

EDITORIAL COMMENTS

From eurocrisis to asylum and migration crisis: Some legal and institutional considerations about the EU's current struggles

Nature and depth of the crisis

The current First Vice President of the European Commission, Frans Timmermans, recently summarized the root cause of the unprecedented massive influx of Syrian refugees to the EU since the summer as follows:

“There is a hell on earth. It is called Syria. The fact that millions of people try to flee from that hell is understandable. The fact that they try to stay as close to their home as possible is also understandable. And it is self-evident that they try to find safe shelter somewhere else if that doesn't work. Millions of Syrians have left their country and stay in neighbouring countries such as Lebanon, Jordan and Turkey, sometimes for many years. Some are in big refugee camps, but many more are in ordinary cities and villages. They hope for a swift return. But as the war continues, hope fades. Currently there are almost no safe areas left in Syria. More and more people are fleeing. The situation in neighbouring countries offers little or sometimes no hope. So people look for a safe haven [via Turkey which shelters itself already more than 2 million refugees] in Europe. The problem will not solve itself. The influx of refugees will not stop as long as the war continues. Much has to be done to end this conflict, and the whole world will have to be involved. Meanwhile, we have to make every effort to manage the flow of refugees, to offer people a safe place to stay, in the region, in the EU and in the rest of the world.”¹

If large parts of the population in EU Member States are losing confidence not only in their national governments but also in the EU institutions, as many opinion polls indicate, it is precisely because of their declining confidence in the ability of these public authorities to manage the massive flows of refugees and other persons in need of international protection, who entered the EU earlier this year via the Central Mediterranean route, but who now do so essentially via the Western Balkan route. Moreover, they lack confidence in the public authorities' ability to effectively return third country nationals who are not in need of such protection. Experience shows that persons originating from Syria, Iraq, Afghanistan and Eritrea have, in line with the relevant EU

1. Letter of First Vice President Frans Timmermans to the S & D group in the European Parliament of 21 Oct. 2015, available at <www.socialistsanddemocrats.eu>.

legislation and the Geneva Refugees Convention, an average recognition rate of more than 75 percent when seeking asylum in EU Member States, whereas that rate is much lower for persons originating from e.g. Pakistan, Senegal, Niger or Mali who also have entered the EU in large numbers over the last months. Experience also shows that both categories make use of very well-organized international networks of smugglers to reach their destination in the EU.²

The two charts reproduced below, published by Frontex, give a clear picture of the formidable management tasks which the public authorities in the EU have been facing along the Western Balkan route since January 2015.

Winter is approaching and news is spreading that the EU is taking and implementing a series of measures in order to control these flows better, e.g. by tripling its military presence on the Mediterranean Sea in order to tackle smugglers and dismantle human trafficking groups,³ rolling out “hotspots”,⁴ increasing reception capacity to 100,000 persons in Greece and other Western Balkan countries, relocating 160,000 and resettling 22,000 persons in need of international protection,⁵ stepping up enforcement of the Returns Directive

