

**REPORT OF A CEPS TASK FORCE**

# The European Border and Coast Guard

Addressing migration and asylum challenges  
in the Mediterranean ?



Sergio Carrera  
Steven Blockmans  
Jean-Pierre Cassarino  
Daniel Gros & Elspeth Guild

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Chairman: Enrico Letta

Rapporteurs: Sergio Carrera,  
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Daniel Gros  
Elspeth Guild

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The Centre for European Policy Studies (CEPS) is an independent policy research institute based in Brussels. Its mission is to produce sound analytical research leading to constructive solutions to the challenges facing Europe today.

This Task Force report is based on original research and draws upon the existing literature, along with the discussions of a Task Force that met over six months (in three meetings between June and December 2016). The contents of the report reflect the general tone and direction of the discussions and contributions by members and participants. The proposals and recommendations do not necessarily represent a full common position agreed by all Task Force members and participants, nor do they necessarily represent the views of CEPS or the institutions to which the members and participants belong. A full list of members and participants is in the appendix.

Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs section at CEPS, Visiting Professor at the Paris School of International Affairs (PISA) at Sciences Po, Associate Professor/Senior Research Fellow at the University of Maastricht and Honorary Industry Professor and Senior Research Fellow at the School of Law at Queen Mary, University of London. Steven Blockmans is Senior Research Fellow and Head of EU Foreign Policy at CEPS. Jean-Pierre Cassarino is Research Associate at the Tunis-based Institut de Recherche sur le Maghreb Contemporain (IRMC). Daniel Gros is Director of CEPS. Elspeth Guild is Associate Senior Research Fellow at CEPS and Jean Monnet Professor ad personam at Queen Mary, University of London as well as at Radboud University Nijmegen.

The views expressed in this report are attributable only to the authors writing in a personal capacity and not to any institution with which they are associated.

The photo on the cover, taken 28 June 2015, features a handmade wooden ship decorated with drawings by children from the SOS Kinderdorf organisation on Maria Theresien Street in Innsbruck. The ship was built to draw attention to the plight of refugees.

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CEPS

Place du Congrès 1, B-1000 Brussels

Tel: 32 (0) 2 229.39.11

website: <http://www.ceps.eu>

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## List of Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
EBAS	European border and asylum service
EBCG	European Border and Coast Guard
ECGFF	European Coast Guard Functions Forum
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EU	European Union
EUNAVFOR	European Union Naval Force
HR/VP	High Representative/Vice-President
IOM	International Organization for Migration
JO	Joint operation
MRCC	Maritime Rescue Coordination Centre
MSF	Médecins sans Frontiers/Doctors without Borders
NGO	Non-governmental organisation
OMN	Operation Mare Nostrum
SAR	Search and rescue
SBC	Schengen Borders Code
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council



## Introduction

The ‘European humanitarian refugee crisis’, which resulted from the entry of substantial numbers of asylum seekers through eastern Mediterranean routes,<sup>1</sup> has put EU borders and asylum policies, and the commitment to its founding principles, into the spotlight. The EU Dublin asylum system,<sup>2</sup> which sets common criteria for determining member states’ responsibility for assessing asylum applications, was devised as a complement to the internal border-free Schengen area almost 30 years ago. At the time it seemed natural to assign the responsibility for assessing the claims of asylum seekers for international protection to the member state where they first entered the common Schengen space, given that member states remain solely responsible for managing their external borders.

The European refugee crisis<sup>3</sup> has shown that this model of attribution of responsibility leads to a systemic asymmetry in the EU. This relates to an unfair sharing of legal responsibilities and the wrong kinds of incentives for countries holding the common EU territorial and sea external borders, to de facto disregard their obligations to comply with European and international standards and fundamental rights protections.

The EU’s southern maritime border represents a rather different set of challenges from land or air borders. The Mediterranean context opens up its own policy specificities, which relate to the dilemmas surrounding the experiences of

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<sup>1</sup> E. Guild and S. Carrera, “Rethinking asylum distribution in the EU: Shall we start with the facts?”, CEPS Commentary, CEPS, Brussels, 17 June 2016.

<sup>2</sup> See Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, pp. 31–59. For an assessment, refer to S. Peers, V. Moreno-Lax, M. Garlick and E. Guild (eds), *EU Justice and Home Affairs Law*, Vol. 3, 2<sup>nd</sup> edition, Leiden: Brill/Nijhoff, 2015.

<sup>3</sup> S. Carrera, S. Blockmans, D. Gros and E. Guild, *The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities*, CEPS Special Report, CEPS, Brussels, 2015; E. Guild, C. Costello, M. Garlick and V. Moreno-Lax, “The 2015 Refugee Crisis in the European Union”, CEPS Policy Brief No. 332, CEPS, Brussels, 2015(a).

people trying to enter the EU through dangerous trips by sea. These trips often involve extreme hardship and risks to the people involved, which in many cases have led to lives being lost in the Mediterranean, estimated at the end of November to be about 4,690 deaths in 2016.<sup>4</sup>

The humanitarian refugee crisis in Europe has led to multiple sets of EU policy initiatives. The following three can be especially highlighted: first, a proposal for a regulation aimed at reinforcing the competences of the Frontex Agency, presented with the strapline ‘European Border and Coast Guard’ (EBCG); second, a set of legislative proposals seeking to reform (yet not abandon) the Dublin system; and third, a proposal to strengthen the European Asylum Support Office (EASO) into a European Union Agency for Asylum.

In June 2016 CEPS launched a Task Force entitled “Towards a European Border and Coast Guard”. The primary goal of the Task Force was to examine the main legal, political and ethical challenges to the EU’s border and asylum policies. It aimed at assessing the extent to which the establishment of a common European border and coast guard, with particular focus on the difficulties in the Mediterranean context, could address these challenges and if so, in what specific ways.

The 2015 European Agenda on Migration called for the management of EU external borders to be increasingly a shared responsibility, notably through setting up a European system of border guards, which “would cover a new approach to coastguard functions in the EU, looking at initiatives such as asset sharing, joint exercises and dual use of resources as well as the possibility of moving towards a European Coastguard”.<sup>5</sup>

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<sup>4</sup> Among these, 4,172 were recorded to have taken place in the central Mediterranean. Refer to the International Organization for Migration (IOM), “Recorded deaths in the Mediterranean Sea by Month, 2014–2017” (<http://missingmigrants.iom.int/mediterranean>). There were 3,279 reported deaths in the Mediterranean in 2014 and 3,770 in 2015. See also IOM, *Fatal Journeys: Tracking Lives lost during Migration*, Geneva, 2014.

<sup>5</sup> See European Commission, A European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015, p. 17. Refer also to the European Global Strategy, “Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union’s Foreign and Security Policy”, June 2016, which states that “Common Security and Defence Policy

During the CEPS Task Force process, the above-mentioned Commission proposal on a European Border and Coast Guard was formally adopted (September 2016), through what has become Regulation 2016/1624.<sup>6</sup> The Task Force actively contributed to the discussions leading to its adoption and addressed key issues and open questions that will characterise its practical implementation in the phases to come.

Furthermore, as the research provided in this report demonstrates, the EBCG Regulation 2016/1624 cannot be expected to lead to the creation of a *truly common* European border guard; neither is it suited to address the systemic asymmetries and capacity burdens resulting from the EU Dublin system. There is a growing gap between what EU law and the policy say and what actually happens on the ground. While the EU talks about a ‘*common*’ European policy on borders and asylum, this policy does not properly assure a shared and fair deal in responsibilities and lacks an ‘integrated’ institutional governance or federal system ensuring a common European response to the border and asylum dilemmas. This gap leads to a number of issues that call for closer examination and reflection, and for which a new political compromise is needed at the EU level.

The report is divided into four chapters. Chapter 1 addresses the main perils characterising the current scope and functioning of the EU Dublin asylum system. Chapter 2 moves into an in-depth assessment of the issues affecting the shape of EU border and asylum policies. In chapter 3, the report then briefly examines the main innovations brought by the adoption of Regulation 2016/1624 on the European Border and Coast Guard of September 2016. Chapter 4 concludes by outlining proposals and recommendations for addressing the identified challenges, chiefly the establishment of a European border and asylum service (EBAS).

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(CSDP) missions and operations can work alongside the European Border and Coast Guard and EU specialized agencies to enhance border protection and maritime security in order to save more lives, fight cross-border crime and disrupt smuggling networks”.

<sup>6</sup> Regulation No. 2016/1624 on the European Border and Coast Guard of 16 September 2016, OJ L 251/1, 16.9.2016.

## 1. The perils of the EU Dublin asylum system

The ‘country of first entry’ rule under the EU Dublin asylum system puts profound capacity and specific structural pressures on frontier EU member states in the Mediterranean. The rule gives the responsibility for examining an asylum application to the member state through which the applicant has first irregularly entered the EU.<sup>7</sup>

Under often deficient first-reception conditions, this system frequently obliges asylum seekers to stay where they may not want to, even if they have stronger personal and family links or professional opportunities elsewhere in the EU. The EU Dublin system is characterised by a double solidarity deficit, first towards the EU member states concerned, and second towards the asylum seekers themselves.

Among the package of new EU legislative proposals in the field of asylum, the European Commission issued one for a regulation recasting the Dublin system.<sup>8</sup> This proposal is currently under negotiation and would revisit the present temporary system for relocating asylum seekers from Greece and Italy. The Council adopted a decision back in September 2015,<sup>9</sup> which, combined with a resolution agreed on 22

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<sup>7</sup> For the purposes of this report, our focus is mainly on the “first country of entry” criterion of the EU Dublin Regulation. The authors acknowledge that there are other elements in the hierarchy of criteria under the Dublin Regulation, especially as the “first country of entry” is the last criterion of the hierarchy. For a detailed study on the EU Dublin system, refer to Peers et al. (2015), *op. cit.*, chapter 6; and F. Maiani, “The Reform of Dublin III Regulation”, Study for the European Parliament, PE 571 360, Directorate-General for Internal Policies, Brussels, 2016.

<sup>8</sup> European Commission, Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, Brussels, 4.5.2016.

<sup>9</sup> Council of the European Union, Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 12098/15, 22 September 2015.

July,<sup>10</sup> stipulated the relocation of 160,000 asylum seekers from these two countries.

The temporary relocation system has drawn ample criticism since its inception. It does not change fundamentally the EU Dublin system. It constitutes a temporary derogation of Art. 13(1) of the Dublin III Regulation (604/2013) applicable to asylum seekers arriving in Italy and Greece who were to be distributed on the basis of a 'distribution key' of alternative criteria (GDP, total population and level of unemployment).

