high, medium and low levels of current responsibilities in the areas of border controls, asylum and immigration. These were:

- Belgium
- Finland
- Italy
- Latvia
- Malta
- Poland
- The Netherlands
- Sweden

- The United Kingdom

Experts in the relevant Ministries and governmental bodies of these Member States were requested to participate in (telephone) interviews to respond to a questionnaire on the implementation of Article 80 TFEU. The list of officials who were interviewed, and/or who submitted written answers to the questionnaire, appears in Annex I. It should be noted that within the timeframe of the study, approaches to Member States often resulted in the identification of officials who could primarily address asylum related issues, rather than the border management and immigration issues which are of equal concern for this Study. This is perhaps reflective of the focus of discussions on solidarity in the EU to date.

Further interviews were conducted (mostly in person) with officials from the following organizations:

- European Commission
- LIBE Committee of the European Parliament
- Frontex
- UNHCR
- IOM
- ECRE

All face-to-face and telephone interviewees spoke as experts, with their own knowledge and opinions naturally influenced by their country's or organization's experiences, but not representing official positions taken by their Member States or agencies. This chapter does not directly cite any interviewee, but reports on comments made, and responsibility for any errors in representation of those comments lies with the authors of this Study.

The Questionnaires (which appear in full in Annexes II and III) cover the issues arising above under Chapters 1 and 2 addressing the institutional aspects of ensuring solidarity and fair sharing of responsibility; the specific material aspects for policy areas related to border checks, asylum/protection and immigration (regular and irregular); and the financial implications of solidarity.

3.2. Institutional issues for ensuring solidarity and fair sharing of responsibility

In assessing the institutional issues related to solidarity and fair sharing of responsibility in policies relating to borders, asylum and migration, six key themes were addressed. These involved:

- **The relationship** between Article 80 TFEU and Articles 77 to 79 TFEU
- **The level** at which solidarity is required or appropriate – whether bi-lateral, multi-lateral or pan-EU
- **Applicability** of Article 80 TFEU to the Union and/or to the Member States
- Whether solidarity and responsibility sharing should be **voluntary or obligatory**
- The role of **other international actors**
- The **tools** that could be used to advance solidarity

In considering the **relationship between Article 80 TFEU and Articles 77 to 79 TFEU**, Member State officials tend to make a distinction between the **legal** and literal relationship based on the text, and **the political and policy** relationship that emerges in reality.

Meanwhile, European Commission officials suggest that a distinction should be made between solidarity within the context of the developing common European immigration and asylum system (legal but also political) and solidarity as a response to immediate crises and individual Member State's calls for assistance (primarily policy and political). As things currently stand, solidarity is more a question of the latter responses, and it is thus primarily a matter of border management and asylum issues to date.

For officials in Belgium, Latvia, Poland and Sweden, as well as for Simon Busuttil, MEP and Member of the European Parliament's LIBE Committee, the legal understanding is primarily offered as one of a limited relationship: Article 80 on solidarity and responsibility sharing is limited to those matters that arise in Articles 77 to 79, and it could extend the interpretation of those articles. The language of the Treaty clearly makes the link between these articles – and some Member State experts view this as clearly limiting the scope of Article 80.

Among the interviewees, only one suggested that since Chapter headings in the TFEU do not impose limitations on the underlying Articles, there is no explicit argument to limit the scope of Article 80 TFEU to the issues mentioned in 77 to 79. Meanwhile, the ECRE expert suggested that Article 80 TFEU should be read together with Article 4 TEU (principle of sincere cooperation among MS, appropriate measures to ensure the obligations arising out of EU law and refraining from measures which could jeopardise the attainment of the Union's objectives). The ECRE expert believes that solidarity and fair sharing of responsibility also applies to the EU's external policy when it comes to matters of migration, although there is a concern that solidarity in external processing could also be detrimental for refugees.

While Belgian officials suggested that the limitations of the application of Article 80 exist in policy and political terms as much as in legal terms, officials in the UK suggested that although they would not be seeking to extend the definition of solidarity, they would view the application of Article 80 in a practical and pragmatic way, and extend assistance where that was viewed useful and necessary, whether or not such solidarity and support would be covered under Article 77-79. Dutch officials implied a similar position, noting that putting solidarity into legal texts is not as important as carrying out supportive actions where such actions are in the national interest. Polish officials indicated that although in legal terms Article 80 refers directly only to articles 77-79, solidarity as such is not limited to those articles and there should be some flexibility, as it is one of the basic principles on the EU legal system. This latter point was reiterated by the ECRE expert. Malta suggested that while Article 80 is limited to the activities enumerated in Articles 77-79, one should not be too restrictive in considering what that actually means, as those articles include quite a long list of policy areas, and the implications of solidarity in harmonization can be profound, meaning that Article 80 is quite comprehensive in their view. Italy suggested that solidarity is a more general 'umbrella' which could cover different aspects of EU activities and cooperation, and be considered as a basic principle governing relations between Member States, informing all EU legislation and national laws and policies.

One Belgian official did note that, a year after entry into force of the Treaty, one could see that Member States that are under pressure call on Article 80, not just in legislative terms but also in order to encourage other Member States to support them in practice.

UK officials also suggested that there is no current and clear definition of solidarity or responsibility sharing and that is one of the key problems underpinning any discussion of the implementation of Article 80, not least because different Member States and the

European Commission, for example, operate with differing understandings of 'solidarity'. A Dutch official similarly suggested that 'solidarity' seems more of a moral than a legal concept – and in the moral context has a primarily positive sense, whereas in the legal context it becomes more of an obligation, and less a question of positive support to fellow states.

The ECRE expert identified the absence of an explicit goal of solidarity to be a major obstacle to its achievement, as well as any explicit linkage between solidarity in different areas of migration activity (e.g. from ECRE's perspective, if a Member State knew that relocation of asylum seekers would occur then it might not push to seal its borders, thereby obstructing refugees who are seeking protection).

One expert also suggested a legal and linguistic interpretation of Article 80 that limits it in scope to application to the issues raised in Articles 77-79. It was suggested however that practical application of 'solidarity' would and should be broader – applying to a wider range of issues over the longer-term including development and climate change induced migration and integration. In such contexts, as well as the current issues facing EU Member States, there are requirements for global or broad solidarity, as well as regional and local solidarity. Hence, for the EU, the principle of subsidiarity plays a role.

With regard to **the level at which solidarity is required**, and subsidiarity on this point, while Swedish and Dutch officials indicated that the principles in article 80 TFEU are limited to the spheres set out in articles 77-79 TFEU and thus relate only to EU action, Belgian and UK officials indicated that responsibility sharing could be bi-lateral, multi-lateral or pan-EU. Finland, Latvia and Poland suggested that Article 80 itself applies only at the EU level but does not exclude bi- or multi-lateral actions between the Member States, a position also suggested by one Belgian official, who noted unsuccessful efforts by some Member States and institutions to have reference to Article 80 in new legislation where some Member States preferred a voluntary approach to cooperation. However, on a cautionary note it was suggested that if Article 80 is mentioned explicitly in motivations for solidarity, then the action should be pan-EU. This should happen in order to avoid a multi-speed EU, and thus avoid the creation of sub-groups within the area in which internal borders have been lifted. Malta's position is that while bi- and multi-lateral solidarity can be useful, Article 80 places an obligation on the EU as a whole, which means that such bi- and multi-lateral activities would not meet the Treaty obligations. Italy's approach to the question of whether bi- and multi-lateral measures of solidarity were also acceptable was to indicate that anything other than pan-EU solidarity would be contrary to the treaty.

According to a European Commission official, Article 80 TFEU provides a legal basis for measures falling under Articles 77 to 79, but on condition that such measures are necessary. However, the idea that new EU asylum measures can only be adopted if all the Member States are able to take on the duties introduced by them, cannot be welcomed. This idea is currently supported not only by the Mediterranean Member States, but also by more conservative Northern and Western Member States. For the European Commission, the 'mutualisation' of asylum policy follows from the Amsterdam Treaty and Member States must accept the responsibilities thereunder. Similarly, according to the same European Commission official, Malta's position that every measure in the field of asylum must take solidarity into account, is currently not followed. All measures must be looked at globally and, where necessary, solidarity mechanisms should be put into place. In this sense, Article 80 can be a legal basis for relocation schemes or for introducing the possibility of suspension in the Dublin mechanism. The need for solidarity (or the risk of negative effects if no compensatory measures are included) in every single legislative instrument cannot be

used to stall developments (e.g. Malta's objection to the expansion of the Long Term Residence directive to persons in need of subsidiary, because of its possible negative impact, is a case in point).

According to Simon Busuttil, MEP, the principles of Article 80 should also be applicable to the actions of Member States at a national level in the areas of border checks, asylum and immigration. This is because the individual actions of Member States in these areas cannot but have effects on other Member States. This is also compatible with the reading of Article 4 of the TEU on the principle of loyal cooperation which requires Member States to assist each other in carrying out tasks which flow from the Treaties.

Belgian officials also offered varied views as to whether Article 80 is **applicable to Member States or the EU**, and views across the Member State officials interviewed are likewise split. The Latvian official indicated that Justice and Home Affairs are a matter of shared responsibilities, where the Member States retain competences, so legally the Member States are not obligated to anything under Article 80. Rather, the Union is – although Member States might experience a political obligation to join activities. The UK officials suggest that Article 80 is addressed to the Union, and to acts of the Union, not to Member States, but acknowledge that in practice they may choose not to make that distinction. One Belgian official stated that article 80 is addressed to the Union, thus applies to the Union, but also, or indeed therefore, to Member States when implementing the Union's legislation, a view echoed by the Dutch official interviewed. Swedish officials see the principles of Article 80 as applicable to the Member States only when they are implementing policies and acts of the Union. Italy sees the article as addressed to the Member States as well as the EU. Poland meanwhile indicates that depending on the measures undertaken on the basis of Article 80 TFUE, there may be both EU and Member State obligations. Malta also sees application to both the EU and to Member States, but notes that initiatives require EU coordination and an active EU role.

Two experts consider Article 80 to apply to Member States as well as the EU, noting that the word "implementation" is a textual argument for that position.

Maltese officials view the issue of the **obligatory or voluntary nature** of solidarity under Article 80 to be rather complicated, with an obligation on the EU to coordinate, but also obligations placed on the Member States. The EU institutions are, in this view, required to foster and promote the concept, although Member State participation might be voluntary. Under some circumstances, therefore, failure to participate in an activity coordinated under Article 80 might not present a breach of treaty obligations. For Italy, the situation is one which requires change: participation in responsibility sharing is currently voluntary, but should become more obligatory if the very essence of the EU is not to be lost: where participation is voluntary, there is no real solidarity. For Polish officials likewise, solidarity should be obligatory, although with some built in flexibility as to what exactly is obliged. For Latvia it depends on the context and content of particular agreements. Belgian officials view solidarity by Member States as voluntary – unless it is specifically spelled out in agreed legislation, but even then they raise the important point of what sanctions would or could be applied.

For the UK officials, determining whether solidarity is obligatory or voluntary in nature comes back to defining what solidarity really is, which has not yet been done. If there is an obligation under Article 80 then it is a legal one, with some room for uncertainty and political adaptation due to the vagueness of the phrasing. Member States could thus be said to have a moral obligation to do more nationally: in other words any obligations can

come on both sides of the 'solidarity' issue – Member States have a moral obligation to develop their own systems and structures in the migration, border and asylum areas, and then if they need support through solidarity, other Member States might have a legal and/or normative obligation to assist them. Similarly, failure to meet treaty obligations could come on either side of the solidarity issue: Member States need to do what is mandated in directives and legislation, and in some circumstances, failure to meet obligations is sometimes actually what inspires calls to solidarity. However, such failures should not be rewarded. The Dutch official suggested that solidarity can be understood in different ways in relation to EU activities in this area: solidarity is, in essence, a voluntary act, however Member States volunteer to include obligations in the *acquis* for reasons of solidarity, thereby taking further questions of solidarity out of the equation, and rather making legal duties to implement legislation.

Swedish officials take a similar view, but posit a stronger opinion on the obligatory nature of solidarity: Member States have a duty to respect the principles of Article 80 when implementing Union policies and legislation, and non-participation by any Member State in sharing responsibility and expressing solidarity when implementing Union policies could constitute a breach of a binding Union act if such solidarity is required as a treaty obligation.