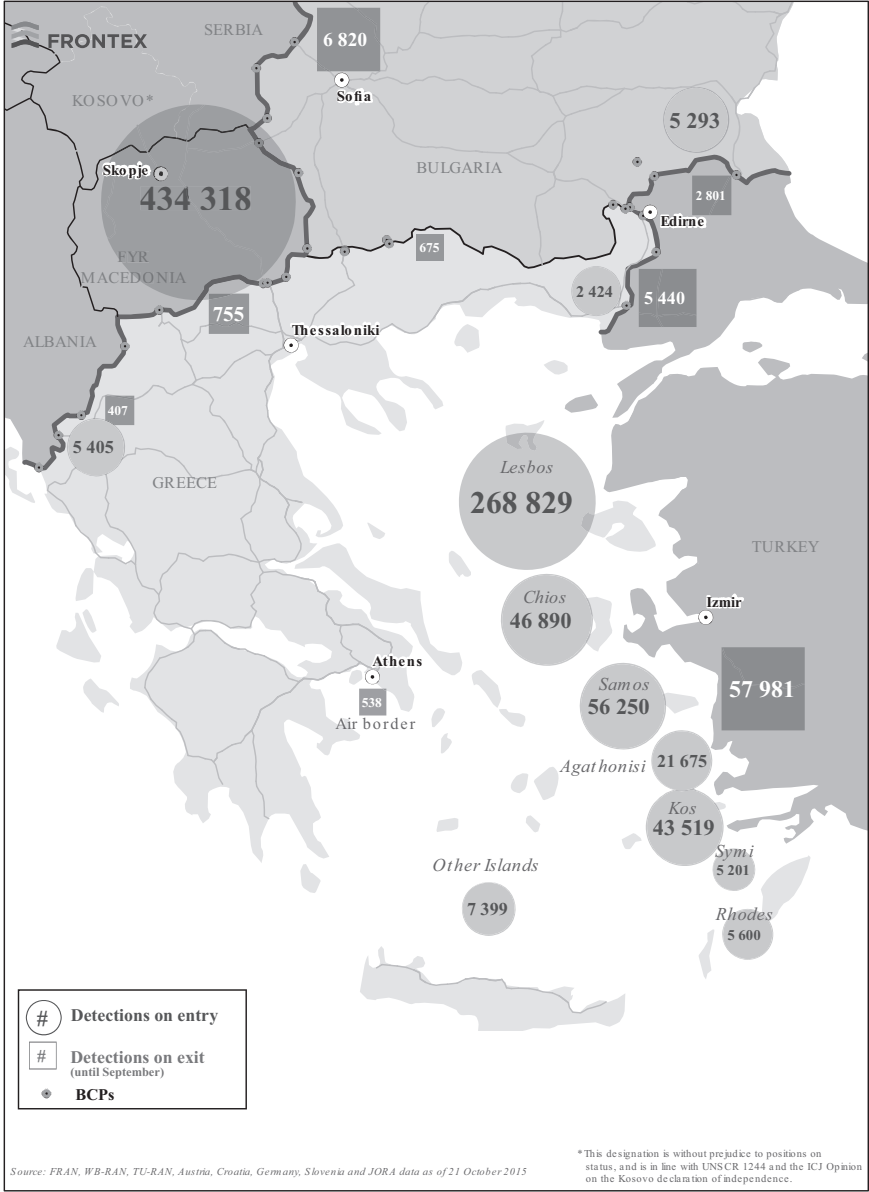
2. See the various recent UNHCR reports on human trafficking available at <www.unhcr.org>.

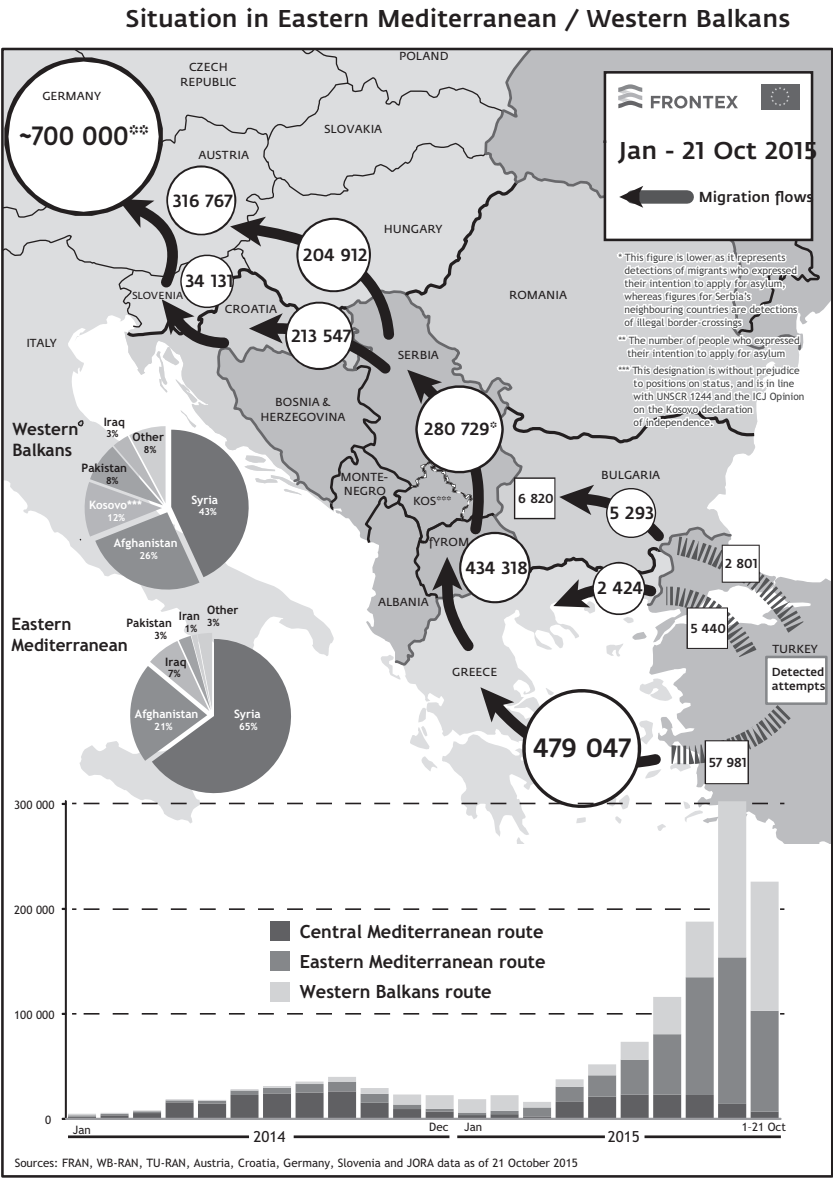
3. On 22 June 2015 a crisis management operation (EUNAVFOR MED) was launched to fight smuggling activities in the Southern Central Mediterranean, enabling the EU naval operation to conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, within international law. On 14 Sept. 2015, Member States agreed to move to the second, operational phase, after a first, information gathering phase. See Council Decision (CFSP) 2015/778 of 18 May 2015, O.J. 2015, L 122/31.