The system has not worked in practice. As of December 2016, only 1,950 asylum seekers have been relocated from Italy and 6,212 from Greece.<sup>11</sup> France is the EU member state having relocated the largest number of applicants, followed by the Netherlands and Finland. Austria and Hungary are the only two EU member states not having submitted any pledge nor having relocated any at all. And Poland has 'frozen' the implementation of its original pledges.

The Commission has reported that thousands of applicants are now waiting in Italy and Greece to be relocated. It has also underlined its "right to take action against those member states not complying with their obligations" under the two Council decisions on relocation. The legality of this system, however, is currently pending before the Court of Justice of the European Union (CJEU). Hungary and Slovakia have requested the EU Court to annul the decision.<sup>12</sup>

Under the new proposal to recast the Dublin system, the European Commission has put forward four main modifications, as outlined below.

The first is converting the temporary relocation system into a permanent one through a 'corrective solidarity mechanism'. This mechanism would mean that each

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<sup>10</sup> Council of the European Union, Resolution of the Representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40,000 persons in clear need of international protection, 11131/15, 22 July 2015.

<sup>11</sup> European Commission, Eighth Report on Relocation and Resettlement, COM(2016) 791, Brussels, 8.12.2016.

<sup>12</sup> See respectively Case C-647/15 (action brought on 3 December 2015) and Case C-643/15 (action brought on the 2 December 2015).

member state is assigned a quota of asylum seekers from a member state confronted with a “disproportionate number of applications” based on two distribution criteria (a reference key): population size and total GDP, with equal 50% weighting and based on Eurostat figures.<sup>13</sup> The application of the corrective allocation would be triggered automatically in cases where the number of asylum seekers for which a member state is responsible exceeds 150% of the figure originally identified in the reference key.

Second is a penalty system called a ‘financial solidarity mechanism’, according to which any member state refusing to accept asylum seekers would pay €250,000 per applicant who would have otherwise been allocated to that member state during the respective 12-month period.<sup>14</sup> It also increases the obligations by asylum seekers to register in the first state of entry and stay there. Otherwise, penalties will be applicable to asylum seekers, so as to limit the rights and protection that they will be afforded by the member state responsible for assessing their application.<sup>15</sup>

Despite evidence demonstrating the need to move towards an asylum seeker preference-centric model,<sup>16</sup> the envisaged criteria for the distribution key do not include the individual preferences of asylum seekers.<sup>17</sup>

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<sup>13</sup> See Arts 34 and 35 of the Commission’s proposal (COM(2016) 270 final). It would apply to member states “confronted with a disproportionate number of applications for international protection for which it is the Member State responsible under this Regulation”.

<sup>14</sup> See Art. 37 of the proposal.

<sup>15</sup> Art. 4 states that the asylum seeker has the duty to present her/his application in the member state of first entry, comply with the transfer decision and be present and available to the responsible competent authorities. Art. 5 foresees penalties in cases of non-compliance. It is striking to see how the proposal for a regulation even limits reception conditions as envisaged in Arts 14-19 of the Receptions Directive 2013/33, with the possibility to only provide emergency health care during the procedures.

<sup>16</sup> E. Guild, C. Costello, M. Garlick and V. Moreno-Lax, “Enhancing the Common European Asylum System and Alternatives to Dublin”, CEPS Paper in Liberty and Security in Europe, No. 83, CEPS, Brussels, September 2015(b); Maiani (2016), *op. cit.*

<sup>17</sup> This is despite the fact that several stakeholders consulted by the Commission during the development of the proposal stressed the need to guarantee this component. Indeed, the

According to the Commission’s proposal for recasting the Dublin Regulation, [t]here is no or very little redistributive effect from the Dublin III Regulation. This appears to be due to: the hierarchy of criteria, which does not take member states’ capacity into account; the disproportionate responsibility placed on member states at the external border, by mostly applying the criteria of first country of entry; and the low number of actual transfers.<sup>18</sup>

That notwithstanding, the proposal does not get away with the first irregular entry criterion as the default criterion for attributing responsibility.

Third, a revamped version of EASO (EU Agency for Asylum) would coordinate and run the corrective mechanism and reference key system.<sup>19</sup> The European Commission presented a Proposal for a Regulation for the European Union Agency for Asylum in May 2016.<sup>20</sup> It aims at strengthening EASO so as to “reinforce and complement the asylum and reception systems of Member States”.<sup>21</sup>

The EU Agency for Asylum would have new powers to ensure a uniform application of EU asylum law across the Union, a new monitoring role in the situation of asylum in the EU, information on country of origin to allow for a

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proposal for a regulation states that the coordinators of the political groups represented in the LIBE Committee of the European Parliament “noted the importance of taking an applicant’s preferences/characteristics into account”. The UNHCR also expressed a similar point: “The general view was that an applicant’s preferences or characteristics should be taken into account for the allocation of a Member State responsible in view of integration perspectives and to reduce secondary movements.” See pp. 12 and 13 of the Commission’s proposal for a regulation (COM(2016) 270 final).

<sup>18</sup> Refer to p. 12, *ibid.*

<sup>19</sup> See para. 9 of the Preamble. Art. 35(4) of the proposal provides that “[t]he European Union Agency for Asylum shall establish the reference key and adapt the figures of the criteria for the reference key as well as the reference key referred to in paragraph 2 annually, based on Eurostat figures”. According to Art. 37(5), the Agency will also monitor the ‘financial solidarity’ procedure.

<sup>20</sup> European Commission, Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM(2016) 271 final, Brussels, 4.5.2016.

<sup>21</sup> *Ibid.*, p. 2.

‘common analysis’ and the ability to deploy increased operational and technical assistance to member states (asylum support teams and an asylum intervention pool). It would implement the Common European Asylum System (CEAS) and ensure convergence in the assessment of asylum applications across the EU.

Importantly, the proposal also envisages “the possibility for the Agency to facilitate the examination of applications for international protection that are under examination by the competent national authorities”.<sup>22</sup> It foresees the possibility for EU member states to seek assistance from the Agency in cases “where their asylum and reception systems are subject to disproportionate pressures” and when “the asylum and reception systems are so serious that they jeopardize the functioning of the Common European Asylum System”.

This would be done through the deployment of asylum support teams (composed of experts from member states or experts seconded by member states to the Agency and experts from the Agency's own staff)<sup>23</sup> and an asylum intervention pool to provide technical and operational assistance. Art. 16(3) establishes that the Agency will coordinate and organise assistance that could comprise, for instance, facilitating “the examination of applications for international protection that are under examination by the responsible authorities” or “provid[ing] assistance in the examination of applications”.

The details of the operational and technical assistance would be laid down in an operational plan to be agreed between the Agency and the host member state concerned. The operational plan will contain such elements as a detailed and clear description of the tasks and special instructions for the asylum support teams or

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<sup>22</sup> Ibid., p. 9.

<sup>23</sup> According to the proposal (COM(2016) 271 final, p. 10),

[t]he operational and technical reinforcement that may be provided by the asylum support teams or by experts deployed from the asylum intervention pool may include the screening of third-country nationals, the registration of application for international protection, and where requested by Member States, the examination of such applications, as well as the provision of information and specific assistance to applicants or potential applicants that could be subject to relocation.

See also Recital 16 of the Preamble and Arts 17-18 of the proposal.

experts and specific information on their tasks concerning assistance with applications for international protection.<sup>24</sup>

The EU Agency for Asylum would be granted the power to intervene in member states that are subject to disproportionate pressures to reinforce their asylum and reception systems for a short period of time when these states have not implemented its recommendations or “have not taken sufficient action to address the pressure”.

In cases where there is a “disproportionate pressure on their asylum and reception systems”, in Art. 22(3) the proposal grants the Commission the power to decide on deploying the new Agency irrespective of the consent of the member state concerned. Finally, the new Agency would monitor and report to the Commission on a yearly basis on the application of the above-mentioned ‘financial solidarity mechanism’ under the new Dublin system.

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<sup>24</sup> See Art. 19, *ibid.*

## **2. Asymmetry in responsibilities: What are the challenges for EU border and asylum policies?**

The asymmetry of responsibilities characterising the current EU model for sharing them under European border and asylum policies poses a number of challenges:

- 1) mistrust and the shifting of responsibilities,
- 2) incapacity to meet EU standards,
- 3) unilateral and ad hoc actions,
- 4) a multi-actor and scattered setting, and
- 5) the limits of third-country cooperation.

### **2.1 Mistrust and the shifting of responsibilities**

The humanitarian and political crises on refugees in Europe of 2015–16 have shown that the EU cannot shelter behind the illusion that the difficulties posed by migration and asylum from the Mediterranean and the Middle East are to be borne solely by Schengen external border-states and their local communities.

It has become evident that the Dublin system de facto provides the wrong kinds of incentives. EU member states of first entry can avoid responsibility for asylum seekers who enter their territory if they do not undertake the necessary efforts to register and process them. They may also engage in practices whose compatibility with Schengen rules, the Treaties and the EU Charter of Fundamental Rights is questionable.

This is what happened in the Franco–Italian affair in 2011.<sup>25</sup> In April 2011, following the Arab Spring revolutions, in total around 50,000 North African asylum seekers and immigrants from Tunisia, Libya and Egypt arrived in Italy. The Italian authorities issued around 24,000 six-month temporary-residence permits on humanitarian grounds. The residence permits gave an automatic right to move

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<sup>25</sup> S. Carrera, E. Guild, M. Merlino and J. Parkin, “A Race against Solidarity: The Schengen Regime and the Franco–Italian Affair”, CEPS paper in Liberty and Security in Europe, April 2011, p. 3.

freely in the Schengen zone, thus many Tunisians started to head towards France. France responded by reintroducing border checks and blocking a train carrying a few hundred third-country nationals at its border.

The European Commission came to the conclusion that both states were ‘formally’ in compliance with EU law but that “the spirit of the Schengen rules” had been violated.<sup>26</sup> The solution was ‘more EU’<sup>27</sup> in the Schengen governance framework through a strengthened (less intergovernmental) Schengen evaluation mechanism, a new procedure to temporarily derogate Schengen in situations of a disproportionate number of entries and serious deficiencies in member states holding the common external border. These measures came along with stricter rules for EU member states to reintroduce internal border checks within the Schengen area.<sup>28</sup>

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<sup>26</sup> “From a formal point of view steps taken by Italian and French authorities have been in compliance with EU law. However, I regret that the spirit of the Schengen rules has not been fully respected.” See European Commission, “Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis”, MEMO/11/538, Brussels, 25.7.2011.