According to Simon Busuttil, MEP, all Member States have a duty to respect the principle of solidarity set out in the Treaty. Moreover challenges and problems relating to borders, immigration and asylum do not pertain to particular Member States. They are a European challenge which calls for European solutions and therefore all the Member States have a duty to play their part. Whilst the most important consideration is that there should be a political will to deliver results, experience has shown that with voluntary mechanisms Member States have not always lived up to their obligations.

According to a European Commission official, the Commission is able to launch infringement procedures against many Member States, but it is questionable whether such an approach can be beneficial or even thinkable, especially in times of crisis. The Commission's approach has thus consisted of providing financial assistance while at the same time exercising pressure on Member States to take up their responsibilities resulting from European asylum law. At the same time, the Commission is working on the adoption of the second generation asylum instruments, which should address further needs in the Member States. Furthermore, in order to monitor the correct implementation of EU policy, and to identify the needs for solidarity, a Schengen-type of evaluation mechanism of the Member States' performance could be introduced. This would consist of measuring, for example through EASO, how Member States implement EU asylum policy (e.g. what means do they make available) and to subject them to "peer pressure". However, at present this is still a controversial issue.

As to whether there is a need for solidarity and fair sharing of responsibility to be included in all legislation, opinions again differ among officials across Member States. The drafting of Article 80 says 'whenever necessary', so some Member State officials suggest that it is not obligatory to include it. Others, such as Latvia, take a flexible stance, indicating that solidarity should be included, but rather than allowing its non-inclusion to impede the path towards agreements, it could be that compensatory measures are included in another instrument, to allow for political decisions to be taken. The Netherlands and UK officials' pragmatic approach is to say that solidarity should be included if it is needed – but at the same time, it should be borne in mind that in order to achieve harmonization and solidarity as linked issues, all Member States need to implement all agreements – that is obligatory.

What might be called the 'frontline' states take a stronger stance: Italy views the principle of solidarity as necessarily informing all EU legislation and national activities. Malta meanwhile takes the view that Article 80 requires the inclusion of solidarity, and thus Member States, and the EU as a whole, are bound to include it in all relevant measures (articles 77-79) with little room for interpretation. Swedish officials noted that if proposals do not include appropriate measures of solidarity then the requirements of Article 80 could mean that those proposals cannot be passed. Member State officials also point to the European Parliament as requiring the inclusion of solidarity in new legislation, meaning that its non-inclusion could prove an impediment to the adoption of instruments.

The role of other international actors is seen by several Member State officials as being very useful and important in the implementation of responsibility sharing and solidarity programmes, policies and projects in practice and the need for cooperation is stressed by many. The Dutch official noted the special status of UNHCR under a Declaration to the EU Treaty, including the institutional obligation on the Commission to include UNHCR on asylum related issues. Swedish officials noted that international actors such as UNHCR and IOM not only assist in implementation of EU projects, programmes and policies but also influence the context in which solidarity takes place, and help shape the preconditions for its achievement. This is also confirmed by Simon Busuttil, MEP, who notes, in particular, that international actors can help determine which migrants should benefit from the proposed relocation mechanism. They can also assist in providing advice about ways to implement solidarity between Member States. However, experience shows that international actors have tended to give a higher priority to resettlement from third-countries rather than to intra-EU relocation.

In general, and with the above exceptions, all interviewees only envisioned an advisory role at most in the policy making process.

According to a European Commission official, the entrenchment of the Geneva Convention and the principle of non-refoulement in EU asylum law, justify UNHCR's contributions. UNHCR is also the privileged partner on matters of resettlement, relocation, (external) joint processing and EASO, and still plays an important role in the status determination processes in major Member States.

The ECRE expert notes that NGOs play a role in integration, resettlement, transfer, reception and legal assistance, particularly in the new MS, but also that they depend often on ERF funding and the willingness of their governments to subsidize their activities. On the migration side, the sense from one of the experts is that the potential of international organizations is not always recognised fully by the EU. While the role of international organizations in the legislative process is acknowledged (e.g. in consultations, EP hearings, etc.), they are not included in policy making (although more often than not they are involved in implementation), and see their expertise in these areas as under-utilised. The fact that the Member States and the Union contribute to organizations such as IOM and UNHCR could, it is suggested, be used more strategically, as an overall benefit and contribution to solidarity. Swedish officials note that these organizations can bring the full range of their own member states on board to create conditions for broader successful solidarity, including through the EU's Global Approach to Migration.

For UNHCR meanwhile the organization has its specific mandate and role linked to the Geneva Refugee Convention and under the Procedures Directive, where it is involved in communication with Member State authorities (preamble 13), and with asylum seekers (art.10) as well as on COI information (art.8) and to have access to applicants and present

its views (art.21). It also has a practical role played out through working relations and project funding as well as a working arrangement with Frontex (liaison officer in Warsaw; informal exchanges), assisting the EU agency to integrate the duties of protection. UNHCR regrets, however, that the Border and Return Funds are not open to them, as well as the fact that the ERF does not fund the UNHCR liaison officer in Malta.

Finally on the institutional issues, Member States and institutions consider there to be a wide range of **tools** that could be used to advance solidarity. The Latvian expert pointed out that as migration, asylum and border management are complex issues, they require a comprehensive approach – or a full tool box. Others, such as the Italian interviewee, noted that different tools are needed for different cases or challenges, and needs assessments are required to see what is most appropriate.

As one expert noted, all of the tools involved are essentially a matter of capacity building, and this is true whether collectively or nationally. Finnish officials also noted that learning best practices from one another was an essential part of efforts towards greater solidarity.

According to a European Commission official, there is a whole range of ideas to ensure solidarity, including joint processing of claims or the revision of Dublin to include sharing of responsibility. However, tension often arises with some Member States when it comes to the actual adoption and implementation of such measures. The reasons are diverse. States may publicly express their solidarity, for example with Italy when it is affected by mass influx from North Africa, yet at the same time require that the country in question exercise border control more rigorously. Some States oppose relocation, because they fear that it will act as a pull factor for more asylum seekers. Such States thus prefer to express solidarity with countries with a high influx of asylum seekers only through financial measures. Others argue that Member States that call for solidarity and support should first ensure that EU rules are actually applied. Solidarity should not be a reward for Member States that fail to implement EU policy correctly. Furthermore there are also legal obstacles to solidarity and responsibility sharing: relocation is possible only for persons seeking subsidiary protection; asylum seekers seeking refugee status come under the Dublin Regulation, which sets limits to relocation.

According to the same European Commission official, there is a risk that Member States will react in a protectionist manner if EU policy is seen to fail. Calls for the reintroduction of interior border controls or exceptions to the visa policy may eventually also have an influence on the future development of EU policy. Solutions should thus be found for when EU policy comes under strain, for example through the possibility of a temporary suspension of the Dublin and mechanisms to reduce the burdens of the responsible States.

That **geography** should be accorded a stronger role in understanding problems and developing tools arose in several interviews. UK officials, for example, suggested that support and solidarity are required to enhance individual Member States' capacities to deal with their individual roles in border, asylum and migration issues, often created by unchangeable factors such as geography.

Legislation, financial programmes, agencies and centralized operations were all addressed in the interviews.

Belgian and Swedish officials viewed **legislation**, leading to a stronger Common European Asylum System (CEAS) and harmonization, as intertwined with solidarity – there cannot be one without the other, and each leads to more of the other in turn. On the other hand,

Maltese officials noted that harmonization in and of itself does not mean that there is solidarity – in fact harmonization of legislation could add to the burden for some Member States as they are thus required to do more. UK officials also noted that whether legislation is an effective tool for solidarity depends very much on what the legislation actually says. One of the experts, however, remarked that legislation rarely moves quickly enough to offer an appropriate immediate response to newly emerging problems in this field. Swedish officials pointed to the adoption and common application of legislation as the primary tool for developing solidarity. The ECRE expert noted that even where legislation is agreed, its **implementation** is often not harmonious, thus solidarity would be enhanced not only by improved legislation but also by better and more coordinated implementation. UNHCR pointed to widely divergent recognition rates for asylum seekers although Member States are using the same qualification and procedures directives.

According to Simon Busuttil, MEP, legislation is the most important instrument. The EU needs a legislative instrument which can regulate intra-EU burden sharing at a European level. However, agencies also play an important role, especially the European Asylum Support Office (EASO), in coordinating the intra-EU relocation of refugees, and Frontex, in terms of saving migrants and coordinating the disembarkation of asylum seekers who are rescued. Funding schemes, too, are important in order to help Member States that face disproportionate burdens in the management of migration flows, and Member States that accept migrants through the relocation mechanism.

The issues of solidarity and the sharing of responsibility have several **financial aspects**. Monetary costs can be a motivation in seeking or agreeing to solidarity: there can be efficiencies in acting together or at least in not doubling or further multiplying the use of resources. Thus a goal of solidarity could be either more evenly distributing the costs of border management, asylum and immigration policies and their implementation, or an overall reduction in those costs, either for the EU as a whole or for Member States individually.

Although interviewees were asked about the costs of their systems, the costs associated with solidarity, the financial benefits or costs seen to date in measures aimed at sharing responsibility and similar questions, no-one was able to offer specific answers, or even estimates. Many pointed to the fact that it would be impossible to see where expenses begin and end, whether for emergency situations or for border, asylum and migration related issues generally. Even if attempting to assess the impact of solidarity by measuring costs after solidarity is implemented and comparing to what the costs would have been without the solidarity approach, one would be asking for estimates of what might have been – in other words for the unknowable. Some did suggest that financial or budgetary departments might have more ideas, but doubted this and thought it unlikely that there would be the type of accounting our questionnaire requested.

As far as **financial instruments** are concerned, while one of the European Commission officials noted that these are the strongest elements of solidarity existing to date, Member States generally stressed that the sums involved in the various Funds in this area are small, they are more motivational than compensatory, they are insufficient to actually address needs, and the bureaucracy involved also makes them unattractive. One official noted that there is some back and forth between the Commission which manages the funds and Member States on why there is such a high level of bureaucracy involved in their administration: whereas staff working on the issues of migration, asylum and integration in Member States find the paperwork to be excessive, the Commission staff note that Member

States' finance ministries have laid down the rules and strict procedures. Finding the balance appears to be difficult.

Officials also noted the inter-play in discussions between financial measures and more practical measures e.g. relocation. Some felt that solidarity could be expressed through either, and some officials suggested that Member States facing significant influxes appear to generally be less interested in receiving money to assist with the problem (financial solidarity) and more interested in addressing the problem through practical means. This is a point the Maltese officials confirmed, noting that for them practical solidarity such as the Intra-EU Relocation from Malta (EUREMA) pilot project and border control work by Frontex were of primary importance. For Malta the major problem is that of long-term integration, which cannot be addressed by money alone.

According to Simon Busuttil, MEP, solidarity cannot merely consist of financial support. However, such support is essential for Member States facing disproportionate burdens in terms of their obligations under EU asylum law (e.g. reception standards). Financial support can also help incentivise Member States to participate in solidarity by hosting asylum seekers through intra-EU relocation schemes.

There are currently four Funds (European Refugee Fund; Borders Fund; Return Fund and Integration Fund) but the financial instruments, their approach and implementation are under review at the time of writing. The Commission has started a process of reflection on the shape and content of the future financial instruments in this field, putting out a public consultation document and assessing the major benefits of the existing responsibility sharing instruments. The total of Funds available in this area, as one interviewee noted, currently accounts for some 0.7-0.8 per cent of the total EU budget.

What is more, emergency funding from the Borders and Refugee Funds can only cover a limited number of emergencies in a fiscal year, and any Member States facing emergency situations after that will not have access to similar funds – or the finances for non-emergency projects will be depleted.

While the **agencies** facilitating pan-EU cooperation or solidarity such as Frontex and EASO are relatively new, there is a sense that the actions of Frontex to date are very promising and that more could be done. The UK officials noted the British desire to play a more central role in Frontex than it is currently permitted to do, and stressed that such agencies have an important role to play in enhancing solidarity.