4. A “hotspot” is an area at the external border that is confronted with disproportionate migratory pressure. It is here where the EU, through the agencies Frontex, the European Asylum Support Office (EASO) and Europol – united in so-called Migration Management Support Teams – under the control of the host Member State, provides operational support to ensure that arriving migrants are registered, and to avoid them moving on to other Member States in an uncontrolled way.

5. See *infra* text at footnotes 38 and 39. “Relocation” means a distribution among Member States of persons in clear need of international protection. The instrument is based on Art. 78(2) and (3) TFEU, which allows the Council to adopt emergency measures if one or more Member States are confronted by an emergency situation characterized by a sudden inflow of third country nationals. It implies a temporary derogation from Regulation (EU) 604/2013 determining the responsible Member State for processing an application for international protection. See for a commentary: Peers, “Relocation of asylum-seekers in the EU: Law and policy”, available at <www.Eulawanalysis.blogspot.be/2015/09/relocation-of-asylum-seekers-in-eu-law.html>. “Resettlement” means the transfer of individual displaced persons in clear need of international protection, on submission of the UNHCR and in agreement with the country of resettlement, from a third country to a Member State. Following up a Recommendation of the European Commission for a European resettlement scheme, the conclusions of representatives of Member States, meeting in the Council, on 20 June 2015 concerning such a scheme in favour of 22,504 persons, available at <www.consilium.europa.eu/en/meetings/jha/2015/07/20>.

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and other key asylum and migration legislation,⁶ hardening its approach to readmission agreements with third countries,⁷ preparing legislation in order to create a common border and coastal guard,⁸ and concluding a joint action plan with Turkey on the management of migration.⁹ As a result, the movement of refugees and third country irregular migrants towards the EU and, within the EU, from its southern and central European Member States (in particular Greece, Croatia, Slovenia, Austria, Hungary) to the northern Member States (in particular Germany, Sweden,¹⁰ Finland and the Benelux) have increased and accelerated, thus putting further strain on the already tense societies of these Member States.

As was the case during the sovereign debt crisis which surfaced in 2010, the issue of the EU's managing capacity and the related question of the availability of adequate instruments are at the core of the public debate about the asylum and migration crisis. Some have gone as far as considering both crises existential. They compare the disarray prevailing in February 2010, when an increasing number of Member States no longer had access to capital markets and therefore experienced great difficulty in servicing their sovereign debt under reasonable conditions, which in turn threatened to destabilize their public sector and economy and ultimately the euro zone and the EU's internal market as a whole, with the situation prevailing in October 2015, when e.g. a Member State like Greece faced a flow of 6,000 refugees a day and Slovenia a daily number equal to 0.6 percent of its population, creating obvious threats to its public order and security. Further downstream, similar threats prompted Hungary to erect fences at its external border with Serbia, whilst Germany (expecting at least 800,000 new migrants to cross its borders this year, i.e. an increase of 1% of its population) and Austria opted for the temporary reintroduction of controls at their internal borders (i.e. their borders with other Schengen Member States) and prolonged that measure several times on the

6. See the Commission's Communication of 13 May 2015, "A European Agenda on Migration", COM(2015)240; see for an overview the Commission Communication "Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration", COM(2015)510 of 14 Oct. 2015.