<sup>27</sup> See S. Carrera, “An Assessment of the Commission’s 2011 Schengen Governance Package: Preventing abuse by EU member states of freedom of movement?”, CEPS Paper in Liberty and Security in Europe, No. 47, CEPS, Brussels, March 2012; European Commission, Schengen governance – Strengthening the area without internal border control, COM(2011) 561 final, Brussels, 16.9.2011, p. 2; Regulation (EU) No. 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 291/1, 6.11.2013; and Regulation (EU) No. 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No. 1683/95 and (EC) No. 539/2001 and Regulations (EC) No. 767/2008 and (EC) No. 810/2009 of the European Parliament and of the Council, OJ L 182, 29.6.2013.

<sup>28</sup> For a recent analysis during the ‘European humanitarian crisis’, refer to E. Guild, S. Carrera, L. Vosyliūte, K. Groenendijk, E. Brouwer, D. Bigo, J. Jeandesboz and M. Martin-Mazé, “Internal Border Controls in the Schengen Area: Is Schengen Crisis Proof?”, Study for the European Parliament, PE 571 356, Directorate-General for Internal Policies, Brussels, 2016.

Still, the question was left open regarding ways to effectively address the inherent asymmetry of responsibilities stemming from the linkage between the first entry criterion and the allocation of responsibility for assessing asylum applications in the EU Dublin system.

## 2.2 Incapacity to deliver EU standards and fundamental rights

The CEAS puts a high degree of pressure on EU member states holding the common EU external border to keep their reception capacities and asylum systems up to the required standards in international and EU legislation and in the EU Charter of Fundamental Rights. The EU Dublin system leaves this under the general principle of ‘mutual trust’, which presumes that all EU member states have similar levels of international protection and comply equally with the fundamental rights of asylum seekers and refugees.

Both the European Court of Human Rights (ECtHR) in Strasbourg and the CJEU in Luxembourg have debunked this presumption in several judgments. The CJEU has underlined for instance that the presumption of EU member states’ compliance with fundamental rights may be rebuttable in individual cases.<sup>29</sup> This is so in the event of “systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or

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<sup>29</sup> See CJEU, Case C-411/10, *N.S. v. Secretary of State for Home Department* [2010] OJ C 274/21; see also Case C-493/10, *M.E. v. Refugee Applications Commissioner* [2011] OJ C 13/18, 21 December 2011, in which para. 80 reads, “it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR”. Para. 104 reads, “[i]n those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable”. And para. 106 reads,

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

degrading treatment” within the meaning of Art. 3 of the European Convention on Human Rights (ECHR) and Art. 4 of the EU Charter of Fundamental Rights.

The fact that the current EU Dublin system puts disproportionate pressures on reception capacities in ‘frontier states’ like Greece and Italy, so that these states confront more challenges to ensure an efficient, human rights-compliant and independent judiciary to carry out that test, further endangers the principle of mutual recognition that lies at the basis of European cooperation on Schengen, asylum and other areas, such as judicial cooperation in criminal matters.

At present no EU member state can ‘send back’ (through so-called ‘Dublin transfers’) asylum seekers found in their territory and having entered first through Greece. There are still no guarantees that an asylum seeker sent by another participating EU member state to Greece would not face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

When it comes to Italy, the Strasbourg Court found in the case of *Tarakhel v. Switzerland* in 2014 that “[w]hile the structure and overall situation of the reception arrangements in Italy cannot therefore in themselves act as a bar to all removals of asylum seekers to that country, the data and information set out above nevertheless raise serious doubts as to the current capacities of the system”. The Court concluded that “the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded”.<sup>30</sup>

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<sup>30</sup> Refer to the case *Tarakhel v. Switzerland* (application no. 29217/12), 4 November 2014, para. 115. The Court also highlighted that,

118. The Court reiterates that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim. It further reiterates that, as a “particularly underprivileged and vulnerable” population group, asylum seekers require “special protection” under that provision.

As the humanitarian refugee crisis in Europe has illustrated, these capacity deficits put the sustainability of the entire Schengen governance system, the CEAS machinery and the Union's legitimacy at stake.

In line with the Schengen Borders Code (SBC), and based on a proposal by the European Commission, the Council adopted on 12 May 2016 a decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk in light of serious deficiencies identified in Greece contrary to EU standards.<sup>31</sup>

The EU Dublin system also leads to countries like Greece or Italy to engage in practices that may be at odds with the Union's founding principles and which in some cases have been held to be in violation of the ECHR and the EU Charter of Fundamental Rights. This has been the case in respect of the so-called 'extraterritorial push backs' from Italy to Libya, which were ruled out by the 2012 Strasbourg Court case *Hirsi* as being in violation of the ECHR.<sup>32</sup>

The case concerned the legality of Italian military vessels returning to Libya a ship with Eritrean and Somali nationals, left on the shores of Libya in May 2009. The Court found that the forced return implemented by the Italian authorities constituted a violation of the obligation of *non-refoulement* under Art. 3 ECHR and that of 'collective expulsion' foreseen in Art. 4 of Protocol 4, which prohibits collective expulsion, and of Art. 13 of the Convention (the right to an effective remedy).<sup>33</sup>

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119. This requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability.

<sup>31</sup> Council of the European Union, Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, 8835/16, Brussels, 12 May 2016.

<sup>32</sup> ECtHR, Judgment of 23 February 2012 in the case *Hirsi Jamaa and others v. Italy*, application no. 27765/09.

<sup>33</sup> L. den Hertog, "Two Boats in the Mediterranean and their Unfortunate Encounters with Europe's Policies towards People on the Move", CEPS Liberty and Security in Europe, No. 48, CEPS, Brussels, 2012.

The Strasbourg Court also held that irrespective of ‘where’ these practices occur, including the high seas (international waters) or sea borders of third countries, EU member states are still responsible for keeping up these standards of protection as they fall under their jurisdiction. The notion of jurisdiction and liability in cases of violations of the rights of asylum seekers (in particular the principle of *non-refoulement*) does not end at the EU’s borders.<sup>34</sup>

The EU pressures on Italy to implement the EU hotspot approach have also led to incapacities to ensure fundamental rights. A recently published report by Amnesty International,<sup>35</sup> which has been endorsed by a large group of non-governmental organisations (NGOs),<sup>36</sup> provides evidence of the existence of coercive practices and rights violations by Italian authorities when implementing the obligatory fingerprinting and identification of all irregularly entering asylum seekers and migrants in line with the EU hotspot approach. According to the Amnesty International report, the “100% identification rate” target has allegedly led to cases of arbitrary detention and ill-treatment by the Italian police.

In December 2015 the European Commission launched infringement proceedings against Italy for not properly implementing the Eurodac Regulation 603/2013, in particular when it comes to “effective fingerprinting of asylum seekers and transmission of data to the Eurodac central system within 72 hours”.<sup>37</sup> The European Commission’s report on the progress of the hotspots in Italy stressed that

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<sup>34</sup> Similar legality questions are currently being considered by the ECtHR in another case against Italy, *Khlaifia and Others v. Italy*, application no. 16483/12 (<http://www.statewatch.org/news/2016/jun/echr-Grand-Chamber-hearing-Khlaifia-and-Others-v-%20Italy.pdf>).

<sup>35</sup> Amnesty International, *Hotspot Italy: How EU’s Flag Approach Leads to Violations of Refugees and Migrants’ Rights*, London, September 2016 (<https://www.amnesty.org/en/documents/eur30/5004/2016/en/>).

<sup>36</sup> See ADIF (Associazione Diritti e Frontiere), “Alongside Amnesty International”, 7 November 2016 (<http://www.statewatch.org/news/2016/nov/eu-hotspot-ill-treatment-supporting-AI.htm>).

<sup>37</sup> See European Commission, “Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings”, Press release, Brussels, 10 December 2015 ([http://europa.eu/rapid/press-release\\_IP-15-6276\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6276_en.htm)).

[f]urther efforts, also at legislative level, should be accelerated by the Italian authorities in order to provide a more solid legal framework to perform hotspot activities and in particular to allow the use of force for fingerprinting and to include provisions on longer term retention for those migrants that resist fingerprinting. The target of a 100% fingerprinting rate for arriving migrants needs to be achieved without delay.<sup>38</sup>

The first European Commission report on relocation and resettlement<sup>39</sup> of March 2016 recalled the 100% fingerprint target and called on the Italian authorities to show further effort to allow the use of force for fingerprinting and “to include provisions on longer term retention for those migrants that resist fingerprinting”.<sup>40</sup>

According to the above-mentioned Amnesty International report, the hotspot approach “has served primarily as a reaffirmation of the Dublin system. It has increased, not reduced the burden on frontline countries’ shoulders to police borders, protect asylum seekers and keep irregular migrants out”.<sup>41</sup> It has been reported that “[t]he number of currently existing hotspots and their capacity are not sufficient to ensure the disembarkation and processing of all arrivals”.<sup>42</sup> The challenges posed to reception incapacities in these two member states have therefore not been properly addressed under this model.

Interviews conducted in Italy for the purposes of this report have confirmed that picture and that the policy priority given to more stringent fingerprinting processes of individuals in the Eurodac database has increased and further problematised Italian authorities’ incapacities to adequately receive and assist the new arrivals and to comply with EU standards.

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<sup>38</sup> European Commission, Progress Report on the Implementation of the hotspots in Italy, COM(2015) 679 final, 15.12.2015, p. 4.

<sup>39</sup> See European Commission, First Report on Relocation and Resettlement, COM(2016) 165 final, Brussels, 16.3.2016, specifically Annex IV (State of Play Report – Italy), p. 3.

<sup>40</sup> This was despite the fact that the report acknowledged that “[f]ingerprinting rates reported by the Italian authorities, the IOM and Frontex have almost reached 100% in recent disembarkations in operational hotspots” – see p. 3 of Annex IV.

<sup>41</sup> *Ibid.*, p. 6.

<sup>42</sup> *Ibid.*, p. 11.

The EU hotspot approach is a process of sorting out/screening people into categories at the moment of arrival. It screens for ‘who you are’ at the moment of disembarkation, determining not only your nationality but also whether you are an ‘economic migrant’ or an ‘asylum seeker’. The moment of disembarkation is one when people are highly vulnerable and psychologically unstable. NGO interviews for this report have alluded to cases where psychological coercion techniques have been used by Italian authorities, e.g. promising things to the migrants in exchange for their fingerprints, or other pressures.

### 2.3 Unilateral and ad hoc actions

Countries like Italy and Greece have continually called for more ‘EU solidarity’ and ‘fairer sharing of responsibility’ among all EU member states. They have also stressed the need to move beyond the Dublin regime. The lack of a common European system of responsibility has led them to devise national and unilateral responses to assisting migrants and asylum seekers at sea.