Frontex meanwhile is largely satisfied with the contributions of Member States to its operations and activities, although the agency must sometimes engage in lengthy and challenging operations in order to receive the material resources, particularly equipment, it views as necessary for particular operations. It is for this reason that the proposal amending the Frontex Regulation includes the possibility of Frontex acquiring its own assets in order to give more autonomy to the Agency. Currently, at the end of each year, Frontex must inform Member States on the type of operations planned for the following year, allowing Member States to plan their contribution in advance (bilateral talks are undertaken with the Member States). There are, however, unforeseeable situations (for instance, the current situation in Northern Africa) which cannot be planned for and which call for immediate action.

The activities Frontex undertakes are an expression of solidarity with Member States in need, for example Italy with large arrivals of Tunisians in February and March 2011.

However, they are not legally based on Article 80 TFEU, which only came into being after the establishment of Frontex itself.

Operational agencies such as Frontex or the EASO have budgets to which Member States contribute – a cost for solidarity, but not one that any Member State could weigh up against the benefits, and the general sense was that the contributions were, to date, appropriate. One interviewee who expressed dissatisfaction with Frontex did note that its less than optimal activities would be paid for by the Union without common goods emerging.

In terms of **centralized operations** the ECRE expert suggested that these would be difficult to envisage, and Member State reactions bore out this view. Belgian officials were not sure that these would necessarily enhance ‘solidarity’ or rather be a matter of more deeply developing the CEAS and with it creating more political integration or even federalism. UK officials felt that centralized operations would be going a step too far, as the point of solidarity in their view should be to enhance national capacities so that, following support where necessary, each Member State is individually capable of dealing with their own pressures.

Belgian officials suggested that it could be interesting to think about tools for greater solidarity to actually stop and get a better view of what the ‘burden’ is, the factors involved, and to develop an analytical formula for this assessment including working out how far solidarity would go in addressing the burden.

3.3. Border management

Some argue that the need for solidarity in border management follows implicitly and naturally from the Schengen construction and the removal of internal frontiers – and from that argument can flow the notion that policy in this area is straightforward, and actually needs no explicit legislation. The removal of internal frontiers and consequent focus on the external borders of the EU as a whole naturally means that some Member States have greater responsibilities than others – they have longer land or sea borders, more people crossing the borders, more or less ‘difficult’ non-EU neighbours etc. Those Member States need to continue their border management measures even if they are experiencing a low crossing rate, as migratory routes are subject to constant changes.

This reasoning also means that whereas many focus on solidarity in the area of asylum as the headline-grabbing issue where responsibility sharing is called for, in fact for some officials, border management is the priority in thinking about solidarity. Schengen is a reality, and thus the need to cooperate and share the burdens and responsibilities is a reality, whereas if there is no solidarity in asylum, everyone will manage somehow anyway.

For Member States without significant external borders the benefit of having the ‘frontline’ Member States perform effective border management is a reduction in irregular arrivals that travel on through the frontier-free Union. As Swedish officials noted, having a significant external border and a high number of arrivals does not necessarily translate into high migration, asylum or social welfare pressures for the Member State that has a national responsibility to patrol that frontier. The migratory and other pressures will often be felt in more distant states: some 95 per cent of asylum seekers arriving in Sweden have entered the EU elsewhere.

One Belgian official noted that the benefits of solidarity on border control issues form a chain: more uniformity in border controls and management means more security on the external frontiers; as a result of greater security at the external 'edges' internal security can be better guaranteed, and the resources that had to be used previously by Member States to control and secure their borders and territory that now do not need to be used for that purpose can be used elsewhere. As a process that has been ongoing for some two decades, results can be seen, and of course one resulting benefit for citizens and others legally within the EU/Schengen area is free movement. However, the cost comes for the Member States in the south in particular, which are under ever greater migratory pressure, and have to deal with it on behalf of the whole EU.

However, according to a European Commission, solidarity in border control also implies a correct application of the rules. Malta, for example, has not yet called for a Rabbit action, but will have to respect the rules for search and rescue and debarkation in the Schengen Code if it wants to enjoy Frontex support.

For continued solidarity and further improvements the question becomes how to share the responsibilities – the need to do so being presumed, by many, as natural given that the external borders of the EU are those of the whole EU, not just the single Member State being entered. This is obviously an area where **geography** plays a significant role.

However, the implications of Article 80 and solidarity for border management can also be viewed as politically sensitive, and thus as a difficult policy area: it is, for example, difficult to come up with a 'mathematical system' or precise key to determine how there can be a 'fair' sharing of responsibility at the border. Member States can play a role in identifying and defining their needs in relation to their own borders. It was suggested in interviews that in addressing border management, those asked to contribute to solidarity and support measures should not be questioning the system for asylum and migration beyond the border, but should address the actual problems in terms of arrivals at borders, or interceptions prior to arrivals. In other words, they should address the facts, and later assess whether the Member State in need of assistance in border management was in some sense 'guilty' of stimulating the problem through poor migration and asylum policies or implementation. In some cases there is simply an emergency provoked by external factors and geography, in other cases there are structural problems in how a Member State is dealing with the full range of migration and protection issues. A short-term programme of assistance in border management could include factors of longer-term conditionality – to improve asylum systems, for example, or measures for dealing with the return of irregular migrants.

The keys to solidarity at the border are seen as political 'sharing' of the burden and financial solidarity.

The Italian official suggested that in some senses border solidarity could be the 'easiest' or at least best-defined area out of the three areas dealt with under Article 80. Effectively, handling a border crossing - simply considered as the arrival and entry into territory or not (and including interception) is the same activity everywhere in the EU (and beyond). Others question how straightforward this really is, given the chain of consequences. However, if one takes the starting point as simple, practical cooperation, a ship or personnel can be offered to help, for example through Frontex. Furthermore, the benefits can be seen immediately – through fewer arrivals or better controls – during a joint operation. In addition, with internal frontiers removed across the Schengen area, Member States realize that control of the external borders is not simply a national affair, but a task that is

performed for the EU as a whole. Therefore it is widely accepted that this task can be fulfilled collectively or jointly.

However, solidarity in border management, particularly through joint patrols and maritime interceptions give rise to questions about how solidarity can then be extended into the asylum and immigration areas. For example, if there are joint maritime patrols and people are intercepted, which Member State is responsible for those rescued? Such issues require clear advance guidelines in order to allow the apparently straightforward sharing of the border management elements to be successfully concluded. One could also say that this represents a form of 'snowball effect' of practicing solidarity: action in one area gives rise to the need for action in other areas.

This could be a reason for which Swedish officials stress that border control remains a national issue for each Member State, and that solidarity and responsibility sharing in this area could be most effectively achieved through the development and application of legislation.

In terms of cooperation through the development of EU level agencies, most Member State officials interviewed seem to be satisfied with the coordinating work conducted by **Frontex** to date, certainly within the constraints of its current remit (which is under revision). Frontex provides centralized support and coordinates resources – all currently contributed by Member States although there is a suggestion that Frontex should be able to make its own material acquisitions in future (e.g. ships or helicopters) and put those at the disposal of states in need rather than relying on the material contributions of Member States. This is one way in which Frontex could be strengthened as an actor in its own right – an actor which has been developed to be able to play a successful coordinating role focusing on the issue of border management where previously Member States had to take the lead, and their ability to do so was frequently compromised by the need to balance border issues with other political concerns. At the same time, the agency cannot take on sole responsibility for border management: that is the job of the Member States, and Frontex's contributions can only build on Member States' own work.

Frontex offers risk assessments, training of border guards and a venue for collaboration and cooperation for the Member States, as well as its role in coordinating operations when required, particularly in cases of large flows of (irregular) migrants and asylum seekers towards one or more Member States whose own systems cannot cope with those flows.

Those Member States that have had strong reasons to call on Frontex for assistance gave suggestions for improvements. There was an Italian suggestion that more flexibility is needed in how Frontex works on an operational level, so that they can have quicker reaction times and greater efficiency. Malta noted that there are areas associated with border management in which Frontex could play a role, but which it has not yet taken up. Documenting the undocumented would be one such area – helping to trace their origins, thereby facilitating returns of irregular migrants. One Belgian expert also noted that in spite of Frontex's work and efforts, it remains the case that its actions are not always optimally serving the common interests of the Member States. Swedish experts note that as their Member State has had little reason to call on Frontex, the major benefits they have seen are in networking and the exchange of knowledge and experience.

It should also be noted that in early March 2011, the Civil Liberties, Justice and Home Affairs Committee of the European Parliament voted on a report by MEP Simon Busuttil on the Frontex regulation. The Committee endorsed, in particular, a proposal to establish an

EU Border Guard System, as well as to increase substantially the human and technical resources available to Frontex.

As far as **financial instruments** are concerned, in emergency situations the funds available are not sufficient to meet real needs, and they must thus be both larger and more flexible according to one state that has had reasons to make use of it. One of the European Commission officials interviewed noted that strengthening financial solidarity is important. The **External Borders Fund** provides for fundamental investments (cars, buildings), however personnel is not covered by it, which might be problematic: if national border management staff is underpaid, for example, this could have an effect on the execution of border management policy. The question is how this can be controlled, and an analysis of the fund and its workings, including sufficiency of means should be welcomed. The allocation of money from the Borders Fund is partially based, by the Commission, on Frontex risk analyses for the year ahead, as well as the ongoing issues in the field. The southern and eastern EU Member States naturally are found to be most under pressure, and thus receive most funding. The Borders Fund and the Frontex budget form the major financial costs to the Union, and thus Member States as the Union's budgetary contributors.

There are, of course, non-financial costs related to border management. On the political side there are the political questions and unknowns of whether problems with large influxes are related to the very fact of EU membership, for example, although in most cases the flows are perceived by those on the receiving end as being more a matter of push factors than of the pull of being the EU's frontier state(s). There is also the question of what the cost of not demonstrating solidarity would or could be: having removed internal frontiers it is not easy to re-erect them, either practically speaking or in terms of reversing one of the success stories of the Union as a whole – and so solidarity in border management, whatever it costs, should avoid the expense of such a reversal.

Similarly there are non-financial benefits: while there is no real shared responsibility for border controls at present, within the Frontex mandate there is the possibility of joint operations. Within these operations border guards from EU Member States or Schengen Associated Countries (SAC) support the host Member State which is facing pressure on its external borders. The financial cost related to this responsibility sharing effort lies in sending staff to another Member State in need and not using their capacities at home for that period of time. However, the sharing of experiences between the border guards, learning from each other, getting to know realities at other borders, could be considered as compensation for the deployments – a non-financial benefit. The officers who participate in these activities have, when coming back to their own Member State's services, an added value in themselves. Swedish officials note that in working towards solidarity, one should be looking for European added value – and preferably an added value that can be measured.

3.4. Asylum and protection

To some degree similar to border cooperation issues, one can argue that in the absence of internal frontiers, measures for dealing with asylum and protection for refugees within the EU, and broader participation in humanitarian protection elsewhere, should necessarily be subject to solidarity. All Member States are signatories to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, and thus all Member States have international obligations to assess asylum claims and to protect those found to be refugees.

Over several decades, practice has revealed significant differences in how Member States handle these obligations, and in an effort to harmonize and make the situation for asylum seekers and refugees in all Member States more 'equal', directives have been agreed on the Qualification for refugee status, and subsidiary protection status; the Procedures for determining refugee status; the Reception of asylum seekers and Temporary protection. Some officials, notably from the UK and Finland, suggest that these measures, if correctly implemented, would in themselves be a form of solidarity. Others indicate that solidarity and such legislative harmonization go hand in hand: harmonization is not equated with solidarity in this view, rather if they have the same legislation and in principle the same type of operations and approaches then Member States can offer solidarity to each other on an equal footing – and then as there is more cooperation there can be increasing harmonization.

The Dutch official noted the broad spread in recognition rates across the EU, and how the differences seem to be related to Member States' differing policies towards third countries, based on issues such as historical or cultural ties and existing (minority) communities, rather than based on systemic issues in implementation of legislation, for example. The Common European Asylum System should mean that an individual asylum seeker would have the same chance to have their protection claim recognized in each Member State. One phase in coming to that situation is the harmonization of legislation: however with that already done on the key issues, and divergences still being obvious, another phase would need to focus not just on country of origin information but also on attitudes towards countries of origin – evening out the discrepancies in approaches.