7. See Commission action plan on return, COM(2015)453 of 9 Sept. 2015, Commission Communication "Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration", COM(2015)490 of 29 Sept. 2015 and Commission Communication "Managing the refugee crisis: State of Play ...", cited previous footnote.

8. See Commission Work Programme 2016, COM(2015)610 of 27 Oct. 2015.

9. See *infra* footnote 41.

10. Sweden expects the arrival of 160,000 migrants this year, i.e. an increase of 1.6% of its population, and, after Greece and Italy, has therefore asked on 3 Nov. 2015 to benefit from the recently adopted EU relocation scheme.

basis of Articles 23–25 of the Schengen Borders Code.¹¹ In its recently issued Opinion, the Commission accepted the necessity and proportionality of the German and Austrian measures.¹² Nevertheless, pessimists fear that what is now temporary will become permanent and have a knock-on effect on other Schengen Member States, which could jeopardize the Schengen *acquis*. They fear that this, in turn, could become a prelude for a collapse of the Internal Market and ultimately even of the EU as a whole.¹³

Solidarity and responsibility

The rescue operations which have been carried out since 2010 in order to stabilize the euro area are firmly based on two principles: solidarity and responsibility. Clear elements of solidarity can be found in the Treaty establishing the European Stability Mechanism,¹⁴ and elements of discipline are at the basis of the Treaty on Stability, Coordination and Governance in the EMU (the “Fiscal Compact”), which partially duplicated, partially reinforced the revamped Stability and Growth Pact.¹⁵ Since May 2015, a similar approach can be discerned in the way the EU and its Member States are trying to contain the asylum and migration crisis. This is not so surprising if one realizes that both crises have in common that any systemic deficiency in terms of one or more Member States’ compliance with the ground rules underpinning the EMU, respectively asylum and migration policy, has an immediate spill-over effect on other Member States’ ability to comply with these rules, ultimately undermining each of the policies as a whole. In the current crisis, therefore, the decision to step up the enforcement of two key sets of rules, that is to say those governing the Common European

11. See Chapter II (“Temporary reintroduction of border control at internal borders”) of Regulation (EC) 562/2006 (“Schengen Borders Code”), O.J. 2006, L 105/1.

12. See European Commission press release No IP/15/5900 of 23 Oct. 2015.

13. See e.g. *Financial Times* of 4 Sept. 2015: “EU refugee crisis: End of an ideal” and *The Guardian* of the same date: “This refugee crisis is too big for Europe to handle – its institutions are broken”. Compare also *Der Spiegel* of 15 Sept. 2015: “EU-Innenminister ohne Konzept: EU in der Sinnkrise”.

14. Which follows up a range of pre-existing bilateral aid schemes, the European Financial Stability Mechanism Regulation (EFSM) and the European Financial Stability Facility (EFSF). See e.g. de Witte and Beukers, case note on Case C-370/12, *Pringle*, 50 CML Rev., 805–848.

15. Following the adoption in 2011–2012 of a series of EU measures aimed at creating a new regulatory framework for a strengthened economic governance of the Union (the so-called “six + two pack”). See e.g. de Witte and Beukers, *ibid.*, and De Gregorio Merino, “Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance”, 49 CML Rev., 1613–1645.

Asylum System¹⁶ and the Schengen Area,¹⁷ clearly has the aim of increasing discipline on EU Member States. At the same time, the decisions to adopt relocation and resettlement schemes combined with the activation of the Civil Protection Mechanism and emergency funding¹⁸ are to be seen as expressions of solidarity,¹⁹ insofar as they aim at alleviating the burden stemming from the two earlier mentioned sets of disciplining rules. Of course, one may wonder how to categorize the rules activating the Rapid Border Intervention Teams (RABIT) assisting national border guards, and the Migration Management Support Teams (MMST), working in “hotspots”, which the EU puts at the disposal of Member States facing disproportionate migratory flows via the European Asylum Support Office (EASO) and Frontex. Although these teams, composed mainly of seconded national officials, assist such Member States in complying with disciplining instruments, they are increasingly perceived by those same Member States as a variant of the *troika* in the context of the EFSM/EFSF/ESM and therefore as unduly interfering with their