An illustrative example was the Italian Operation Mare Nostrum (OMN), which took responsibility for people in need of rescue and protection in the Mediterranean in October 2013.<sup>43</sup> The OMN focused mainly on search and rescue (SAR) at sea and disembarkation of those rescued in Italian territory. It was the Italian government’s response to the “increase of migratory flows during the second half of the year and consequent tragic ship wreckages off the island of Lampedusa”, where more than 360 migrants had died.

The OMN was a military operation with a predominantly humanitarian approach and its activities took place mainly in international waters.<sup>44</sup> It included

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<sup>43</sup> For official information about the operation, refer to Ministero della Difesa, Marina Militare, “Mare Nostrum Operation” (<http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>). For background on the events that preceded its establishment refer to “Lampedusa boat tragedy: Migrants ‘raped and tortured’”, *BBC News*, 8 November 2013 (<http://www.bbc.co.uk/news/world-europe-24866338>).

<sup>44</sup> According to Amnesty International in *Lives Adrift: Refugees and Migrants at Peril in the Central Mediterranean* (London, September 2014, p. 23),

[t]he area patrolled by OMN, which measures about 43,000 km<sup>2</sup>, extends south of Lampedusa along 400 nautical miles by 150 nautical miles in the eastern part,

operational activities in the SAR zones of Malta and Libya. It entailed close collaboration with the Italian coast guard authority, which coordinated all the SAR operations through the Rescue Coordination Centre in Rome and ensured compliance with international legal standards of the law of the sea. The Italian coast guard relied on additional assets provided by the Italian navy. While the operation's chief goals were to safeguard lives at sea and fight against the trafficking of human beings, its main contributions related to SAR and assisting boats in distress.

The OMN rescued about 150,000 people during its existence and reportedly the costs involved approximately €9 million a month. The Italian operation received little to no support from other EU member states. Slovenia constituted the exception, sending a navy patrol boat with about 40 authorities to support the OMN. Importantly, the OMN regarded any boat in humanitarian distress as in need of SAR.

Despite some academic criticism,<sup>45</sup> the OMN received support from human rights and civil society organisations, which expressed concerns when plans to abort it were announced by the Italian and EU authorities.<sup>46</sup> However, no other EU

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thus overlapping with the Maltese SAR zone south of Malta as well as with the Libyan SAR zone (...) OMN relies on staff and assets from the Italian Navy, air forces, customs police, coastguard and state police. The Navy alone has over 900 personnel dedicated to the operation.

<sup>45</sup> P. Cuttitta, "From the *Cap Anamur* to *Mare Nostrum*: Humanitarianism and Migration Controls at the EU's Maritime Borders", in C. Mattera and A. Taylor (eds), "The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies", CLEER Working Papers 2014/7, Center for the Law of EU External Relations, TMC Asser Institute, The Hague. Cuttitta argues that the operation did not constitute a qualitative move in Italy's policy and practices in the Mediterranean.

<sup>46</sup> According to Amnesty International (2014, op. cit., p. 25),

UNHCR, Amnesty International and other NGOs have all welcomed OMN as the only practical measure that has been put in place to rescue refugees and migrants since the shipwrecks of October 2013. Amnesty International is therefore concerned about the declared intention of the Italian government to close the operation in the course of the Italian presidency of the EU, which ends in December 2014, in the absence of clear commitments by other states and the EU to employ at least the same amount of resources for search and rescue, to take over from OMN.

initiative has since really or formally taken over the humanitarian work that was carried out by the OMN. This has left an important vacuum, with a reported increase in the number of deaths in the Mediterranean.<sup>47</sup> This gap was acknowledged by the above-mentioned 2015 European Agenda on Migration, which stated that “Europe cannot stand by whilst lives are being lost. Search and rescue efforts will be stepped up to restore the level of intervention provided under the former Italian ‘Mare Nostrum’ operation.”<sup>48</sup>

The International Organization for Migration has recently estimated that among the people trying to reach Europe through the Mediterranean Sea, the number of casualties during January–July 2016 reached over 3,034.<sup>49</sup> OMN finished at the end of 2014, following a joint statement by the former Commissioner for Home Affairs Cecilia Malmström and the Italian Interior Minister Angelino Alfano,<sup>50</sup> and the launch of a new Frontex Joint Operation (JO) Triton, which, as confirmed originally by the Commission,

cannot and will not replace Mare Nostrum. The future of Mare Nostrum remains in any case an Italian decision. Triton will not affect the responsibilities of Member States in controlling their part of the EU's

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See also *La Repubblica*, 5 August 2014 ([http://www.repubblica.it/politica/2014/08/15/news/alfano\\_immigrati\\_mare\\_nostrum-93838728/](http://www.repubblica.it/politica/2014/08/15/news/alfano_immigrati_mare_nostrum-93838728/)).

<sup>47</sup> See Forensic Oceanography/Watch the Med, “Death by Rescue”, 2016 (<http://deathbyrescue.org/report>).

<sup>48</sup> European Commission, COM(2015) 240 final (2015), op. cit., p. 3.

<sup>49</sup> See Missing Migrants Project, “Migrant, Refugee Deaths at Sea Pass 3,000 as Arrivals Near 250,000”, IOM, Geneva, 26 July 2016 (<http://missingmigrants.iom.int/migrant-refugee-deaths-sea-pass-3000-arrivals-near-250000>).

<sup>50</sup> Refer to European Commission, “Statement by Commissioner Malmström after the meeting with Italian Interior Minister Alfano”, Brussels, 27 August 2014 ([http://europa.eu/rapid/press-release\\_STATEMENT-14-259\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-259_en.htm)) and European Commission, “Frontex Joint Operation ‘Triton’ – Concerted efforts to manage migration in the Central Mediterranean”, Memo, Brussels, 7 October 2014 ([http://europa.eu/rapid/press-release\\_MEMO-14-566\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-566_en.htm)).

external borders, and their obligations to the search and rescue of people in need.<sup>51</sup>

Search and rescue at sea has proved to be an area where countries like Italy have felt obliged to provide a ‘national’ response. While there is also a SAR and disembarkation regime in international law<sup>52</sup> – there is not such a wide consensus on the interpretation of the exact criteria determining EU member states’ obligations to disembark rescued migrants and asylum seekers at distress at sea. Not all persons being rescued are always disembarked at ‘the nearest port’, but rather at a ‘place of safety’ of the coastal state concerned.

In the EU, those who are rescued fall – by default – into the Dublin regime described above. The combination of these two factors leads to a fundamental conundrum: according to interviews carried out for the purposes of this report, the Dublin logic, through which the first state of entry is the one responsible for assessing asylum claims and those not legitimised to stay in its territory are expelled, may constitute a deterrence for member states from actively engaging in SAR operations of people in distress at sea. The conundrum becomes more important in light of the diverse interpretations that EU member states have of the concept of ‘place of safety’ for disembarkation.

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<sup>51</sup> See European Commission, “Statement by EU Commissioner Cecilia Malmström on operation Triton”, Brussels, 7 October 2014 ([http://europa.eu/rapid/press-release\\_STATEMENT-14-302\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-302_en.htm)). The mapping of national authorities is provided by M. Vasquez, J. Kisielewicz, N. Shembavnekar, S. Petronella, J. Brassington and M. Capdevila, “Mapping Annexes to the Final Report – Study on the feasibility of improved co-operation between bodies carrying out European Coast Guard functions”, ICF International, London, June 2014 (<http://ec.europa.eu/transport/modes/maritime/studies/doc/2014-06-icf-coastguard-mapping.pdf>).

<sup>52</sup> The more relevant instruments on SAR are the UN Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue, and for Frontex operations the Regulation (EU) No. 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex at the external borders of the Member States of the EU (Regulation on Frontex sea border surveillance operations), OJ L 189/93, 27.6.2014.

As stated above, the Frontex-led JO Triton has not formally taken over the work of OMN in Italy. Compared with the OMN, Triton covers a different geographical area, is conducted by national authorities responsible for Schengen cooperation and has distinct purposes and practical aims.<sup>53</sup> The main goal and core mandate of the Frontex JO Triton is ‘border control and surveillance’. Triton does engage in SAR as a general obligation under international law, but only in the context of border controls and surveillance activities and not as part of its official mandate.<sup>54</sup>

There has been a great deal of ambiguity concerning Triton’s formal competences, which signals the sensitivities of certain Mediterranean states as regards the competence for SAR. The fact that Regulation 656/2014<sup>55</sup> only applies to SAR situations emerging from “border surveillance” activities at sea coordinated by Frontex, and not to those conducted by EU member states, further illustrates this concern.

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<sup>53</sup> For more information on JO Triton refer to Frontex, “Joint Operation EPN Triton” (<http://frontex.europa.eu/operations/archive-of-operations/djhlpB>). According to Frontex, the following countries are participating in the operation: “Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom/Egypt”. The official objective of the operation is “[t]o implement coordinated operational activities at the external sea borders of the Central Mediterranean region in order to control irregular migration flows towards the territory of the Member States of the European Union and to tackle cross-border crime”.

<sup>54</sup> According to Frontex, “[i]nternational law obliges all captains of vessels to provide assistance to any persons found in distress at sea. SAR is also a specific objective of the operational plan of every Frontex joint maritime operation. For this reason, vessels deployed by Frontex to an operational area are always ready to provide support to the national authorities in SAR operations”. See Frontex, “The role of Frontex in search and rescue”, 7.7.2016 (<http://frontex.europa.eu/pressroom/hot-topics/the-role-of-frontex-in-search-and-rescue-EQYKeH>).

<sup>55</sup> See Regulation No. 656/2014, op. cit.

A total of 153,988 persons entering irregularly in the EU were intercepted and/or rescued in the scope of JO Triton by November 2016.<sup>56</sup> As reported by Frontex,<sup>57</sup> “between January and June 2016, Frontex-deployed assets rescued 24,657 people within Operation Triton in the Central Mediterranean Sea and 34,255 people within Operation Poseidon in the Aegean Sea”.

More than 90% of irregular entry detections by Frontex are actually people who have been rescued at sea through SAR activities. This is despite the Frontex JO Triton mandate being border control and surveillance and not SAR. According to interviews with Frontex officials in November 2016, a total of about 150,000 people had been reported by Frontex JO Triton as irregular entries in Italy so far that year, among whom only 4,000 have not been rescued at sea.

It is central to clarify that Frontex JO Triton statistics correspond with the total number of entries into Italy by sea. This is based on an agreement between Frontex and the Italian Ministry of Interior, in which all persons who are rescued at sea are then counted for the purposes of Triton statistics. According to our interviews, Frontex is responsible for about 30% of those detections. Interviews conducted in Italy for this report confirmed that the statistics show how the existence of SAR operations such as OMN have had no visible effects on the actual number of people who enter irregularly by sea or their intentions. Since the end of OMN the numbers have remained stable and have not decreased.<sup>58</sup> Indeed, the number of people rescued at sea has increased despite no EU-led operation formally having SAR in its mandate. Moreover, NGOs have reported that the reasons why people try these highly dangerous routes go beyond expectations of

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<sup>56</sup> S. Carrera and L. den Hertog, “A European Border and Coast Guard: What’s in a Name?”, CEPS Liberty and Security in Europe, No. 88, CEPS, Brussels, March 2016.