The existing directives have achieved varying degrees of success in implementation and practice, and different Member States have differing opinions as to their success. The UK official notes, for example, that the Qualification directive is viewed as having made a more useful contribution than the Reception directive, while UNHCR research indicates that the Procedures directive is being implemented in different ways in different Member States and that this is giving rise to concerns.

The links between implementation of directives (what could be called living up to mutually agreed responsibilities towards fellow Member States as well as towards asylum seekers and refugees) and solidarity are very deep. To date, major calls for solidarity are either linked to emergency influxes, or to states that are not yet, for whatever reason, fully implementing the content of the directives.

Solidarity in emergency cases seems to be somewhat more achievable, particularly when the emergency either faces a number of Member States at the same time or is linked to or part of a globally important humanitarian event.

Calls for solidarity in situations in which responsibilities, through implementation of directives, are not being met give rise to questions about how well the EU and its Member States are managing to develop their Common European Asylum System. Member State officials, in interviews, were open about calling into question the good faith of those Member States not fulfilling their obligations and yet calling for solidarity, as noted above. One official noted, however, that even if there is a desire to 'slap the hand' of the Member State that is not implementing the EU acquis, at the end of the day, it is in the interests of all Member States to make sure that the acquis is implemented, and thus to offer financial solidarity and operational support. The ECRE expert similarly suggested that to some Member States, the sharing of responsibility and solidarity seems to be seen as a tool allowing them not to take on any responsibility themselves. In such cases, the central

element needed as a basis to cooperation and solidarity in a frontier-free EU, trust, appears to be lacking.

However, even when the directives can arguably be said to be being implemented, major differences in the results remain, including widely varying recognition rates for beneficiaries of protection, for example, as the UNHCR interviewee noted. Furthermore, the ECRE staff member interviewed noted that in some instances Member States are developing national measures to avoid the implementation of directives, such as new or additional forms of national protection with lenient termination procedures to avoid granting either refugee status or subsidiary protection under the Qualification Directive.

At the same time, one measure, the Dublin Regulation, which assigns responsibility to a particular Member State, - most often the Member State in which an asylum seeker first arrived -, complicates the discussion as it is precisely not a responsibility sharing measure, but a responsibility-assigning measure. In its current form, **geography** makes the decisive factor for where major responsibility for asylum seeker claims, procedures, protection and integration lies. Current discussions on solidarity in asylum are thus dominated by the question of whether the Dublin Regulation requires some kind of compensatory 'sharing' mechanism, and if so whether that should be a financial or a practical tool, such as relocation.

In addition, whereas Dublin is sometimes seen as the cornerstone of the Common European Asylum System, at least one interviewee indicated that it cannot be the foundation to the system in practical terms, because it is not efficient enough, and is costly for relatively few beneficial results, and currently is precisely contrary to efforts to increase solidarity. Yet the basic issue of the Common European Asylum System remains: that in whichever Member State an asylum claim is processed, it should receive the same answer. As yet, this clearly cannot be said to be case. Swedish officials also noted the concern that the application of a suspensive effect in the Dublin system could lead to a greater influx of asylum seekers to the Member State to which Dublin cases are not returned, as well as an increase in secondary movements of asylum seekers.

Relocation has emerged as the measure of solidarity suggested to compensate for the impacts of the Dublin regulation, as well as for use in emergencies or situations in which a Member State's capacities are exceeded. Interviewees pointed clearly to distinctions between the relocation of asylum seekers (which would be the case for any programme linked to Dublin) and refugees (as in the case of the EUREMA Pilot Project assisting Malta). There is seen to be a distinction between accepting the responsibility to determine status but not being able to integrate the numbers of refugees admitted and denying responsibility to determine status at all. Swedish official stated that there is no demonstrated evidence that the Dublin System itself contributes to a significant degree to the uneven distribution of asylum seekers among Member States, and that the problems some Member States face in terms of the extent of the influx can be better dealt with by means other than relocation.

Polish officials noted their participation in EUREMA, but also that refugees generally did not wish to be relocated to Poland, but to western European states. Looking to the longer-term, UK officials noted that any relocation should be a bi-lateral support system on a case-by-case basis, not EU wide, and not obligatory for Member States. Belgian officials indicated some openness towards the idea, but noted that in the current context any relocation to Belgium would be politically unacceptable.

Both UNHCR and the ECRE expert pointed to the problems that can arise in connection with relocation. The ECRE expert pointed to the fact that while relocation might be beneficial for the individuals, it can create tensions between Member States particularly where larger and richer Member States have to take over responsibilities from smaller Member States that do not want to invest in the development of a proper asylum policy or system. The UNHCR official, meanwhile, pointed to the role the agency has played in screening and facilitating relocation. However, she noted that problems include the facts that durable solutions are only possible for small numbers; it is based on voluntary participation; and practical requirements (family connections, knowledge of language) may limit the scope. While suggesting that a more systematic approach would be welcome, the UNHCR official pointed to UNHCR's disappointment that where relocation of refugees has taken place within the EU, there has not been a resultant strengthening of integration potential for those refugees who remained in the first state. Once relocation has happened, it might be difficult for a Member State, even if it appreciates the assistance and solidarity shown, to invest in its systems and capacities rather than to expect relocation to continue.

For some linked to relocation, for others something which could only take place if there were no explicit link to relocation, **joint processing** has been on the agenda for discussion, particularly since the setting out of the Stockholm Programme. UNHCR maintains, as it has since 2003, that joint processing should be considered and seriously discussed, while recognizing that there are many persistent questions such as where processing takes place and the appeal mechanisms. Member State officials raised concerns both about joint processing meaning taking responsibility for asylum applicants granted status after processing by their asylum officers under a joint processing scheme, and about asylum officers being intended to process claims under another Member State's procedures, given that in spite of the directives these are not identical, and conceiving of non-nationals, albeit fellow EU citizens, taking such legal decisions for a state being difficult.

The idea of joint processing might also undermine the fundamental issue of each Member State taking on its own responsibilities in the asylum field, and mean that Member States avoid their obligations under international agreements although a modified approach, such as conducting interviews, or contributing other resources such as Country of Origin Information or interpreters might gain more traction. There seemed to be no widespread agreement on or understanding of what 'joint processing' would or could actually mean. There was even a suggestion that is seemed more like a slogan than something concrete or currently meaningful.

According to a European Commission official, joint processing (internally and externally) is foreseen by the Stockholm Programme. However, its implementation might prove complicated. Member States often express concerns related to their sovereignty. The way in which EASO now works in Greece will give the Commission an opportunity to see what the practical issues are. On the other hand, it can be remarked that on matters of border control, the fact that border guards from one Member State can offer assistance to border guards in another Member State, and participate in the identification of migrants, is not seen as an obstacle by the Member States concerned.

While Member States have mixed views on relocation as an expression of solidarity, an increasing number of Member States, including Belgium, Finland, the Netherlands, Poland, Sweden and the UK, among the officials interviewed, support the expression of global solidarity through **resettlement**, including at the EU level. However, a resettlement programme could fall outside the scope of Article 80. The Finnish response to the questionnaire indicated, nonetheless, that as a Member State with a relatively low number

of asylum seekers, it sees ERF funding and other support measures (e.g. the Integration Fund) as useful in assisting it to conduct its resettlement programme.

In terms of **operational agencies and support**, the European Asylum Support Office is in its infancy and views as to its potential contribution to solidarity in asylum issues varied between hope and scepticism. Member State officials look for various added benefits from the EASO such as spreading their own expertise on country of origin information in the case of Belgian officials, or providing training, quality control and pooled experts such as interpreters. Swedish officials note satisfaction that EASO has decided to focus on reform of the Greek asylum system as one of its first tasks: an effort that is important to the EU as a whole. UNHCR pointed to all these potential tasks, and to the ambitions of EASO, but also to the relatively limited budget and resources envisioned in order to achieve such ambitions.

The Dutch official noted the high expectations being placed on EASO as it gets started, literally from the position of just having an office and a director. While there is reason to hope that EASO will be successful, the implication is that expectations should be managed, otherwise, in the short-term at least, when the agency cannot possibly achieve all that is being suggested is achievable, it will appear to have failed. The situation with Frontex was similar – after some two years of operations many found it not to be living up to (high or excessive) expectations. Now, as noted, there is general satisfaction with Frontex.

Meanwhile the ECRE expert noted that there are concerns regarding the level of independence EASO might have vis-à-vis the Member States and the fact that whatever tools EASO offers to Member States, ultimately their asylum decisions will still come down to national interpretation. Maltese officials also suggested EASO might offer a more structured approach to relocation. However, one of the experts noted that the question of who should steer solidarity (currently the European Commission or Member States) is important. When Malta and Italy asked for solidarity at times of increased influx, they were heard and effective measures were taken. When Greece was facing its reception crisis, the Commission (not Greece) called for solidarity, to no effect. The suggestion was made that perhaps international organizations may be in a better position to implement solidarity in such circumstances.

On the **financial level**, the European Refugee Fund is the longest standing financial instrument, but as already noted, Member State officials suggest that the levels of funding offered are insufficient for any real impact and that the level of bureaucracy involved is discouraging. The ERF is not necessarily being used at present to actually stimulate solidarity as such, but to offer collective funding for national projects. Swedish officials, for example, note while specific projects relate to specific Member States, the outcomes can be used for and by the EU as a whole. Where the financial aspects of solidarity are concerned, Member State interviews indicate that the aim would be to reduce overall expenditure on asylum for the EU as a whole, through efficiencies in systems and operations, as well as an overall reduction in the number of arrivals, procedures and thus needs for reception and longer-term welfare assistance.

3.5. Immigration

Immigration seems to be the area in which there has both been least actual movement towards solidarity across the EU, and the lowest level of interest or apparent need for Member States to cooperate. This is certainly the case where legal immigration is concerned, as has been indicated in Chapter 1 of this Study in discussing the origins of

solidarity in these areas in the TFEU. Nonetheless, one interviewee contributed the useful reminder of the linkages between regular migration and other entry channels where individuals are concerned: without commitments, for example through solidarity, to allowing legal immigration, 'unfair' behaviour by some Member States could result in an increased number of asylum seekers, posing challenges to procedural systems and the rights of those people who need protection. On the other hand, a Commission official pointed to links in the alternate direction: for instance the regularization of failed asylum seekers could be considered out of a concern to help local labour market shortages, although a general regularization would be contrary to the European Pact on Immigration and Asylum.

One Commission interviewee noted that Member States retain the competence to determine quotas of immigrant workers, and that the Union can only act while respecting the principles of subsidiarity and proportionality. History has shown that it has been very difficult to adopt immigration directives: the unanimity rule required the acceptance of many 'may' clauses in directives. Even under the present co-decision and qualified majority rule, the adoption of new directives (e.g. single permit, seasonal workers) proves to be very sensitive. Introducing solidarity to directives, conceived as a notion that is broader than burden sharing, requires a general common view on a European common migration policy. The difficulties in the introduction (and subsequent withdrawal) of the EC's directive on labour immigration in 2001, demonstrates how problematic this is. One can therefore be sceptical about the possibilities of achieving such common policy, including solidarity.

One of the implications for solidarity on economic immigration centres on the 'brain drain/gain' issue, and even more on the competition between Member States to attract the best immigrants for their economic needs. A Commission official noted that such a competition need not be negative, and in any case exists and can hardly be avoided between major immigration countries employing migrants to help advance their economies. Furthermore, in the immigration area the directives include several optional provisions, leaving plenty of discretion to Member States, whereas for the purposes of solidarity the common application of rules is important.

On the subject of **visas** one Belgian official noted that the adoption of community norms has largely been completed, through regulations rather than directives, with little room to manoeuvre for Member States. In those areas where there is the possibility for variations, there is often a clause relating to uniform practice. This makes any other form of solidarity in this area unnecessary. In addition, Member States can represent one another in consular affairs in third countries, meaning that smaller Member States can make savings in terms of the number of personnel and other related resources they need to employ. The benefits are, however, not so much financial as political and juridical: for example the Common Application Centre in Kinshasa has led to a significant decline in 'visa shopping', bringing advantages not only to the Member States but also to those people seeking a visa in terms of the guarantees regarding their rights. However, Member States are not (yet) ready to allow visa decisions to be fully handled by the Commission or a centralised authority.