16. The main components of the Common European Asylum System (“CEAS”) are the following: the Asylum Procedures Directive harmonizes asylum procedures and aims at fairer, quicker and better quality asylum decisions (Regulation (EU) 2013/32, O.J. 2013, L 180/60); the Reception Conditions Directive ensures that there are humane material reception conditions (such as housing) for asylum seekers across the EU and that the fundamental rights of the persons concerned are fully respected (Regulation (EU) 2013/33, O.J. 2013, L 189/96); the Qualification Directive clarifies the grounds for granting international protection (Regulation (EU) 2011/95, O.J. 2011, L 337/9); the Dublin Regulation contains the rules establishing the State responsible for examining asylum applications (Regulation (EU) 604/2013, O.J. 2013, L 180/31); the Eurodac Regulation establishes the Eurodac system in order to allow comparison of fingerprints with the aim of assisting the application of the Dublin Regulation (Regulation (EU) 603/2013, O.J. 2013, L 180/1). These rules are complemented by legislation on legal and irregular migration: the Returns Directive provides for common rules for the return and removal of the irregularly staying migrants (Directive (EU) 2008/115, O.J. 2011, L 348/98); the Long Term Residence Directive covers the conditions for awarding long-term resident status to non-EU nationals (Regulation (EU) 2011/51, O.J. 2011, L 132/1).

17. Compare the Schengen Borders Code, providing EU States with a single set of common rules that govern external border checks on persons and entry requirements of stays in the Schengen Area; harmonizing these rules, the EU seeks to render them more efficient, whilst increasing their transparency. Similarly, through the Schengen Visa Code EU Member States have harmonized conditions and procedures for issuing short-stay visas (i.e. visas for stays that do not exceed three months). They have also established a list of countries (Regulation (EC) 539/2001, O.J. 2001, L 81/1) whose citizens are subject to a visa requirement when entering the EU and a list of countries for which this requirement is waived (long-stay visas and residence permits for visits exceeding three months remain subject to national conditions).

18. The main sources of funding are the Asylum, Migration and Integration Fund (AMIF), the Internal Security Fund (ISF), the European Social Fund (ESF) and the European Regional Development Fund (ERDF).

19. Cf. Art. 80 TFEU: “The policies of the Union set out in this Chapter [i.e. ‘Policies on border checks, asylum and migration’] and their implementation shall be governed by the principle of fair sharing and responsibility including its financial implications, between the Member States.”

national sovereignty. This was, for instance, one of the reasons why Hungary refused the benefit of an EU relocation scheme, as it was made subject to *inter alia* the deployment of EASO and Frontex on the territory of the beneficiary Member State and the presentation to the Commission of a roadmap leading to compliance with the most important elements of the EU *acquis* in the area of asylum and migration.²⁰

Rule-based EU policies: Hard cases

This year's events trigger the question whether the sheer size of migratory flows from Greece along the Western Balkan route up towards the north of the EU put such an excessive pressure on the Member States affected that even if they had the best possible performing public institutions, they would have difficulty to fully comply with the relevant EU *acquis*. Given the inherently limited scope of editorial comments – and above all the fact that the situation on the ground shows such a complex variety and is constantly changing – only a few examples of such difficulties can be discussed below.

As indicated above, an important part of the relevant *acquis*²¹ can be found in the Schengen Borders Code, under which Member States have an obligation to ensure that the external border is only crossed at authorized border crossing points and that third country nationals seeking to enter their territory satisfy the entry conditions. Member States must refuse entry to those third country nationals who do not satisfy the entry conditions; however, this is without prejudice to the rights of persons seeking international protection. Third country nationals who do not satisfy the entry conditions may be authorized to enter a Member State's territory on humanitarian grounds, on grounds of national interest or because of international obligations.²² A person who crosses a border illegally and who has no right to stay on the territory of the Member State concerned must be apprehended and

20. See Arts. 7 (Operational support to Italy and Greece) and 8 (Complementary measures to be taken by Italy and Greece) of Council Decision (EU) 2015/1523 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (O.J. 2015, L 239/146), which is mirrored by Arts. 7 and 8 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (O.J. 2015, L 248/80). Under Art. 8, as a precondition for benefiting from the relocation scheme, Italy and Greece have an obligation to present and implement a roadmap including “adequate measures in the area of asylum, first reception and return, enhancing the capacity, quality and efficiency of their systems in these areas, as well as measures to ensure appropriate implementation”.