<sup>57</sup> See the Frontex articles, “The role of Frontex in search and rescue”, 7.7.2016 (<http://frontex.europa.eu/pressroom/hot-topics/the-role-of-frontex-in-search-and-rescue-EQYKeH>) and “13 800 migrants rescued in central Med last week”, 30.5.2016 (<http://frontex.europa.eu/news/13-800-migrants-rescued-in-central-med-last-week-ACfEBV>).

<sup>58</sup> Based on statistics available at Frontex, “Migratory routes map” (<http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>).

being safe at sea. Arguments about the ‘pull effect’ of SAR operations are not substantiated by any solid evidence.

Who are those people crossing the Mediterranean by boat? The main nationalities of persons irregularly entering the EU through the Central Mediterranean route and caught by Frontex JO Triton have been Eritrean, Nigerian, Somalis, Sudanese and Gambian. Some of them enjoy high rates of international protection recognition in EU member states, and have been identified by the United Nations High Commissioner for Refugees (UNHCR) as among the top ten source countries of refugees.<sup>59</sup>

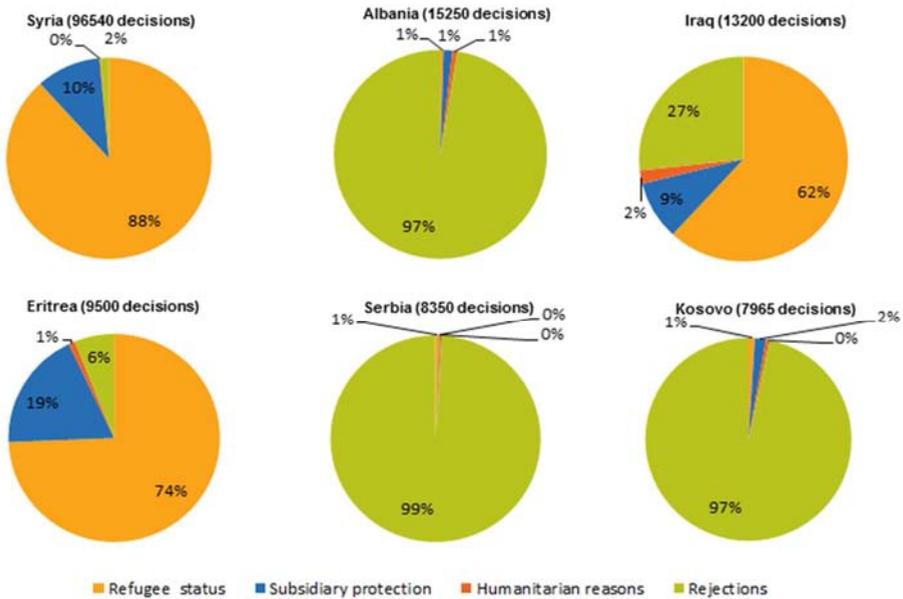
These countries include Somalia, South Sudan, Sudan, the Democratic Republic of the Congo, Central African Republic and Eritrea. Still, a majority of the disembarkations from the central Mediterranean routes take place in Italian ports and the envisaged hotspots. Disembarkations in Malta are almost zero. Reportedly, this may be the consequence of an Italian–Maltese agreement.<sup>60</sup> According to Eurostat asylum statistics, as Figure 1 also shows, Eritreans had a high recognition rate in the EU, at 93%, for international protection or other forms of subsidiary protection during the first quarter of 2016.

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<sup>59</sup> See UNHCR, “Mid-year trends 2015”, Geneva, 18.12.2015; see also Guild and Carrera (2016), op. cit.

<sup>60</sup> H. Grech, “Italian MEP asks Brussels about ‘secret Malta-Italy migrants for oil deal’”, *The Malta Independent*, 18 October 2015. This was also underlined in Carrera and den Hertog (2016), op. cit.

Figure 1. First instance decisions in the EU-28, by citizenship (1<sup>st</sup> quarter 2016)



Citizenships selected here are those for which the highest number of first instance decisions was issued during Q1 2016

Source: Eurostat, 2016.

It is important to highlight that the nationalities of people arriving in Libya have been reported as shifting, now including not only nationalities from Africa, but also Syrians. In December 2016 the UNHCR registered approximately 38,000 refugees and asylum seekers in Libya, half of whom were reported to be from Syria. According to the same source, “[i]t is estimated that the total number of migrants, refugees, and asylum seekers currently in Libya is much higher than these figures”.<sup>61</sup> This gives a clear indication of a change in the actual nature of migratory movements towards central Mediterranean routes, which may be the result of the

<sup>61</sup> See UNHCR, “UN report urges end to inhuman detention of migrants in Libya”, 13 December 2016 (<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21023&LangID=E>); see also UNHCR and UN Support Mission in Libya, *Detained and Dehumanised: Report on Human Rights Abuses of Migrants in Libya*, Geneva and Tunis, 13 December 2016.

closing the eastern Mediterranean routes owing to the EU–Turkey deal and policies of closure in the Western Balkans.<sup>62</sup>

The ‘SAR gap’ left by OMN has been filled by the involvement of the Italian coast guard and several NGOs. These have included, for instance, the Migrant Offshore Aid Station (MOAS) (Malta) in partnership with the Italian Red Cross, Doctors without Borders (MSF) (Brussels and Barcelona branches), SOS Méditerranée (in partnership with the Amsterdam branch of MSF), Sea-Watch, Save the Children, Proactiva Open Arms, Sea-Eye, Jugend Rettet and the Dutch charity, Refugee Boat Foundation.

These NGOs have two different operational ‘models’:<sup>63</sup> first, organisations counting with larger vessels that carry out fully fledged SAR activities; and second, small-scale NGOs that exclusively rescue people and provide emergency medical assistance, and which do not engage in taking those who have been rescued back to Italian ports. They are actually among the few actors that are at present ‘formally’ engaging in SAR in the central Mediterranean Sea.

Interviews conducted in Italy for the purposes of this report have revealed that some of these civil society actors have been exposed to demands by Italian authorities to cooperate in the so-called ‘fight against smuggling’, in particular with respect to reporting suspected smugglers and assisting in police investigations. There have been a few reported incidents of violence against some of these same NGOs and other boats by Libyan coast guard authorities.<sup>64</sup>

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<sup>62</sup> S. Carrera and E. Guild, “EU–Turkey plan for handling refugees is fraught with legal and procedural challenges”, CEPS Commentary, Brussels, 10 March 2016.

<sup>63</sup> See for instance, *EUobserver*, “How NGOs took over migrant rescues in the Mediterranean”, 1 September 2016 (<https://euobserver.com/opinion/134803>).

<sup>64</sup> See “Libyan coastguard speedboat attacked migrant dinghy, says NGO”, *The Guardian*, 21 October 2016 (<https://www.theguardian.com/world/2016/oct/21/men-on-libyan-coastguard-boat-reportedly-attack-dinghy-of-refugees-and-migrants>).

## 2.4 Whose maritime borders in the Mediterranean?

### 2.4.1 A multi-actor and fragmented landscape

Art. 77(2)(d) of the Treaty on the Functioning of the European Union (TFEU) stipulates that the Union shall adopt any measure necessary for the gradual establishment of an integrated management system for external borders. The current landscape of actors involved in EU border control/surveillance-related activities is anything but integrated at present.

There is an increasing plurality of actors involved in maritime border management and surveillance activities in the EU. This blurs who is doing what and who is (or should be) responsible for what. The Mediterranean is becoming a highly populated and dispersed area of actors and authorities, some of whom have very little to do with questions related to Schengen and asylum protection as envisaged in EU law.

The EU legal system makes a clear distinction between the domains of ‘borders’ and ‘asylum’. Border controls and surveillance are regulated by the SBC<sup>65</sup> and related pieces of legislation, and provide common rules as to how checks on persons and surveillance are to be conducted in compliance with EU principles and fundamental rights.

The SBC establishes an explicit hierarchy between borders and asylum, i.e. the former must be without prejudice to EU member states’ obligations to ensure international protection, and search and rescue at sea. Whenever a person seeks international protection, albeit at the border or at sea (in EU, international or third-country waters) s/he comes within the scope of EU asylum protection law and the EU Charter of Fundamental Rights, and normal border procedures no longer apply.<sup>66</sup> International protection obligations take over.

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<sup>65</sup> Regulation (EU) No. 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1, 23.3.2016.

<sup>66</sup> Art. 3 SBC states that “[t]his Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to: (b) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*”. See also Art. 4.

Each of these frameworks is in the hands of specific, responsible national authorities. There is equally a plainly demarcated difference between those actors involved in border control/surveillance and those responsible for asylum reception, procedures and determination. This is not only related to their attributed powers, but is also a way to duly ensure their expertise and compliance with EU standards and rule of law principles.

The nature of the authorities responsible for Schengen has been considered the best fit to ensure compliance with Art. 7 SBC, which stipulates that their conduct while carrying out border checks/surveillance needs to fully respect human dignity, especially in cases involving vulnerable persons, and that any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures. Moreover, while carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

There are more than 50 national authorities involved in the border control functions that are included in the Schengen Borders Code.<sup>67</sup> EU member states have been requested to designate responsible national authorities.<sup>68</sup> In three-quarters of cases the ministries of interior (or their federal counterparts) are involved or control one or more border guard functions. In a third of all countries, the ministry of interior acts as the main or only responsible ministry.

Another ministry that may be responsible is the ministry of justice, as in countries like Denmark and Iceland. The ministry of justice acts as the lead with other counterparts in the cases of Hungary, Norway, Sweden and Switzerland. In these countries, the ministry of justice is also tasked with the function of law

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<sup>67</sup> Refer to the full list in the SBC ([http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen/docs/handbook-annex\\_01\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen/docs/handbook-annex_01_en.pdf)). See also Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006, pp. 1–32.

<sup>68</sup> Para. 18 of the SBC Regulation establishes that “Member States should designate the national service or services responsible for border-control tasks in accordance with their national law. Where more than one service is responsible in the same Member State, there should be close and constant cooperation between them”.

enforcement. The ministry of finance is mainly responsible for the customs function. The ministry of defence is involved, along with the ministries of interior or justice, in four Mediterranean countries (France, Italy, Malta, Portugal and Spain) and two Nordic countries (Norway and Sweden).