From a **financial perspective**, Member States dealing with more visa applications, for example because they have more consular offices in more countries, should not face higher costs because the visa applicants pay the administrative fees for the visas. There are at least two special cases in this regard: Russians applying for a special visa from Lithuania to visit Kaliningrad – these visas are free to the applicants for political reasons, but the Member States collectively cover Lithuania's costs through the Borders Fund. Secondly, the Common Application Centre in Kinshasa is also largely financed by the Borders Fund.

Solidarity through funding is also important where **integration** is concerned, through the Integration Fund. It should be observed that other EU social funds also apply to (newly arrived) third country nationals in cases of specific needs. Local authorities, which face the major issues connected with integration in practice have indicated that, with the decline of national budgets for integration measures, there is a need for EC support. Demanding and promoting integration without creating the opportunities thereto (such as language training) is not fruitful.

A Commission official noted that integration is not only an immigrant-Member State relationship, but that there is also a third party involved: the country of origin. Certainly when that country promotes the maintenance of national-cultural identity (e.g. the call of Turkey for Turkish citizens in Germany to learn Turkish first and then German), there is an issue of solidarity vis-à-vis that country of origin.

For Swedish officials, activity related to solidarity in immigration matters focuses on the **removal and return of irregular migrants**, on which there has been progress, including through Frontex operations. IOM has a role in organizing voluntary return that meets qualitatively important criteria like reintegration and sustainability. The IOM expert suggested that in this context, IOM as an international organization has a different level of capacity than national governments, and that this illustrates how capacity building and playing to comparative advantages are an issue in solidarity.

Also related to return, it was noted that there is more impetus towards solidarity in forced return than there is in stimulating voluntary return. One rare example of the latter is a programme under which Norway is financing, via IOM, voluntary returns from Greece. The inclination towards solidarity in forced return might be illustrative of an understanding that solidarity is more easily sought to face or force a negative action than to deal with a positive one.

Amongst the areas of solidarity in returning irregular migrants are **joint flights** and **readmission agreements**. A Maltese official noted that they would have made more use of joint flights if the migrants they sought to return would have had the necessary documentation.

On readmission, the Maltese official noted that the agreements that are in place could be more rigorously enforced and taken more seriously by the EU as a whole. The Italian official pointed to dissatisfaction with the EU approach to joint flights and to readmission, and the greater ease of acting bi-laterally with the third state. A UK official, on the other hand, suggested that the EU as a whole has more clout than individual Member States in achieving readmission agreements, although sometimes as far as their implementation is concerned a Member State might prefer to resort to a past bi-lateral agreement and make appropriate changes to continue readmissions practice as before, while not infringing the EU's new agreement. On joint flights, meanwhile, the British official cited cost efficiencies.

Return also involves financial aspects, primarily under the Return Fund. One Belgian contributor noted that although the Integration and Return Funds are, and must remain, separate, there is some scope for overlap in the case of projects for asylum seekers during their procedures which would aim to promote integration in case the outcome of the application for protection is successful, but also to make return more likely if the asylum application is denied, including offering some education, training or experience during the time of the asylum procedure which could be useful after return.

4. CONCLUSIONS

This fourth and final part of the Study will draw on the findings of the theoretical and empirical elements of the study set out in chapters 1-3 above. This will lead to the formulation of ideas for (further) implementing solidarity mechanisms in the field of European immigration, border control and asylum policies, taking into account the legislative EU framework, the possible mechanisms in burden/responsibility sharing, the financial implications and the visions of the Member States and key institutions.

4.1. General principles

The definition of 'solidarity' or absence thereof has been a theme in all three chapters of this Study. In Chapter 1 the background to solidarity's inclusion in the TFEU was elaborated – including discussions of its breadth and meaning, and the variety of insights as to what solidarity might mean to different Member States and institutions that emerged during the process leading to the TFEU. In Chapter 2 several questions were posed about the form solidarity or sharing can take: addressing causes or effects; justice or outcome oriented; redistributive or cooperative; addressing burdens, responsibilities or broader aims of solidarity and cooperation. In Chapter 3 it was noted that some interviewees from Member States in particular suggested that a debate on the definition of 'solidarity' is needed before some of the questions posed for this study could realistically be answered.

In sum, there seems to be little agreement on the meaning of solidarity. However, the question for the purpose of this Study then is to what degree explicit agreement on the meaning of this basic principle is necessary to make implementation of Article 80 effective.

To some extent this invokes the proverbial chicken and egg: clearly the drafters of the Treaty found it optimal or convenient not to fully define solidarity, even if some suggested and continue to suggest that a definition could theoretically facilitate the achievement of the principle. Or perhaps they rather surmised that defining solidarity too precisely might impede its actual development. As was explained in Chapter 1, amendments to include a definition or exclude certain aspects of solidarity were not adopted.

By leaving 'solidarity and responsibility sharing' as broad concepts, it was concluded in Chapter 1 of this Study, that the drafters intended Article 80 to apply to all matters coming under border, asylum and immigration management. Even if the history of the notions are traceable to 'burden sharing' in asylum law, and the relevance for border management was explicitly acknowledged, the principles are now seen to be generally applicable. Suggestions for amendments to limit it to more specific matters in the policy area of border management, asylum and migration, were not adopted. Nonetheless, questions remain about its applicability in an institutional context as will be set out in more detail below.

Similarly, the nature of solidarity and responsibilities to be shared is broader than that of the distribution of financial burdens that follow from border management, asylum and immigration policies. The idea of financial burden sharing was probably perceived as one of the most obvious ways to show solidarity and share responsibility, but is certainly not the only course to achieve this goal. Other forms of cooperation, material support and even Union action are possible.

One can thus ask, what part of solidarity requires better definition for all Member States and EU institutions to clearly understand it and agree on its advancement: is it the principle

itself; its content; its goals? Is it better to leave some elements of the definition open to the context – both temporal and situational (including aspects such as geography; scope; number of Member States involved in the need for solidarity and extension of it; political etc.)?

Is there in fact a progression to be seen following the subjects, and semantics of this approach in the area of justice and home affairs in the EU?

In the asylum area, there has long been a tendency to talk of 'burden sharing'; semantics moved to 'responsibility sharing' in part to promote more positive connotations, but this terminology also fits more appropriately with the expansion of cooperation and trust to border management issues. 'Solidarity' is a notion with broader traction and application to the EU in a range of activities, and adds the aspect of cooperation and togetherness which is appropriate to a Union of Member States acting as one.

Solidarity as cooperation to address the needs and goals of the Union as a whole in the areas of border controls, asylum and immigration remains a broad concept, however, with a lot of room for contextualizing, debate and discussion, about the forms of cooperation, the needs and the goals of the whole and/or of any sub-group of Member State.

Within any conceptual or definitional debate on the content and goals of 'solidarity' the needs-based input, and the outcome, perhaps come down to the central issue of 'trust', which presupposes loyalty. Solidarity is required, because removing internal frontiers means having to trust neighbours – to trust those with external frontiers to manage them well, and to trust those without extensive entry points to the Union to assist appropriately in ensuring the management; trust that all fellow Member States will adhere to regulations and directives, so that any need for solidarity in asylum, in particular, is based on exogenous factors.

A minimal condition for trust is loyalty by Member States in the implementation of the EU policies; in order to assure loyalty, solidarity and sharing of responsibility may well be necessary. As the recent judgment of the European Court of Human Rights in *M.S.S. v. Greece and Belgium* has shown, blind trust in other Member States' loyalty in correctly implementing EU policy is not sufficient. Solidarity may be a tool to assist other Member States to reach the standards set at EU level or even to compensate for their failure to do so.

It is useful then to reflect on the table presented in Chapter 1 of this Study: solidarity in Article 80 has, as its role, the promotion of trust for the purposes of (a sense of) freedom, security and justice within an area with no internal frontiers, and its expression and significance lie in cooperation through a) all Member States properly implementing all agreed directives and regulations and b) supporting Member States in developing their systems for border management, asylum and immigration to function to the benefit of the EU as a whole.

When it comes to formulating the particular implications of these notions, the exercise of determining the scope of solidarity and responsibility sharing becomes more complicated. This follows partially from the diversity in policy goals in EU immigration and asylum policy itself. These goals vary from advancing macroeconomic benefits for the Union, as in the case of regulation of economic migration by third country nationals, to protecting the individual rights of refugees, victims of human trafficking or immigrants seeking integration. Additionally, these policies have spillover effects on one another and require a

multi-purpose approach, as has been made clear through the identification of the reasons for solidarity in Chapter 2.

In the long term, elucidation of the notion of solidarity requires the formulation of the level of trust to be reached in matters of immigration and asylum within the European Union and the means to achieve this, taking also into account the principles of subsidiarity and proportionality in the determination of the respective roles and jurisdiction of the Union and the Member States.

Meanwhile and on a short term basis, what is intended by solidarity, its goals, content, anticipated outcomes, could be spelled out on a case by case basis in any agreements reached that call on Article 80.

4.2. Institutional considerations

In Chapter 3, six areas related to the institutional context of solidarity on border control, asylum and immigration policies were addressed from the standpoint of Member States, EU bodies and other organizations. There was no real consensus to be found among interviewees for this study on any of the issues, other than the fact that actors beyond the EU and its Member States, i.e. international organizations, other than UNHCR to an already defined degree, have no role to play in decision making on solidarity – only in an advisory role and as implementing partners.

On **the relationship** between Article 80 TFEU and Articles 77 to 79 TFEU it was noted that there are distinctions between the legal relationship (which sees solidarity as limited to the issues raised in Articles 77-79 TFEU) and the political or policy relationship, which sees Member States calling for solidarity on immediate matters of concern which would broaden the scope of Article 80. The Article itself is not necessarily always referred to in such calls, but is implied in any linking of solidarity and these issues. Nonetheless, the legal analysis contained in Chapter 1 of this Study suggests that it might be appropriate to examine whether Article 80 can be used to go beyond the explicit scope of Articles 77-79, extending solidarity and responsibility sharing to further border, asylum and immigration issues. The importance of external policy for immigration and asylum has been recognized by the Union, raising the question to what extent elements of solidarity and responsibility sharing should be governing principles in that policy area, too. Similarly, the Member States could be expected, in the areas where they maintain competence, to refrain from adapting measures that would affect EU policy and the solidarity required thereof.

The level at which solidarity is required or appropriate – whether bi-lateral, multi-lateral or pan-EU, was seen to depend very much on the precise issue at hand and, to some degree, on whether or not Article 80 is explicitly mentioned in a call for solidarity -the suggestion being that any link to Article 80 implies pan-EU activity.

Opinions expressed in Chapter 3, based on interviews, similarly differed on whether or not Article 80 TFEU is **applicable** only to the Union or also to the Member States. In the analysis in Chapter 1 it was shown that broader solidarity under Article 4 TEU applies to both the Union and the Member States.

Whether solidarity and responsibility sharing should be **voluntary or obligatory** was shown in Chapter 3 to depend, in the opinions of experts, on the precise subject matter (financial, training, patrols, relocation etc) and the nature of agreements. Many Member States would not agree to certain facets of solidarity in asylum and immigration being

obligatory, e.g. relocation, at this point, meaning that if there were to be directives or regulations in these areas, participation would need to be voluntary.

International actors such as UNHCR, IOM and possibly NGOs are seen as generally important to the implementation of policies in the areas covered by articles 77-79 TFEU, and thus to active solidarity, as well as natural advisors at all stages. However, they are not viewed to have any decision making or legislative role.

Financial instruments, legislation, and particularly its appropriate implementation, agencies such as Frontex and EASO have all been seen to be useful **tools** for advancing solidarity. However, there are questions for some, as demonstrated in Chapter 3 about whether centralized operations are an appropriate tool. The need for several and complementary tools was stressed.

In institutional terms, then, it is seen that there is little agreement on the extent and possibilities for solidarity. It is suggested on the basis of the research for this Study that for each instrument emerging in which solidarity under Article 80 is an issue, it be clearly established:

- a) The nature of the involvement of Member States required – whether voluntary or obligatory – and if voluntary, then the nature of the action as a pan-EU activity or a sub-group activity needs to be fully agreed upon;
- b) The range of tools that are to be employed to ensure solidarity is achieved;
- c) The role of international actors to be included in the implementation of the relevant policy or legislation.