21. See for a comprehensive overview of the *acquis*, Boeles, Den Heijer, Lodder and Wouters (Eds.), *European Migration Law*, 2nd ed. (Intersentia, 2014); Peers, *EU Justice and Home Affairs Law*, 3rd ed. (OUP, 2010).

22. See Art. 15(4)(c) of the Schengen Borders Code.

made subject to the return procedures.²³ The obligation is without prejudice to the rights of persons seeking international protection and the principle of *non-refoulement* as well as ensuring effective access to the asylum procedure.²⁴ The practical problems which in particular Greece and Italy are facing when complying with these rules, especially the duty to carry out border surveillance,²⁵ is that the massive attempts at crossing the external border by third country nationals are largely outside border crossing points, but are carried out by criminal organizations at the sea border, i.e. not only on the territorial sea of these Member States but also on high seas or on the territorial sea of third countries like Turkey or Libya. There, following an interception by the coast guards of the EU Member States, the right to refuse a crossing onto their territorial sea is subject to the application of the principle of *non-refoulement*.²⁶ Moreover, in case of a rescue operation, they have the duty to provide assistance to persons in distress and disembark them at a place of safety the nearest to the rescue incident, which in practice is often on their national territory.²⁷

Practice also shows that once people have arrived on its territory, a Member State situated at the EU's external border is frequently faced with refusals to apply for asylum in that country, while these people have no other title allowing them to enter the territory. Sometimes the migrants refuse to be fingerprinted (assuming that the Member State in question actually complies with its obligation under EU law to proceed with such fingerprinting, which, for a variety of reasons, legitimate and less legitimate, it sometimes fails to do).²⁸ For instance, the vast majority of the Syrian refugees entering the EU from Turkey via Greece, contrary to their obligation (under EU rules) to apply for asylum in the Member State of first arrival, express the wish to do so instead in Germany, Sweden or other Member States in the north or northwest of the EU. In principle, from that moment on, the persons in question become irregular migrants and the return *acquis* (including application of the principle of *non-refoulement*) should be applied, i.e. the simplified return procedure under national law²⁹ or the regular return procedure in conformity with EU law.³⁰ In case of a regular return procedure, the Member State must issue a

23. See Art. 12(1) of the Schengen Borders Code.

24. See the Asylum Procedures Directive.

25. See Art. 2(11) of the Schengen Borders Code.

26. See e.g. Arts. 4, 7 and 10 of Regulation (EU) 656/2014 on surveillance at the external sea borders, O.J. 2014, L 189/93.

27. See e.g. Art. 9 of Regulation (EU) 656/2014, cited previous footnote.

28. See Art. 14(1) of the Eurodac Regulation.

29. See Art. 2(2) of the Returns Directive.

30. See Arts. 6–9 of the Returns Directive. Compare the recent ECJ judgment in Case C-290/14, *Skerdjan Celaj*, EU:C:2015:640, where the ECJ again addressed the relationship

return decision offering a voluntary departure period between 7–30 days. If there is a risk of absconding, the Member State may refrain from granting such period and directly enforce removal. Detention is in theory possible but can only be applied in order to prepare the return and/or to carry out the removal process, in particular when there is a risk of absconding. In case of forced removal, and in case the obligation to return has not been complied with, the Member State must issue an EU-wide entry ban and put the ban in the Schengen Information System (SIS).

Comprehensive as these rules may seem in theory, practice shows how difficult it is for Member States, such as Greece and Italy, to avoid the risk of absconding actually materializing when, on the one hand, the number of persons entering the country is so extremely high and, on the other hand, their reception and detention capacity so low. An additional difficulty is the uncertainty for Greece as to whether Turkey can be considered a “safe third country”. Persons who have applied for asylum in a Member State can be returned to a third country in application of the “safe third country” principle, on the basis of which their application can be considered inadmissible. But for that, the third country in question must fulfil three rather strict conditions, set out in the Asylum Procedures Directive.³¹ Another problem relates to persons who, after entering the EU via Greece, move on to another EU Member State through one or more non-EU Member States, such as the Former Yugoslavian Republic of Macedonia (FYROM) or Serbia. According to the Schengen Borders Code, thorough checks must be carried out on third country nationals before allowing them to exit.³² In practice, if the person argues that he/she only intends to transit the respective third country in order to reach a Member State where he/she is accepted (e.g. in light of the recently announced asylum policy of Germany with respect to Syrian refugees), it appears very difficult if not impossible to prevent this. Finally, Member States should refrain from any measure facilitating irregular movements to other Member States, but if such movements of persons seeking asylum in another Member State than the one of first arrival nevertheless occur, then these applicants should in principle be sent back to the first Member State by virtue of Regulation 604/2013. However, if the Member State responsible for processing the asylum application is Greece, case law of both the ECJ and the ECtHR currently excludes return to that Member State as long as this is considered contrary to