As Figure 2 below shows, the ‘main responsibility’ in EU member states holding territorial external borders usually lies with specialised/professionalised border authorities or services. This complies with the obligation laid down in the Schengen Border Catalogue, which identifies as ‘best practice’ that the national border authorities should be of a civilian (non-military) nature and that “the competent national authority is a specialised border guard or border police force (not a military one)”.<sup>69</sup>

For those EU member states not holding the common Schengen external border the authorities responsible have moved to the police or ‘border police’, and to airport authorities. In some member states these are assisted by other authorities. What are their functions? The common rules on border controls and surveillance – rules governing border control of persons crossing the external borders of the member states of the Union – are set out in the SBC.<sup>70</sup> The SBC states that “[b]order control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued”.<sup>71</sup>

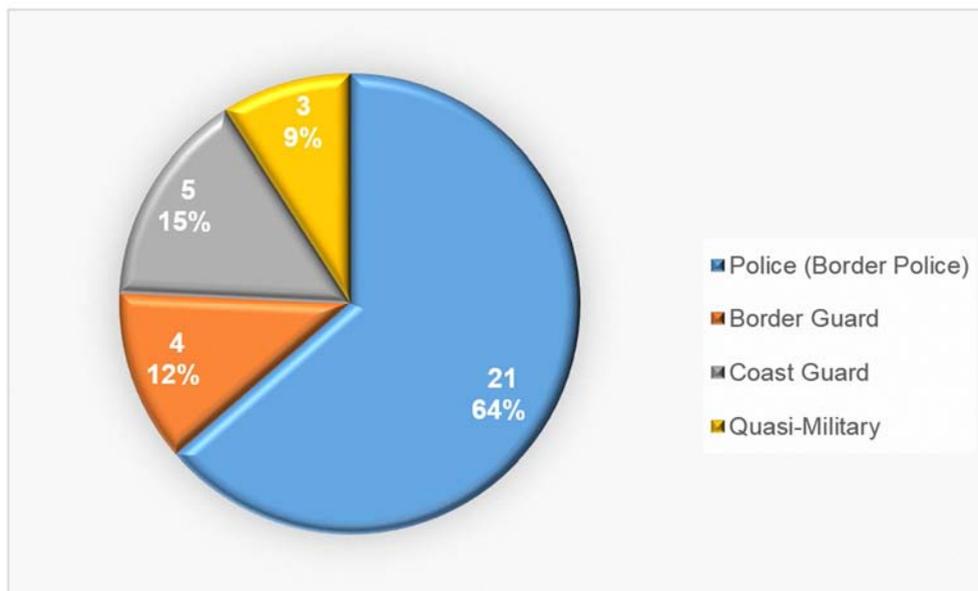
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<sup>69</sup> Council of the European Union, Updated Schengen Catalogue on External Border Control, Return and Readmission, 3<sup>rd</sup> Draft, 15250/2/08, Brussels, 2 December 2008.

<sup>70</sup> The SBC Regulation differentiates between “border checks of persons at border crossing points” and “border surveillance” functions. According to Art. 2(11), ‘border checks’ means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it; under Art. 2(12), ‘border surveillance’ means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks.

<sup>71</sup> See para. 7 of the SBC Regulation.

Figure 2. Types of national services responsible for Schengen border tasks



Source: Authors' elaboration.

Therefore, these authorities do not deal with asylum. The SBC also positions Frontex as the main actor to manage and coordinate operational cooperation and assistance to EU member states.<sup>72</sup> As we discuss in chapter 3, the new EBCG Regulation gives the Agency the responsibility to monitor and scrutinise implementation of the SBC by EU member states' authorities.

The picture becomes even more diversified when looking at national services holding 'coast guard-related' competences. More than 300 national authorities have been identified as engaging in coast guard functions in the EU.<sup>73</sup> These present

<sup>72</sup> Para. 19 states: "Operational cooperation and assistance between Member States in relation to border control should be managed and coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States ('the Agency'), established by Council Regulation (EC) No 2007/2004."

<sup>73</sup> See M. Vasquez, J. Kisielewicz, N. Shembavnekar, S. Petronella, J. Brassington and M. Capdevila, *Final Report – Study on the feasibility of improved co-operation between bodies carrying out European Coast Guard functions*, ICF International, London, June 2014

an uneven involvement of civil, paramilitary and military actors, depending on each member state. By way of illustration, the contacts of the European Coast Guard Functions Forum (ECGFF)<sup>74</sup> in Italy include the Italian coast guard, the Italian navy and the Guardia di Finanza; in Portugal, the Marinha, Guarda Nacional Republicana and Autoridade Maritima Nacional; and in Spain, the Armada Española, Guardia Civil and Customs Spain. It is noticeable that not all EU member states concerned have a specialised ‘coast guard’ authority.<sup>75</sup>

Furthermore, each of these domestic actors are under different ministries, which include not only those of the interior, but also finance, customs, fisheries and defence. There is a high degree of integration in coast guard services emerging from the Nordic approach, where maritime safety, marine protection and defence prevails. For example, the Icelandic Coast Guard is an independent agency established under the Icelandic Transport Authority.<sup>76</sup> A similar approach is taken in Sweden and Norway. Still, in other coastal states around the Baltic Sea, i.e. Lithuania, Latvia and Poland, there seems to be a clearer division among the different national services and responsible ministries. With the exception of Croatia, the SAR function on the Mediterranean coast is mainly conducted by naval services, though in the Nordic or Baltic Seas there is greater variety of agencies involved, ranging from the navy to the coast guard, police or even specialised agencies.<sup>77</sup>

There is no agreement at the EU level on a precise list of coast guard functions. The ECGFF highlights, however, that ‘coast guard functions’ are not only those related to ‘maritime border controls’ or search and rescue, but also include tasks as diverse as the following (Figure 3): maritime safety, including vessel traffic

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(<http://ec.europa.eu/transport/modes/maritime/studies/doc/2014-06-icf-coastguard.pdf>).

<sup>74</sup> See ECGFF, “Mission & Tasks” (<http://www.ecgff.eu/mission-tasks>).

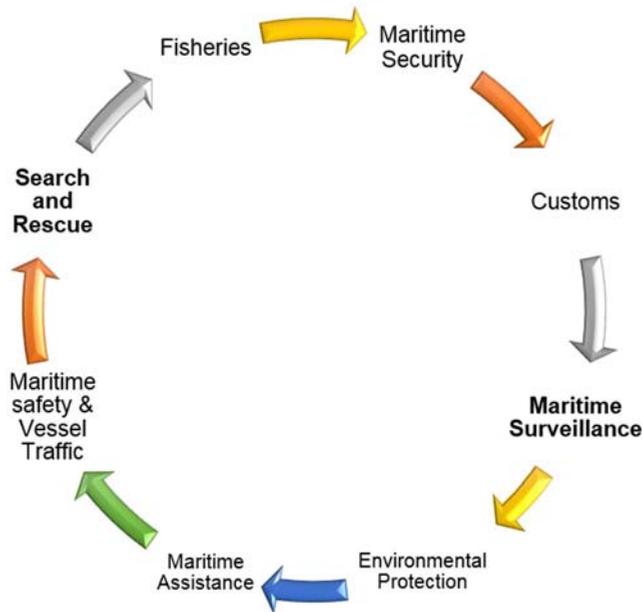
<sup>75</sup> Notably, Greece, Ireland and Croatia count with a specialised coast guard authority.

<sup>76</sup> Icelandic Transport Authority, “Ships and Cargoes” (<http://www.icetra.is/maritime/ships-and-cargoes/>).

<sup>77</sup> This difference could be explained by SAR operations being of a very different nature in the Mediterranean, where refugee or migrant boats from the southern Mediterranean is the primary concern, whereas in other seas the primary concern is SAR of fishermen, passengers and pleasure sailors.

management; maritime, ship and port security; maritime customs activities; the prevention and suppression of trafficking and smuggling, and connected maritime law enforcement; maritime monitoring and surveillance; maritime environmental protection and response; maritime SAR; ship casualty and maritime assistance services; maritime accident and disaster response; and fisheries inspection and control.

Figure 3. Coast guard functions in the EU



Source: Authors' elaboration.

### 2.4.2 Operation Sophia

The gaps resulting from the asymmetry in responsibilities of the Dublin system leave the door open to other actors to get involved in these domains. This has been the case for instance with defence or military actors. The EU Naval Force (EUNAVFOR) MED operation, more recently called 'Operation Sophia', constitutes a case in point. The price the EU paid for the speedy deployment of this Common Security and Defence Policy operation in the Mediterranean was the criticism it drew from international partners and the general public alike, when plans for a

'boat-sinking' operation were unveiled, raising fears about unacceptable levels of violence and collateral damage – a European version of Mexico's drug war.

Civil society organisations and some international partners have reacted negatively to an operation that appears to heighten humanitarian risk by putting migrants in the cross-fire. High Representative/Vice-President (HR/VP) Federica Mogherini was on the defensive, stating time and again that the targets are not migrants but "those who are making money on their lives and too often on their deaths".<sup>78</sup> Yet the problems of Operation Sophia lie less in clumsy public diplomacy than in the perilous mismatch between its stated objectives and the absence of a clear strategy and a mandate under international law, thus creating both operational and political risks for member states involved in the operation.

Success was therefore not assured. Despite these limitations, the naval force nevertheless marked a turning point in the EU's security narrative, because it meant that the Union was finally addressing the threats to security and the humanitarian tragedies in the south-central Mediterranean. The operational model of EUNAVFOR MED is inspired by the EU's Naval Force Operation Atalanta off the Horn of Africa and in the Western Indian Ocean. Launched in 2008, Atalanta has allowed the EU to acquire valuable know-how in maritime security, namely in deterring and disrupting acts of piracy and armed robbery, not just on the high seas but also ashore (for instance, the helicopter gunship attacks to destroy pirates' logistical bases on the coast).

Operation Sophia was launched on 22 June 2015.<sup>79</sup> Phase 1 of the operation (surveillance and assessment), began with no mandate from the UN Security Council (UNSC) to carry out the crucial phases 2 and 3 (seek and destroy), whose

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<sup>78</sup> European External Action Service (EEAS), "Statement by High Representative/Vice President Federica Mogherini on the Council decision to launch the naval operation EUNAVFOR Med", Luxembourg, 22.6.2015.