Furthermore, the Member States and EU institutions involved in decision making on EU legislation in this area should carefully consider for each piece of legislation whether solidarity is really required – it is not an automatic given that there needs to be explicit language on solidarity in every piece of legislation under article 77-79 TFEU. However, if solidarity is needed, then all its aspects should be clearly set out as indicated above, and its relation to other legislation and activities should also be clearly thought through and made explicit. As harmonization deepens, solidarity in terms of cooperation is also likely to deepen, as is trust. These three factors, harmonization, solidarity and trust need to be kept in balance for both the policies and the institutions involved, in order to be most effective.

4.3. Specific policy areas

On specific issue areas within Articles 77 to 79, the following conclusions can be drawn and suggestions made based on the research for this Study:

Border control

A responsibility system in the field of border control should be based on concerns about collective stability/prevention and insurance, and should aim primarily to prevent causes of irregular entry (rather than consequences).

Similarly, the distribution principle should be based on reducing levels of irregular entry (and to a lesser extent compensating countries on grounds of equity). It should only cover direct costs related to border management – not subsequent costs of reception, etc. (except in cases of sudden influx).

In terms of the financial aspects, solidarity in the area of border controls could involve:

- (a) A Fund, such as a revised Borders Fund or
- (b) Transfers in kind, including capacity building.

In terms of joint operations, these should be coordinated by Frontex.

Although the distribution principle and aims focus on entry alone, solidarity in border control as such needs to be linked to questions of solidarity in other areas of asylum and immigration, including but not limited to, determination of status; returns of irregular migrants with no protection claim; integration of those legal entrants who exceed a Member States acknowledged or usual capacity; and support for Member States in border areas with sudden changes in the levels of arrivals in terms of their capacities to administer entry controls and status determination procedures.

One of the most pressing border management situations at the time of writing concerns arrivals from North Africa. With pro-democracy protest movements emerging across North Africa and into the Middle East, there have been significant arrivals of migrants from Tunisia in particular, largely focussed on the Italian island of Lampedusa. As one interviewee pointed out, such arrivals have occurred, and many boats have been lost at sea, in the spring of every year for almost a decade. The question for EU Member States collectively in 2011 is whether the arrivals, interceptions, and departures from Africa this year constitute more of the same, or a new situation. Italy has noted that the arrival of almost 16,000 Tunisians by the end of March 2011 is at least four times higher than the total number of immigrants arriving in Lampedusa in 2010, and compares to just 25 Tunisians arriving in that year.¹²¹ In announcing an agreement with Tunisia to “block refugees from heading to Italy and convince those in Italy to return”¹²² Italian Interior Minister Roberto Maroni said “We are getting ready in case the earthquake happening in Libya is followed by a human tsunami” using the metaphor of the Tohoku earthquake and tsunami of March 2011.

This very concrete and immediate example demonstrates the complexities of solidarity: in terms of interceptions (for control purposes and potentially to save lives) it is a border management problem, one that is focused on Italy but has the potential to impact the whole of the frontier-free Schengen area and the EU more broadly. Thus, Frontex is involved in the coordination of operations, and the situation receives a lot of attention. Italy is calling for assistance and Council meetings to discuss the arrivals – from its own point of view because it is in the frontline. One could more cynically ask (as one expert did in interview) whether Italy is not using the political momentum of the moment to try to get more support, and share the responsibility more broadly, than has happened in previous years.

However, the complexities go further into the question of whether the emerging migration and border ‘crisis’ from North Africa is not likely also to become a protection crisis. As NATO states, including many EU Member States, act to enforce UNSC Resolution 1973 and a no-fly zone in Libya, the humanitarian situation on the ground is at the forefront of discussion and the motives to act. In a humanitarian crisis, a border management issue quickly

¹²¹ See ‘Lampedusa migrant numbers prompt UN crisis warning’ The Guardian 21 March 2011, accessed 26 March 2011 <http://www.guardian.co.uk/world/2011/mar/21/lampedusa-migrant-italy>.

¹²² Italian officials cited in *Italy, Tunisia reach pact on refugees* UPI, 26 March 2011, accessed 26 March 2011, http://www.upi.com/Top_News/World-News/2011/03/26/Italy-Tunisia-reach-pact-on-refugees/UPI-40691301185779/#ixzz1HIDRCsQ7

becomes an asylum and/or temporary protection issue, and a form of solidarity with longer-term and more financially and socially demanding consequences faces Europe.

Asylum and protection

While asylum and protection are at the origin and heart of thinking and acting on solidarity in this area, the research for this Study leads to the conclusion that there is something of an impasse at present.

Two issues combine to create this impasse: relocation and suggestions of joint processing.

Concerns about relocation come in part from confusion about who should be relocated – refugees and/or asylum seekers, and can be summarized as flowing from two issues: 1) The idea of 'rewarding' a Member State which has difficulty in processing asylum seekers while it has not implemented the series of directives already agreed, or a Member State which is not working on integration effectively by taking away refugees; and 2) The idea that Member States and individual refugees or asylum seekers become 'obliged' to accept one another.

Meanwhile, on joint processing, concerns and confusions again appear to stem from the use of the term to mean various things, and so questions arise about whether this is: processing in a Member State or outside the Union; processing carried out under the 'host' Member State's jurisdiction or that of the officers conducting the processing; processing which leads to accepting the refugees or protected persons, where they fall within the definitions of the Qualification directive, for the 'host' Member State, for the officer's Member State or for the Union as a whole, with the latter two possibilities then giving rise to questions about relocation again.

A suggestion to cut through these issues might be to develop schemes thought through in advance, although based on past experience, rather than working on a case by case basis (as indeed was the process that led to the Temporary Protection Directive).

One could for example consider two schemes, which would, admittedly, require amendments to the existing European and national legislative framework.

Scheme 1 would apply to cases where an asylum system is not working, and a Member State has too many asylum seekers for its capacity, or is not (able to) implement(ing) the directives due to capacity and numerical issues. As a consequence, asylum seekers are making secondary movements leading to the application of the Dublin Regulation, but Dublin returns to the Member State in question become difficult to sustain.

For this type of scenario there could be a scheme whereby the Member State in question would call on EASO, and through EASO other Member States to assist with processing. Asylum officers from various Member States, under the auspices of EASO, would then process claims according to a pre-agreed EU procedure developed for these cases where officers from various Member States would conduct procedures for the EU as a whole, leading to acceptance or denial of an EU protection status. For people granted status, the 'host' Member State would be obliged to take an equivalent number of refugees to their accepted caseload averaged over the previous three years, plus a pre-determined percentage of the remainder (e.g. 30%). The other Member States involved in the case determination would then accept the remaining 70% according to a pre-agreed distribution key.

Scheme 2 would apply to cases where the asylum system is not in question, but where there are a number of accepted protection seekers who exceed a (small) Member State's capacity for integration. Under this scheme, a relocation programme such as EUREMA could be applied – however, work would then also be required on developing integration capacity, so that the numbers being relocated could be kept down, and the situation gradually resolved.

These suggested schemes are theoretical at this stage – a starting point for discussion. As noted in discussing border management, however, a potential need for solidarity in protection is seen in the developing situation of departures from North Africa.

In case of a mass influx of truly significant proportions, challenging the Mediterranean EU Member States' asylum decision-making systems, there could be a call on the Temporary Protection Directive – something that has not happened since it was adopted in 2001.

The Temporary Protection Directive provides for a rather loose form of solidarity. Under Article 25 of the Directive, it is provided that Member States will receive people for temporary protection "in a spirit of Community solidarity. They shall indicate – in figures or in general terms – their capacity to receive such persons." They will put this information in a Council Decision, and then notify the Council and Commission of their additional reception capacity beyond that – and all the information will be passed quickly to UNHCR. They will admit eligible people from outside the Community where relevant, and Member States will cooperate on the "transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned" according to Article 26. Member States will communicate requests for transfers to other Member States and notify the Commission and UNHCR.

The Temporary Protection Directive would be put to use on the basis of a Council Decision regarding a Commission proposal on a particular situation – including specification of the group(s) concerned and an estimate of the size of the flow.

The European Council Conclusions of 24/25 March 2011¹²³ included the statement that:

26. The European Council also looks forward to the presentation by the Commission of a Plan for the development of capacities to manage migration and refugee flows in advance of the June European Council. Agreement should be reached by June 2011 on the regulation enhancing the capabilities of Frontex. In the meantime the Commission will make additional resources available in support to the agency's 2011 Hermes and Poseidon operations and Member States are invited to provide further human and technical resources. The EU and its Member States stand ready to demonstrate their concrete solidarity to Member States most directly concerned by migratory movements and provide the necessary support as the situation evolves.

Until 25 March 2011, the migrants arriving on Lampedusa had been primarily Tunisians. Italian forces had turned back ships at sea during early March, but news reports indicated that a first boat from Libya, carrying some 300 people, primarily Ethiopians, Eritreans and Somalis, approached the island on 26 March.¹²⁴ This first arrival indicates that the

¹²³ European Council Conclusions, Brussels 25 March 2011:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf

¹²⁴ "First boat from Libya nears Italian shores" **9news** 27 March 2011, accessed 27 March 2011,

<http://news.ninemsn.com.au/world/8229177/first-migrant-boat-from-libya-nears-italian-shores>

protection situation coming from Libya is unlikely only to involve Libyan nationals: it will include people who were already transiting the country when the conflict broke out; third country nationals who had resided in Libya and either do not want to or cannot return to their countries of origin and potentially others who use the situation to make a precarious journey to the EU in the hope of achieving a status that could not have been obtained under other circumstances.

According to a European Commission official interviewed for this study, Member States that are most affected by mass influx are not always those asking for the activation of temporary protection, due to the fact that this would entail respecting the minimum rights accorded to temporarily protected persons. At a practical level, temporary protection would also require double solidarity: solidarity of the Member States to offer temporary protection and solidarity of the persons involved in moving to Member States where this protection is offered. According to the same official, referring to the events in North Africa in spring 2011, the Tunisian exodus cannot be considered to come within the scope of temporary protection; this is primarily a matter of irregular migration. Although many of these people may eventually apply for asylum, they do not meet the criteria of the groups for whom temporary protection is intended. However, in the event of a mass exodus of persons fleeing the Libya conflict or, via Libya, from Sub-Saharan countries, the conditions for temporary protection may then be met.

Other than temporary protection and use of the asylum system, including steps towards solidarity in terms of numbers, location and finances, recent history offers one other example of protection that the EU could offer – with Member States acting together in solidarity with one another – to third countries and people in humanitarian need, and slightly more distant history combines with recent developments to suggest a medium-term solution.

During the NATO intervention in Kosovo/Serbia starting in March 1999, a million people were displaced (either by Serb forces before and during the initial phase of air attacks on Serb positions, or by the bombardments themselves), and most sought shelter in neighbouring Albania and FYROM. EU Member States supported these two countries in their efforts to protect refugees themselves, and in the case of Macedonia also evacuated some 55,000 Kosovars under the Humanitarian Evacuation Programme (part of the motivation behind the Temporary Protection Directive).

Libyans and third country nationals have been seeking protection across the country's borders with Tunisia and Egypt. Both of these countries have recently seen peaceful revolutions, and themselves need support in achieving new stability. Significant support to those countries (with the necessary foreign policy caution relating to the relative newness of their governments, and ongoing changes to their political systems) and to UNHCR and its partners in establishing, operating and protecting refugee camps in those countries could help to contain the humanitarian situation and potential for departures in the short-term. Such support in conjunction with the ongoing NATO intervention based on the principle of protection of civilians within Libya may offer people a sufficient level of short-term assistance and protection to delay any attempt at a risky sea-crossing, particularly for those for whom return to Libya would be the most desirable durable solution.