between immigration and criminal law, and in particular the compatibility of national penal measures imposed as a punishment for irregular migration with the Returns Directive. See for a commentary, Peers, “The CJEU’s Ruling in *Celaj*: Criminal penalties, entry bans and the Returns Directive”, available at <eulawanalysis.blogspot.be/2015/10/the-cjeuc-ruling-in-celaj-criminal.html>

31. See Art. 38(1) of the Asylum Procedures Directive.

32. See e.g. Art. 7(1)(h) of the Schengen Borders Code.

Article 3 ECHR and Article 4 of the EU Fundamental Rights Charter given certain deficiencies in the asylum procedure as well as certain detention and living conditions there.³³

Downstream of the Western Balkan route to the north of the EU endless permutations and combinations occur from a legal perspective, depending on whether an irregular border crossing occurs between two non-EU States (FYROM-Serbia), a non-EU State and a non-Schengen EU Member State (Serbia-Croatia), a non-EU State and a Schengen Member State (Serbia-Hungary), a non-Schengen EU Member State and a Schengen EU Member State (Croatia-Slovenia) or between two Schengen EU Member States (Slovenia-Austria, Hungary-Austria, Austria-Germany). The ensuing legal complexity is amplified by the temporary reintroduction of border controls in Schengen EU Member States such as Germany, Austria and Slovenia.³⁴ It is therefore impossible in this context to give an exhaustive overview of the tension between law and practice in these bilateral relationships.

Innovative institutional developments as part of the crisis management tools

The management of the euro crisis, including the interconnected banking crisis, led to a series of innovative measures, including agreements between (a limited number of) Member States outside the EU Treaty framework (e.g. the 2012 ESM Treaty, the 2012 Fiscal Compact Treaty and the 2013 Decision of the representatives of the Euro Area Member States meeting within the Council on an intergovernmental agreement concerning the Single Resolution Fund to be established by that EU regulation) as well as regular meetings of the Heads of State and Governments of the Euro Area Member States (“Euro Summits”), which all had in common a clear *nexus* with the EU legal and political order.³⁵

During the current asylum and migration crisis, a similar tendency, though much less developed, can be discerned. In May 2015, the Commission proposed *inter alia* a Council Decision on the basis of Article 87(3) TFEU in

33. See e.g. the ECtHR judgment in *MSS v. Belgium and Greece* (Appl. No. 30696/09) and the ECJ judgment in Joined Cases C-411 & 493/10, *N.S. and Others*, EU:C:2011:865.

34. See *supra*, at notes 11 and 12. Slovenia, as opposed to Germany and Austria, did not further prolong the border controls at its internal borders.

35. See for commentary e.g. Azoulai, Polares, Maduro, De Witte, Cremona, Hyvärinen, Kocharov and Abdallat (Eds.), “Another legal monster? An EUI debate on the Fiscal Compact Treaty”, EUI Working Papers Law 2012/09; Peil, “The sovereign debt crisis, the European Fiscal Stability Treaty, and the balance of power between the EU and the Member States”, Washington University in St. Louis School of Law, Legal Studies Research Paper Series, No 12-07-05 of July 2012.

order to set up an emergency response mechanism to assist Italy and Greece, which would take the form of a scheme allowing 40,000 persons in need of international protection to be relocated from these two Member States to other EU Member States, a so-called relocation scheme.³⁶ The proposal included a distribution key for that purpose based on the size of the population, the total GDP and the unemployment rate of Member States. Following difficult discussions in the June 2015 European Council, the Justice and Home Affairs Council of 20 July 2015 agreed on a General Approach regarding the Commission proposal pending the Opinion of the European Parliament. In parallel, Representatives of the Governments of (all) the Member States meeting within the Council adopted a Resolution on approximately 40,000 persons to be relocated and the distribution of that figure between them, the intention being that the EU instrument would build on that Resolution and would therefore contain multiple references to it, both in its recitals and operative part, raising some delicate questions about its enforceability within the EU legal order.³⁷ On 14 September 2015, the Council finally adopted the EU Decision on that basis.³⁸ However, hardly a week later, it adopted a second Decision of that type providing for a relocation schema concerning an additional 120,000 persons in need of international protection, but this time without building on a consensus between Member States.³⁹ To achieve that purely within the EU legal order, it had to proceed on the basis of a qualified majority voting (QMV) decision, overruling Hungary, the Czech Republic, Slovakia and Romania, with Finland abstaining, making plain a clear political divide between two groups of Member States.