<sup>79</sup> At the outset of the surge, its force strength comprised nine surface units (warships), a submarine, three fixed-wing maritime patrol aircraft, five helicopters and a drone operating under the national flags of fourteen member states (Belgium, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain, Sweden, and the UK). See EEAS, *EUNAVFOR MED Op SOPHIA – Six Monthly Report 22 June–31 December 2015*, EEAS(2016) 126, 27 January 2016 (<https://wikileaks.org/eu-military-refugees/EEAS-2016-126>).

military planning and outcomes were undetermined. Arguably, phase 1 did not need a UNSC resolution, because surveillance is executed in international waters and airspace. But beyond this point there was little indication of what EU forces should do during phases 2 and 3, which means and budget should be used to carry out these tasks or what conditions would have to be met for the Council to decide on the transition beyond phase 1, into Libyan territories.

Attacking traffickers and smugglers and destroying their means might lead to counterattacks by the militias that protect these resources, benefit from or organise trafficking in one way or another. Indeed, the EU would have to calibrate its military activities, particularly when moving within Libyan territorial waters or ashore, to avoid destabilising a political process by collateral damage, by disrupting legitimate economic activity or by creating a perception of having taken sides.<sup>80</sup>

These considerations led to protracted discussions with Russia and China on the language of a UNSC resolution. Russia, in particular, insisted on a watertight mandate to prevent a repetition of what it considered to be an abuse by Western nations of a resolution to intervene militarily in Libya in 2011. The discussions in the Security Council revolved around the words ‘disposal’ (read: sinking) of vessels and related assets, ‘before use’, and the legal definitions of ‘traffickers’ and ‘smugglers’, who, unlike pirates, fall outside the scope of classic international law.

Ultimately, Operation EUNAVFOR MED was granted an international legal mandate by way of UNSC Resolution 2240 on 9 October 2015.<sup>81</sup> This resolution authorises states and regional organisations to intercept, inspect, seize and dispose (i.e. destroy) vessels on the high seas off the coast of Libya for a period of one year,

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<sup>80</sup> Illustrative in this respect is the report of 25 January 2016 by the Operation Commander, Rear Admiral Enrico Credendino of the Italian Navy, for the EU Military Committee and the Political and Security Committee. It gives refugee flow statistics and outlines the performed and planned operation phases (1, 2A, 2B and 3), the corresponding activities of the joint EU forces operating in the Mediterranean and the future strategies for the operation. See EEAS, *Six Monthly Report* (EEAS(2016) 126), *ibid*.

<sup>81</sup> See also the subsequent UN [Resolution 2292 \(2016\), adopted by the Security Council at its 7715<sup>th</sup> meeting, on 14 June 2016](#) (S/RES/2992), and UNSC, “Security Council Authorizes Inspection of Suspected Embargo-Breaking Vessels off Libya’s Coast, Unanimously Adopting Resolution 2292 (2016)”, 14 June 2016 (<http://www.un.org/press/en/2016/sc12401.doc.htm>).

but only when they have “reasonable grounds to believe” that these vessels, inflatable boats, rafts and dinghies are being used for smuggling and human trafficking from Libya.

Adopted under Chapter VII of the UN Charter, the resolution thus effectively details the circumstances under which the use of force may be used, all in keeping with the protection of migrants’ rights, international human rights obligations, international refugee law and the UN Convention on the Law of the Sea. In short, UNSC Resolution 2240 lays down a set of standards that may well complicate the practical running of the operation, especially when confronted on the high seas with smugglers who have proven to possess callous disregard for the well-being of their ‘clients’. To be sure, UNSC Resolution 2240 does not authorise Operation Sophia to act within the territorial and internal waters of Libya, let alone on Libyan territory, as projected by the decision adopted by the Council of the EU.<sup>82</sup>

The alternative legal justification for the implementation of phases 2 and 3 of the operation would be for the EU to act on the invitation of the legitimate government of Libya. However, with two power centres vying for dominance, any strategy that hinged on the invitation of one of the rivalling parties (i.e. that of the internationally recognised ‘government’ in Tobruk) risked irking the other (i.e. the Islamist ‘government’ in Tripoli). The EU’s operation therefore carried serious political risks and might even have ended in impasse.

In the meantime, the practice of fighting traffickers had led to the re-baptism of EUNAVFOR MED to Operation Sophia, after the name given to the baby born on the ship of the operation that had rescued her mother on 22 August 2015 off the coast of Libya.<sup>83</sup> Shortly afterwards, on 7 October 2015, Operation Sophia entered its second phase. According to the information presented on the website of the EEAS, the operation contributed to saving more than 14,800 people in its first year of deployment, while 71 people had been reported to the Italian authorities as

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<sup>82</sup> See part (ii) of phase 2 as well as phase 3 of the operation, in Art. 2(2)(b) and (c) of Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31, 19.5.2015.

<sup>83</sup> See Council of the European Union, Council Conclusions on Migration, 12880/15, Luxembourg, 12 October 2015 ([http://www.consilium.europa.eu/en/policies/\\_17\\_migratory-pressures](http://www.consilium.europa.eu/en/policies/_17_migratory-pressures)).

possible smugglers and 127 vessels had been ‘removed’ from illegal organisations’ availability.

On 20 June 2016 the Council decided to extend the mandate of Operation Sophia for one year and expand it with two additional tasks: training Libyan coastguards and contributing to the implementation of the UN arms embargo in the high seas. These extra tasks were suggested by HR/VP Mogherini to the Government of National Accord Libya,<sup>84</sup> which requested support from the EU one month later.<sup>85</sup> This was subsequently unanimously endorsed by the UNSC in Resolution 2292 on 14 June 2016.

Thus, Operation Sophia matured from its surveillance & rescue phase into a proper ‘Chapter VII’ operation, since it will help enforce the arms embargo imposed by the UN Security Council. The last time the EU member states carried out such an operation was in the Adriatic Sea under the cover of the Western European Union in the context of the wars in former Yugoslavia (1992–93). That operation was carried out in cooperation with NATO.

The effectiveness and proportionality of Operation Sophia has been questioned. The UK House of Lords<sup>86</sup> concluded that there remain significant gaps in the operation’s understanding of smuggling networks and their modus operandi in Libya. The intentions and objectives of the operation exceeded what could be realistically achieved. The House of Lords also concluded that “Operation Sophia is viewed by NGOs in the humanitarian field as a search and rescue mission. It is undertaking valuable work in search and rescue at sea, but this is not its core

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<sup>84</sup> See EEAS, “Remarks by High Representative/Vice-President Federica Mogherini at the press conference on Libya”, Luxembourg, 18.4.2016; see also Ministerial Meeting for Libya Joint Communiqué, Vienna, 16.5.2016.

<sup>85</sup> EEAS, “Statement by the HR/VP Federica Mogherini on Libya”, Brussels, 22.5.2016.

<sup>86</sup> House of Lords European Union Committee, *Operation Sophia, the EU’s naval mission in the Mediterranean: An impossible challenge*, 14<sup>th</sup> Report of Session 2015–16, London (<http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/144/144.pdf>).

mandate.”<sup>87</sup> This is reflected in a document published by WikiLeaks, presenting the six-monthly report of the operation between 22 June and December 2015.<sup>88</sup>

On the basis of interviews conducted for the purposes of this report, we can conclude that, so far, the most visible effects of Operation Sophia – and its focus on fighting smuggling – have been the following:

- 1) More risky and insecure paths are used to reach Europe. The above-mentioned competence to intercept, inspect, seize and dispose (i.e. destroy) vessels on the high seas off the coast of Libya has effectively meant that there are no longer safe boats for immigrants/asylum seekers to reach Italian territory. In the past, the boats used sail directly to Italian territory. Now these are not even equipped to reach international waters and have led to ever more insecure and risky trips, with people being rescued in international waters gradually closer to Libyan waters.
- 2) There have been no visible outputs or results in terms of addressing the smuggling phenomenon. This brings back the question of ineffectiveness. The statistics provided in section 2.3 demonstrate that the number of irregular entries have continued to be rather stable during 2016. Interviews have also revealed that the people who are accused and incriminated as ‘suspected smugglers’ are very low key or level, usually corresponding to the migrant/asylum seeker who drives the boat and holds the compass. This confirms previous evidence and research about the small-scale ‘cottage industry’ organisation of many facilitators of irregular migration.<sup>89</sup> Moreover, it appears that Operation Sophia authorities do not always share information with the relevant criminal justice authorities in Italy for the purposes of investigations and prosecutions of suspects.

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<sup>87</sup> See point 68 of the report.

<sup>88</sup> See EEAS, *Six Monthly Report*, EEAS(2016) 126 (2016), op. cit. (<https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>).

<sup>89</sup> M. Collyer, “Cross-Border Cottage Industries and Fragmented Migration”, in S. Carrera and E. Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings*, CEPS Paperback, Brussels, 2016, pp. 17–23.

- 3) The launch and development of the operation has also put higher pressures on Libyan coast guard authorities, which correspond at the moment to two official actors involved in coast guard activities and one self-proclaimed coast guard actor.<sup>90</sup> As highlighted above, at the end of 2015 there were three declared incidents experienced by NGOs engaged in SAR where armed Libyan coast guards/actors (it is not clear who they were precisely) confronted them and told them to leave and stop saving people.

Interviews for the purposes of this report have additionally revealed that military actors do not always accept or follow the requests issued by the Italian Maritime Rescue Coordination Centre (MRCC) to get involved in SAR. This is despite being the closest boat to a reported or identified incident. These same interviews equally signalled that it is often secret the exact position where these military boats actually are in the waters, which makes it difficult for the Italian MRCC to always count with them in SAR activities. A justification that is often given by these military actors for non-intervention on SAR is that they would need much time to take these people to the Italian mainland, which would 'leave their area of intervention' unattended for the time to engage in and complete the SAR activity.

The complex multi-actor landscape related to border control, maritime surveillance and the 'fight against smuggling' in the Mediterranean leads to a large degree of fragmentation, sectoral responses and dispersion of efforts by various authorities. It also makes cooperation and coordination challenging in practice. The multi-actor context most importantly blurs 'who does what' and 'who is responsible for what where' in cases of asylum seekers and SAR of migrants in distress in the Mediterranean.

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<sup>90</sup> At the end of October, the EUNAVFOR MED Operation Sophia started training the Libyan Navy Coast Guard and Libyan Navy. The initial training is taking place on board of two EUNAVFOR MED ships on the high seas for 78 embarked trainees and their mentors. See EEAS, "EUNAVFOR MED Operation starts training of Libyan Navy Coast Guard and Libyan Navy", Press release 161027\_11, 27 October 2016.

## 2.5 The limits of third-country cooperation

Joint border-surveillance operations at sea, involving EU and third countries, are not new. Among many others, before and after the creation of Frontex in 2005, various bilateral agreements on sea border controls materialised in January 2004 between Tunisia and Italy, in the framework of the Neptune project,<sup>91</sup> in December 2003 between Morocco and Spain<sup>92</sup> and in December 2007 between Libya and Italy.