If meaningful support were given to neighbouring states to protect displaced individuals, and every effort was made to defend the population of Libya, and yet the situation remains

unsafe over the short-term, a humanitarian evacuation programme could be needed. If the situation becomes protracted over the medium- to long-term, alternatives would eventually need to come into play to resolve the situation for the individuals and countries involved. In this case, the traditional solution employed over the last sixty years has been resettlement. Most EU Member States ceased significant participation in global resettlement between the mid-1980s and early 2000s. However, there has been increasing interest and involvement by EU Member States, and interviews for this study have shown quite widespread support for the development of an EU resettlement programme and expression of solidarity with each other and globally through resettlement activities. In cases of more protracted displacement, where a life in a camp, however well supported and safe, is not a solution, resettlement is one of the three traditional durable solutions. If events were to go that way, the EU could eventually participate in resettlement for Libyans – though that would be some years into the future.

In sum, the immediate situation requires, for the EU, consideration of the need for implementation of the Temporary Protection Directive, dependent on the pressures that emerge on Mediterranean Member States during Spring of 2011. In the short-term, the Temporary Protection Directive is likely to be the most useful ‘solution’, allowing EU Member States not only to protect people who cannot be returned to their country of origin or habitual residence in the short-term, but also as an extension of the humanitarian principles underpinning the UNSC Resolution 1973 and as a test of the EU’s first Directive in the area of asylum, which has not yet been acted upon.

Serious and significant support to Tunisia and Egypt, not to ‘block’ refugees but to protect displaced persons should also be offered. Over the longer-term the EU would need to look to acting on emerging interest in resettlement.

Rights of third country nationals residing legally in Member States

The system should be based on concerns about collective stability/inter-ethnic relations; and a desire to limit “country-shopping” for better rights and benefits where third country nationals have more extensive mobility rights.

Solidarity in this area of immigration and integration policy should aim primarily to address the causes of disparities in provisions between Member States, and to bring standards up to a level that addresses stability concerns. Thus the main tool would be convergence of legislation (at a higher standard). This is based on similar arguments to those applying to asylum harmonization (create a level playing field, especially given the possibilities of free movement between Member States).

There may be an argument for supplementary support for countries with less developed structures for guaranteeing the rights and benefits of third country nationals. This would cover direct costs, with distribution through a fund (currently the Integration Fund) to support specific programmes.

There is no convincing argument for responsibility sharing based on numbers of third country nationals (given host country responsibility, plus the fact that immigrants may be beneficial as well as costly).

Nevertheless, solidarity may come into picture when looking at immigration on a more global scale. Particularly in the context of external relations and in attracting immigrants to the European Union, solidarity between the EU and the Member States may be necessary.

Finally, policy created in solidarity within the EU and between Member States has to remain fair to third country nationals and citizens alike.

Illegal immigration and unauthorised residence

The system should be based on concerns about the collective goal of reducing irregular migration, especially in 'new' immigration countries with less developed policies and practices on migration control. Arguments that harmonisation will reduce disparities in levels of irregular migration between countries are less convincing.

Responsibility sharing should relate to the costs of bringing up national measures on employer sanctions to conform to EU minimum standards, as set out in the Sanctions Directive, or possible future legislation introducing more stringent measures.)

It is less likely that a responsibility sharing system would be appropriate for other areas of internal control (access to education, health, welfare, etc.) since these are more critical for basic welfare and human rights – and would thus be more problematic to make the object of measures to step up control.

The system of solidarity in this area should cover direct costs incurred by states in implementing sanctions, though it may also be implicitly recognised that there is a broader set of costs associated with reducing the level of irregular employment (though this would not be a legitimate object for compensation).

The system could take the form of redistribution of financial resources to authorities implementing employer sanctions; or "in kind" assistance with capacity building.

Combating trafficking in persons

Responsibility sharing should offer support both for victims, and for the identification/prosecution of perpetrators. The third area we have identified in Chapter 2 – that of prevention – fits the more classic model of collective EU financing of measures falling under external policy.

In both cases (victims and perpetrators), the main rationale for responsibility sharing would be to meet common EU goals – humane treatment of the victims of human rights abuse; and of reducing the instance of trafficking across the EU. There are no plausible arguments based on insurance, or the goal of reducing country-shopping. In the case of support for victims, any sharing of costs should be targeted based on the concern to maximise the welfare of victims.

In the case of identifying and prosecuting perpetrators, the criteria for channelling resources should be based on concern to maximise apprehension and prosecution of perpetrators. However, special consideration may also be given based on the challenges and resources faced by the Member State (e.g. particular vulnerability as a transit country because of geographical situation, and low GPD per capita). Thus one can envisage a mixture of outcome- and justice-based criteria for distributing the burden.

In both cases, costs are likely to be direct. At present, the question of supplementary and minimum costs does not arise, but could potentially arise in the case of support for victims of trafficking in comprehensive EU legislation is adopted in the area.

Support for victims of trafficking is likely to be provided through financial transfer, targeted at governmental bodies and NGOs. Support in the fight against perpetrators may take the form of either financial or in kind transfers.

Integration of third country nationals

Integration measures are not an obvious candidate for burden sharing or solidarity, for a number of reasons. First, it is difficult to quantify the costs involved in integration, or quantify disparities in the levels of costs faced by different states. Thus it makes little sense to think about possible fluctuations in the distribution of costs in particular Member States over time, so it is not an obvious candidate for an insurance system. Second, it is unlikely that transfers of resources between states to support integration measures will have a significant impact on the scale of the problem in host countries. Indeed, the impact of integration measures on integration may be indirect and diffuse, and only one of many factors in shaping processes of integration. Third, EU common policies are insufficiently developed to imply additional costs for Member States, so it is not clear that a responsibility sharing system should be introduced to help alleviate burdens linked to EU measures.

Having said this, there may be a good case for (increased) burden sharing of the costs linked to integration programmes as a means of promoting the collective goal of good inter-ethnic relations across the EU. Such a rationale would imply supporting integration programmes across the EU, in order to achieve the shared goal of social cohesion. A distribution system might also aim to compensate countries facing particular challenges with integration because of a lack of infrastructure or experience, and/or a low GDP per capita.

Such a responsibility sharing scheme would take the form of financial transfers to cover direct costs associated with a range of possible measures and programmes. These possible measures and programmes would conform to guidelines set out by the EU (although with scope for variations based on national socio-cultural conditions).

In the longer-term, it is possible that Member States might support some forms of policy convergence (beyond what is being adopted in the areas of anti-discrimination and rights of third country nationals). In that case, Member States might think about (upward) harmonisation of certain provisions as a means of creating a level playing field between states regarding the standard of treatment afforded to third country nationals.

Concluding remarks

The purpose of this report has been to identify and assess the implications, scope and perspectives of Article 80 TFEU.

It has been seen that there is currently relatively little agreement on the implications, scope and perspectives of Article 80 TFEU, although there is much thinking and careful consideration, and a sense that cooperation on these issues is vital for the success not just of border, asylum and immigration, but also of the EU as a whole. The removal of internal frontiers is one of the major 'success stories' of the EU for its citizens and businesses. The oil that keeps this success going is the ability to cooperate and trust fellow Member States in managing borders, assessing status and integrating third country nationals who are legally resident, and thus the ultimate implication of, and perspective for Article 80 TFEU is that the principle behind it, solidarity, has to be made to work.

ANNEX I: LIST OF PEOPLE INTERVIEWED*

(*Face-to-face, by telephone or in writing)

Kaspars Abolins	Head of the European Affairs Division, International Cooperation and European Affairs Department, Ministry of the Interior, Latvia
Richard Ares Baumgartner	Senior External Relations Officer, Frontex
Mariusz Boguszewski	JHA Counsellor, Permanent Representation of Poland to the European Union
Dirk Van den Bulck	Commissioner General for Refugees and Stateless persons, Belgium
Simon Busuttil	Member of the European Parliament (LIBE Committee)
Stijn De Decker	JHA Counsellor, Asylum and Migration, Permanent Representation of Belgium to the European Union
Peter Diez	Deputy Director of Migration Policy, Ministry of the Interior and Kingdom Relations, The Netherlands
Lars-Erik Fjellström	Desk Officer, Division for Migration and Asylum Policy, Ministry of Justice, Sweden
Renato Franceschelli	Director of International Affairs, Department for Civil Liberties and Immigration, Ministry of the Interior, Italy
Madeline Garlick	Head of the Policy and Legal Support Unit, Bureau for Europe, United Nations High Commissioner for Refugees (UNHCR),

Belgium

Muriel Guin	Head of Unit B.2 (Asylum), DG Home Affairs, European Commission
Bernd Hemingway	Regional Representative of the International Organization for Migration to the European Union, Belgium
Christophe Jansen	Head of the International Relations Unit, CGRS (Commissariat-General for Refugees and Stateless Persons), Belgium
Rob Jones	Head of Asylum Policy, UK Border Agency, United Kingdom
Henrik Nielsen	Head of Unit C.1 (Border Management and Return Policy), DG Home Affairs, European Commission
Kris Pollet	Senior Legal and Policy Officer, European Council on Refugees and Exiles (ECRE)
David Saville	Head of EU Team, Asylum Policy division, UK Border Agency, United Kingdom
Diane Schmitt	Head of Unit B.1 (Immigration and Integration), DG Home Affairs, European Commission
Joseph St. John	Director, Policy and Planning, Ministry for Justice and Home Affairs, Malta
Sanna Sutter	Senior Adviser, Migration Department, Ministry of the Interior, Finland
Josette Zerafa	Director, EU Affairs, Ministry for Justice and Home Affairs, Malta

* Officials interviewed for this study spoke in their capacity as experts, and did not necessarily provide a national position, or one reflecting current government or organizational policy.

ANNEX II: QUESTIONNAIRE ADMINISTERED TO MEMBER STATE OFFICIALS

Introduction and instructions

Article 80 TFEU states that: the policies on border checks, asylum and immigration and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.

This questionnaire is divided into four sections relating to 1) General institutional issues; 2) Border checks; 3) Asylum and protection and 4) Immigration. The purpose of the questions is the identification of the opinions in your Member State/organization or at least the tendencies therein.

The questions on the institutional framework relate to the significance of Article 80 for the EU and for the Member States, the tools for solidarity and sharing of responsibility and the role of other international actors.

Questions in the subsequent three sections address the implications and scope of Article 80 TFEU (goals, purposes, costs and benefits); its scope as regards the relationship between national, multilateral and European action; the position on existing policy measures; the perspectives on new measures and the financial implications, both current and future, of the implementation of Article 80.

1. Institutional Framework

1.1 What is the significance of Article 80 TFEU and its relation to Articles 77 to 79 TFEU?

Q1: Are these principles limited to the spheres and matters mentioned in Articles 77 to 79 TFEU, or could they serve to broaden the application of those Articles or have an autonomous application?

Q2: Does Article 80 form an impediment for the adoption of EU legislation or the establishment of EU programmes if the proposed measures do not or not sufficiently take into account solidarity and fair sharing of responsibility?

Q3: Can solidarity and fair sharing of responsibility be explored at bilateral or multilateral level as well?

1.2 What are the State obligations under Article 80 TFEU?

Q4: Are these principles applicable only to the Union or also to the Member States in the implementation of matters coming under or possibly affecting EU policies on border checks, asylum and immigration?

Q5: To what extent does your Member State consider that Member States are under a duty to respect these principles and to participate/contribute to the implementation: should solidarity and responsibility sharing exist on a voluntary or on an obligatory basis?

Q6: Would your Member State consider the non-participation (*de jure* or *de facto*) by a Member State in sharing responsibility or solidarity to constitute a breach of a Member State's treaty obligations under the TFEU?

1.3 Which tools may ensure solidarity and fair sharing of responsibility?

Q7: Which of the following tools are in general considered as beneficial for ensuring solidarity and fair sharing of responsibility and to what extent:

- adoption and common application of rules/practices;
- financial solidarity (direct or indirectly);
- central support;
- centralised operation?

1.4 What is the role of other international actors?

Q8: Can solidarity and a fairer sharing of responsibility also be achieved via actions of other international actors like UNHCR and IOM? Is there a role for them in EU policy development? To what extent does solidarity and sharing of responsibility also pertain to the external relations of the EU?

2. Border checks

2.1 Implications of Article 80: purposes and goals of fair sharing of responsibility and solidarity

Q9: Does your state perceive that from its own perspective responsibility related to border policy is being fairly shared across the EU – and if not, does this mean that your Member State should be doing more or less? (define 'fair sharing')

Q10: What is the purpose of Article 80 with regard to Border Checks: cost redistribution, cost reduction or other purposes?