What was certainly an institutional novelty, also in comparison with the informal political fora used at the highest political level during the euro crisis, was the so-called Leaders' Meeting on refugee flows along the Western Balkan route, which was held in the Headquarters of the European Commission on 25 October 2015. At the invitation of the Commission President, the Heads of State or Government of a number of EU and non EU Member States (Albania, Austria, Bulgaria, Croatia, FYROM, Germany, Greece, Hungary, Romania, Serbia and Slovenia) met in the presence of the President of the European Parliament, the President of the European Council, the current and incoming Presidencies of the Council of the EU, the First Vice President of the Commission, the High Representative of the Union for Foreign Affairs and Security Policy, as well as the United Nations High

36. COM(2015)286 final of 27 May 2015.

37. Press release of the Council No 11097/15 of 20 July 2015.

38. See Council Decision (EU) 2015/1523, cited *supra* note 20.

39. See Council Decision (EU) 2015/1601, cited *supra* note 20. As per 4 Nov. 2015, only 116 persons had been relocated from Italy and Greece to Finland (48), Sweden (38) and Luxembourg (30).

Commissioner for Refugees. They agreed on a series of measures, which were laid down in what was called a Statement, in order to improve cooperation and step up consultation between these countries along the route; they also decided on pragmatic operational measures aimed at limiting secondary movements, providing shelter for refugees, managing borders, combating smuggling and trafficking, which could be implemented immediately so as to tackle the refugee crisis in the region.⁴⁰ The Leaders “invited” the Commission to monitor the implementation of the Statement. No doubt such an event, and the conclusions which were reached, triggers questions about respect for the horizontal and vertical distribution of powers within the EU, including its rules on external representation. The same questions arose in connection with the joint action plan aimed at stemming the flow of migrants from Turkey which the Commission agreed *ad referendum* with that country ten days earlier. Although some questioned the absence of a clear mandate from the Council, the action plan was nevertheless welcomed by the European Council at its meeting of 15 October 2015.⁴¹

These rather unorthodox institutional developments could be seen as an indication that the EU legal framework, with its elaborate system of checks and balances and despite the possibilities it offers in terms of secondary legislation and forms of delegation, does not always appear to allow for the necessary flexibility to deal with the complex problems of modern society in crisis situations.

Final considerations

As was often said in connection with the euro crisis, one may wonder whether what is done at national and EU level in order to tackle the asylum and migration crisis is too little, too late – and whether it addresses only the symptoms but not the root causes of the problem it tries to solve. This may be the case; contrary to the euro crisis, however, at least some of the most important root causes of the current crisis are of a geopolitical nature and therefore go well beyond the powers of the EU and its Member States. In the meantime, its societies are under considerable tension, and in an unprecedented but less than perfectly coordinated effort their public authorities are trying to lower this tension, using legal and policy instruments that to some extent are ill fitted given the nature and size of the crisis. As a consequence, the EU institutions and the Member States are compelled to be innovative in order to meet the formidable challenges the crisis poses. In this context, one should realize that a Europe without internal borders will not be

40. See European Commission press release No IP/15/5904 of 25 Oct. 2015.

41. See § 2a of Document EUCO 26/15 of 15 Oct. 2015.

sustainable if the present circumstances persist – and *a fortiori* were they to deteriorate. The Schengen area as an area without internal borders is built on certain premises of organized solidarity; it will simply no longer be accepted if it becomes equated with continued migratory streams of the current or an even greater magnitude. But the EU can't survive either if it abandons its values as enshrined in Article 2 TEU or ignores its legal obligations *vis-à-vis* people who have the right to protection when they flee from war and persecution. That is the balance the Union has to find in order to ensure that it protects its societies, and at the same time does not leave Europe to xenophobes and extremists.