Q11: What have been the major benefits of burden sharing in border issues to date, in general and for your state in particular?

Q12: In which specific contexts have benefits arisen?

Q13: Are the benefits your state has seen mainly financial or political or some other benefits?

Q14: Are the benefits played out domestically, or for your state in its actions at the EU level or do you perceive them as general benefits for the EU, whether or not they have direct impact on your state?

Q15: What have been the major costs (not necessarily financial) of burden sharing to date, in general and for your state in particular?

Q16: In which specific contexts have costs arisen?

Q17: Are the costs your state perceives mainly financial or political or some other costs?

Q18: Are the costs primarily domestic costs, or for your state in its actions at the EU level or do you perceive them as general costs impacting the EU, whether or not they have direct impact on your state?

2.2 Scope of article 80: national action, bi/multilateral action, EU action

Q19: Does your Member State consider that article 80 means that pan-EU solidarity is required, or that, considering the principle of subsidiarity, Member States facing what they perceive to be unfair burdens or responsibilities, having tried to manage alone, should turn first to multi-lateral measures with a small, relevant and voluntarily committed group of Member States, possibly in cooperation with other international organisations?

Q20: Institutionally, how does your Member State consider that solidarity can most effectively be achieved: through common adoption and application of legislation, through Council decisions; via agencies such as Frontex; through coordination; via the Commission?

2.3 Existing policy measures involving border checks

Q21: Is your State satisfied with the working of Frontex to date?

Q22: Which existing policy measures involving solidarity on border checks are satisfactory to your Member State?

2.4 Perspectives for new measures

Q23: What are the needs for solidarity and sharing of responsibility as regards border checks in your Member State?

Q24: How does your Member State see the development of Frontex in terms of means (more means/staff/equipment) and autonomy?

2.5 Financial implications of solidarity and responsibility sharing

Q25: Does your Member State keep records specifically on the financial implications of burden sharing on border checks?

Q26: If yes – what is the balance?

Q27: If not, what is the perception of the financial implications of solidarity measures currently?

Q28: Is your Member State satisfied with Frontex, the External Borders Fund and other financial mechanisms at the EU level relating to border management?

Q29: What are the expectations for the financial implications of solidarity and responsibility sharing on border protection for your Member State? Do you expect net gains or net losses generally?

Q30: What is your Member State's evaluation of the existing funding criteria?

Q31: How heavily do the financial implications weigh in your State's decision to pursue or avert particular policy decisions at the EU level on asylum and protection?

3. Asylum

3.1 Implications of Article 80: purposes and goals of fair sharing of responsibility and solidarity

Q32: Does your state perceive that from its own perspective responsibility related to asylum policy is being fairly shared across the EU – and if not, does this mean that your Member State should be doing more or less?

Q33: What is the purpose of Article 80 with regard to asylum: cost redistribution, cost reduction or other purposes?

Q34: What have been the major benefits of burden sharing in asylum issues to date, in general and for your state in particular?

Q35: In which specific contexts have benefits arisen?

Q36: Are the benefits your state has seen mainly financial or political or some other benefits?

Q37: Are the benefits played out domestically, or for your state in its actions at the EU level or do you perceive them as general benefits for the EU, whether or not they have direct impact on your state?

Q38: What have been the major costs (not necessarily financial) of burden sharing to date, in general and for your state in particular?

Q39: In which specific contexts have costs arisen?

Q40: Are the costs your state perceives mainly financial or political or some other costs?

Q41: Are the costs primarily domestic costs, or for your state in its actions at the EU level or do you perceive them as general costs impacting the EU, whether or not they have direct impact on your state?

3.2 Scope of article 80: national action, bi/multilateral action, EU action

Q42: Does your Member State consider that article 80 means that pan-EU solidarity is required, or that, considering the principle of subsidiarity, Member States facing what they perceive to be unfair burdens or responsibilities, having tried to manage alone, should turn first to multi-

lateral measures with a small, relevant and voluntarily committed group of Member States, possibly in cooperation with other international organisations?

Q43: Institutionally, how does your Member State consider that solidarity can most effectively be achieved: through common adoption and application of legislation, through Council decisions; via agencies such as Frontex; through coordination; via the Commission?

3.3 Existing policy measures involving solidarity on asylum and protection

Q44: Is your State satisfied with the working of the EASO to date?

Q45: Which existing policy measures involving solidarity on asylum and protection are satisfactory to your Member State?

3.4 Perspectives for new measures

Q46: The Asylum Policy Plan points to differences in recognition rates as a result of differing practices in spite of some degree of legislative harmonization. Is your Member State ready to consider solidarity in case determination, such as joint processing? If yes, why, and how, and if not, why not, and what degree of solidarity in this area would be acceptable?

Q47: What level of solidarity does your State consider appropriate in relation to the Resettlement proposal?

Q48: Does your Member State consider it appropriate to complement Dublin (which is not intended as a responsibility sharing system) with a burden sharing system? Should such a system include the relocation of asylum seekers and/or people with a protection status? If so, what kind of criteria would your State like to see – how voluntary (or not) should it be for individuals and/or Member States?

Q49: To what extent is there concern in your State that extending solidarity and responsibility sharing might result in the EU, and your state in particular, becoming a more (or less) attractive destination for asylum seekers ie that responsibility sharing through any mechanism (relocation; financial; joint processing) might increase the 'pie' that is being shared, or increase your State's share and role?

3.5 Financial implications of solidarity and responsibility sharing

Q50: Does your Member State keep records specifically on the financial implications of burden sharing on asylum and protection matters (expenditure and/or income/savings)?

Q51: If yes – what is the balance?

Q52: If not, what is the perception of the financial implications of solidarity measures currently?

- Q53: Is your State satisfied with the current European Refugee Fund and other financial mechanisms at the EU level relating to asylum and protection?
- Q54: What are the expectations for the financial implications of solidarity and responsibility sharing on asylum and protection for your Member State? Do you expect net gains or net losses generally?
- Q55: Are there any specific measures, existing, proposed or mooted, that your Member State sees as either probable financial gains or losses for your budget?
- Q56: What is your Member State's evaluation of the existing funding criteria?
- Q57: How heavily do the financial implications weigh in your State's decision to pursue or avert particular policy decisions at the EU level on asylum and protection?

4. Immigration: visa, conditions of entry and residence, rights of TCN, combating illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation, combating trafficking in persons, in particular women and children

4.1 Implications of Article 80: purposes and goals of fair sharing of responsibility and solidarity

- Q58: Does your state perceive that from its own perspective responsibility related to immigration policy is being fairly shared across the EU – and if not, does this mean that your Member State should be doing more or less?
- Q59: What is the purpose of Article 80 with regard to the above mentioned policy areas of immigration: cost redistribution, cost reduction or other purposes?
- Q60: What have been the major benefits of burden sharing in immigration issues to date, in general and for your state in particular?
- Q61: In which specific contexts have benefits arisen?
- Q62: Are the benefits your state has seen mainly financial or political or some other benefits?
- Q63: Are the benefits played out domestically, or for your state in its actions at the EU level or do you perceive them as general benefits for the EU, whether or not they have direct impact on your state?
- Q64: What have been the major costs (not necessarily financial) of burden sharing to date, in general and for your state in particular?
- Q65: In which specific contexts have costs arisen?
- Q66: Are the costs your state perceives mainly financial or political or some other costs?

Q67: Are the costs primarily domestic costs, or for your state in its actions at the EU level or do you perceive them as general costs impacting the EU, whether or not they have direct impact on your state?

4.2 Scope of article 80: national action, bi/multilateral action, EU action

Q68: Does your Member State consider that article 80 means that pan-EU solidarity is required, or that, considering the principle of subsidiarity, Member States facing what they perceive to be unfair burdens or responsibilities, having tried to manage alone, should turn first to multi-lateral measures with a small, relevant and voluntarily committed group of Member States, possibly in cooperation with other international organisations?

Q69: Institutionally, how does your Member State consider that solidarity can most effectively be achieved: through common adoption and application of legislation, through Council decisions; via agencies such as Frontex and EASO; through coordination; via the Commission?

4.3 Existing policy measures involving solidarity on immigration

Q70: Which existing policy measures involving immigration are satisfactory to your Member State?

4.4 Perspectives for new measures

Q71: What are the needs for solidarity and sharing of responsibility as regards immigration in your Member State?

Q72: How does your Member State see the development of the Integration Fund and the Return Fund in terms of means and autonomy?

4.5 Financial implications of solidarity and responsibility sharing

Q73: Does your Member State keep records specifically on the financial implications of burden sharing on immigration matters (expenditure and/or income/savings)?

Q74: If yes – what is the balance?

Q75: If not, what is the perception of the financial implications of solidarity measures currently?

Q76: Is your State satisfied with the current Integration Fund, Return Fund and other financial mechanisms at the EU level relating to the above mentioned policy areas of immigration?

Q77: What are the expectations for the financial implications of solidarity and responsibility sharing on immigration for your Member State? Do you expect net gains or net losses generally?

- Q78: Are there any specific measures, existing, proposed or mooted, that your Member State sees as either probable financial gains or losses for your budget?
- Q79: What is your Member State's evaluation of the existing funding criteria?
- Q70: How heavily do the financial implications weigh in your State's decision to pursue or avert particular policy decisions at the EU level on asylum and protection?

ANNEX III: QUESTIONNAIRE ADMINISTERED TO EU INSTITUTIONS AND INTERNATIONAL ORGANISATIONS

The Principles of Solidarity and Fair Sharing of Responsibility in Article 80 TFEU

Article 80 TFEU states that the policies of the Union concerning border checks, asylum and immigration, as well as their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.

The question of solidarity and fair sharing of burdens are evoked frequently, especially for the Member States with the eastern and southern borders of the European Union. In the absence of internal border checks, immigrants – legal and illegal – can move freely once inside the EU. Failures at the external borders or unilateral moves like mass naturalisations have consequences for the rest of the European Union. There are causes for concerted action and the sharing of burdens.

The Study commissioned by DG IPOL, Policy Department, Citizens' Rights and Constitutional Affairs of the European Parliament, seeks to evaluate the implications and perspectives of the new Article 80 and to provide ideas on possible implementation modes to make the principle of solidarity effective.

A. Institutional issues for ensuring solidarity and fair sharing of responsibility

- Article 80 TFEU is applicable to all areas of migration, asylum and border control referred to in Articles 77 to 79 TFEU.
 - Are these principles limited to the spheres and matters mentioned in Articles 77 to 79 TFEU, or could they serve to broaden the application of those Articles?
 - Are these principles applicable only to the Union or also to the Member States in the implementation of matters coming under, or possibly affecting EU policies on border checks, asylum and immigration?
- What are the possible tools to ensure solidarity and fair responsibility? In existing literature, different suggestions have been made:
 - common application of rules/practices
 - financial solidarity (direct or indirectly)
 - central support
 - centralised operation

Which of these could be useful for the EU?

- To what extent are Member States under a duty to respect these principles and to participate/contribute to their implementation? Should solidarity and responsibility sharing exist on a voluntary or on an obligatory basis? What is the feasibility of such options, in your opinion?
- At EU level, what are the most promising tools to ensure solidarity and the sharing of fair responsibility?

- legislative instruments
 - the use of agencies
 - funding schemes
- What can be the role of other international actors (IOM, UNHCR, NGOs) in the field of migration and asylum in contributing to more solidarity and a fairer sharing of responsibility?

B. Specific policy areas

- Which opportunities and needs on solidarity and responsibility sharing would you identify in the following policy areas covered by the TFEU?
 - Visa and document policy
 - External border controls and management
 - Asylum and subsidiary protection procedures
 - Reception of asylum and subsidiary protection seekers
 - External cooperation with regard to asylum, subsidiary and temporary protection
 - Provisional measures in the case of sudden inflow
 - Entry, residence, long term residence, family reunification, rights of TCN
 - Prevention of illegal immigration
 - Removal and repatriation policy
 - Combating of trafficking in human beings
 - Integration policies.

C. Financial aspects

- What are, in your opinion, the financial needs that burden border, asylum and immigration policies and require a renewed approach based on solidarity and responsibility sharing?

D. Other concerns

- Are there other concerns that you would like to identify?

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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