There is no need to detail the rationale for these joint operations. Nonetheless, it is important to note that they resulted from a broader framework of bilateral interactions that consolidated over time. In other words, neither Frontex nor the newly created EBCG operate in a vacuum.

This broader framework of bilateral interactions is relevant when understanding the factors that motivated the cooperation of third countries on border controls as well as its implications. This background is also relevant when noting the emphasis placed in the EBCG on “working with third countries (...) in the field of border management, including by deploying liaison officers to third countries or launching joint operations on Union territory or on the territory of third countries”.<sup>93</sup>

As noted in chapter 3, the new EBCG Regulation also foresees the need for increased cooperation with third countries on “return operations” aimed at

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<sup>91</sup> The Neptune project is a joint operation aimed at strengthening controls at the sea borders of the EU in the Mediterranean. This project was introduced by then Italian Interior Minister Giuseppe Pisanu under the 2003 Italian Presidency of the EU and was initiated on 10 September 2003. Since then, the Neptune project has been backed by Cyprus, France, Germany, Greece, Malta, the UK, the Netherlands, Spain and Europol. A joint centre of surveillance was established in Palermo with a view to preventing and acting quickly against illegal migration and human trafficking in the Mediterranean.

<sup>92</sup> The agreement was signed on 4 December 2003 between Spain and Morocco. It was aimed at fighting against human trafficking through joint sea-border police cooperation in the area surrounding the Canary Islands and in the straits of Gibraltar.

<sup>93</sup> European Commission, A European Border and Coast Guard and Effective Management of Europe’s External Borders, COM(2015) 673 final, Brussels, 15.12.2015, p. 6.

expelling or removing irregular migrants, including the acquisition of travel documents.<sup>94</sup>

Beyond their inherent diversity, the above-mentioned joint operations between EU and non-EU countries all responded to a state of emergency. This is a key feature that characterises them. Another common element is that EU member states used incentives, not ‘conditionality’, in order to ensure the cooperation of third countries in reinforced border controls. Incentives included the conclusion of financial protocols to support foreign direct investment and job-creating activities in third countries’ labour markets.

Technical equipment and capacity-building programmes aimed at upgrading their law enforcement bodies were also part of the incentives. The use of incentives was motivated by the perceptible empowerment of some third countries as a result of their proactive involvement in the fight against irregular migration and reinforced border controls. It was also motivated by the growing awareness that third countries were able to capitalise on crucial issue areas (intelligence cooperation and energy security, to name but a few) in order to defend their own views and priorities. In other words, not only have third countries been empowered, but also their capacity to exert a form of reverse leverage on their European counterparts has increased.<sup>95</sup>

These unprecedented policy developments in the relations between some EU member states and Mediterranean third countries result from a learning curve that cannot be dismissed offhand when dealing with increased cooperation on border surveillance, migration controls and readmission, including the swift

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<sup>94</sup> European Commission, Proposal for a Regulation of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulation (EC) No. 2007/2004, Regulation (EC) No. 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final, 15 December 2015, Brussels, p. 87.

<sup>95</sup> See J.-P. Cassarino, “Migration and Border Management in the Euro-Mediterranean Area: Heading towards New Forms of Interconnectedness”, in IEMed, *Mediterranean Yearbook*, European Institute of the Mediterranean, Barcelona, 2005, pp. 227-231; E. Paoletti, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya*, New York: Palgrave Macmillan, 2011; N. El Qadim, *Le gouvernement asymétrique des migrations. Maroc/Union européenne*, Paris: Dalloz, 2015.

delivery of travel documents. Moreover, with specific reference to enhanced cooperation on readmission, various EU member states have learned from their bilateral experiences in the Mediterranean that exerting pressure on strategic and empowered third countries may be counterproductive in concrete terms.

EU policy-makers know that the costs and benefits of the cooperation on readmission are also too asymmetric to ensure its durable implementation, just like they know that the bilateral cooperation on readmission is invariably premised on unbalanced reciprocities.<sup>96</sup> Moreover, they have also learned that cooperation on readmission cannot be viewed as an end in itself, especially when dealing with a strategic and empowered third country. This explains why readmission has often been grafted onto a broader framework of interactions, for readmission is just one of the many means of consolidating a bilateral cooperative framework including other strategic (and perhaps more crucial) issue areas.

These basic considerations are essential to gaining a sense of all the interests at play and of the lessons that have been empirically learned by some EU member states, especially those located on the Mediterranean shore. They also shed light on the challenges lying ahead for the EBCG Agency in its new task of deploying liaison officers in third countries with a view to “cooperating with the authorities of third countries, including as regards the acquisition of travel documents”.<sup>97</sup>

It is too early to understand which means or instruments will be put at the disposal of liaison officers to enable them to effectively accomplish their tasks. It is, however, possible to argue that the Commission is intent on using “trade policy and development aid [in order] to gain more leverage in the area of readmission, building on the ‘more for more’ principle which was applied in relation[s] with

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<sup>96</sup> J.-P. Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Middle East Institute, Washington, D.C., 2010.

<sup>97</sup> European Commission, COM(2015) 671 final (2015), op. cit., p. 5. In its recent EU action plan on return, the Commission noted that “in 2014 less than 40% of the irregular migrants that were ordered to leave the EU departed effectively”. The Commission proposed to increase the rate of so-called “assisted voluntary return” or to enforce “return” more radically. European Commission, EU Action Plan on Return, COM(2015) 453 final, 9 September 2015, Brussels, p. 2.

countries in the EU's neighbourhood".<sup>98</sup> This strategy was made explicit for instance in the June 2015 European Council Conclusions calling for wider efforts to "contain the growing flows of illegal migration".<sup>99</sup>

Two elements markedly distinguish the approach adopted in Brussels from the one adopted by the member states in their bilateral interactions with third countries in the Mediterranean. First, reinforced cooperation on border controls is closely interlinked with cooperation on readmission. They are both part of a package. Second, and more importantly, the often-cited 'more for more' principle is equated with conditionality that the Commission intends to use in order to reward or sanction the responsiveness of third countries.

Making trade policy and development aid conditional upon the cooperation on border surveillance and readmission (including the swift delivery of travel documents) might be at variance with the mutual commitments and the spirit enshrined in the various dialogues, declarations and ministerial conferences on migration and development organised since 2004 between EU and non-EU countries located in the Mediterranean and in Africa.

Incidentally, it is worth recalling that in the July 2004 Rabat Process – which has been presented as a template for subsequent dialogues and exchanges on migration matters between European and African representatives – Morocco explicitly relayed its claims to France and Spain<sup>100</sup> in order to place at the centre of discussions the need for economic development, conflict prevention and poverty eradication in countries of origin and of transit when dealing with the management of international migration, be it legal or irregular. This claim or emphasis was clearly reiterated at the November 2015 Valletta meeting on migration. It cuts across the five priority domains mentioned in the declaration adopted in Valletta.

The extent to which the Commission will reconcile the 'more for more' principle with the above-mentioned mutual commitments remains unclear.

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<sup>98</sup> Letter from Commissioner Dimitris Avramopoulos to Ministers, Ares(2015) 2397724, Brussels, 1.6.2015, p. 8.

<sup>99</sup> European Council, Conclusions, EUCO 22/15, 26 June 2015, Brussels, p. 1.

<sup>100</sup> S. Wolff, *The Mediterranean Dimension of the European Union's Internal Security*, New York: Palgrave Macmillan, 2012, p. 140.

Moreover, member states are fully aware that exerting strong pressures through ‘conditionality’ might put their established relations and cooperation on other strategic domains at risk.

This eminently realistic approach is important to understand why the Council welcomed, in its Council Conclusions dated 8 October 2015, the introduction of the ‘more for more’ principle while making clear to the Commission that it should be used “in a concerted way, at both EU and national level (...) [and that] conditionality should be used where appropriate with the aim of improving cooperation”<sup>101</sup> in the broadest sense.

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<sup>101</sup> Council of the European Union, Council Conclusions on the Future of the EU Return Policy, Press Release 711/15, 8 October 2015, p. 2.

### 3. The new European Border and Coast Guard Agency

One of the most visible proposals presented by the European Commission as a response to the European humanitarian crisis of 2015–16 was an initiative revisiting and revamping the mandate and competences of the EU agency Frontex. Based on Art. 77(2)(b) and (d) and Art. 79(2)(c) TFEU, the European Border and Coast Guard was elaborated in a regulation under the ordinary legislative procedure, which was formally adopted in September 2016.<sup>102</sup>

The proposal for the EBCG<sup>103</sup> had been presented in the second half of 2015 and it had reached interinstitutional agreement between the Council and the European Parliament in record time. The proposal came along without a much-needed impact assessment. Endorsed at the first reading by the European Parliament on 6 July 2016, i.e. barely half a year after the Commission had tabled its proposal, the EU was swift in delivering on its commitments.

The Dutch Presidency of the EU (January to June 2016) had identified as a priority reaching political agreement before summer, so the new agency would be in place as soon as possible. On 27 June, both EU institutions publicised their agreement on the proposal.

Regulation 2016/1624 establishes the EBCG Agency, which will continue to be referred to as Frontex. It provides that the new Agency will have “shared responsibility” with EU member states *in the implementation of* European integrated border management.<sup>104</sup> The Preamble underlines that member states

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<sup>102</sup> See Regulation No. 2016/1624.

<sup>103</sup> European Commission, COM(2015) 673 final (2015), op. cit.

<sup>104</sup> For the first time a piece of EU secondary legislation provides a definition of what ‘integrated border management’ is. According to Art. 4,

European integrated border management shall consist of the following components:

(a) border control, including measures to facilitate legitimate border crossings and measures related to the prevention and detection of cross-border crime, such as migrant smuggling, trafficking in human beings and terrorism, where appropriate, and measures related to the referral of persons who are in need of, or wish to apply for, international protection;

have the primary yet not the sole responsibility for the management of their external borders. This is further stated in Art. 5 of the Regulation.<sup>105</sup>

The Commission's proposal had included one paragraph that was omitted from the final version, attributing responsibility for the management of the external borders to the Agency "where the necessary corrective measures based on the vulnerability assessment are not taken or in the event of disproportionate migratory pressure, rendering the control of the external borders ineffective to such an extent that it risks putting in jeopardy the functioning of the Schengen area". What are the main new features attributed to Frontex by the new Regulation?

In short, the Regulation confers on Frontex more capacity in human resources and equipment. The Regulation envisages a total of 1,500 border guards and other relevant staff.<sup>106</sup> The functioning of the Agency relies on liaison officers who will be sent or seconded by the Agency to the EU member states concerned.

The new EBCG will not only coordinate EU member states' authorities responsible for border controls, but also those with 'coast guard' competences when they "carry out maritime border surveillance operations and any other border control tasks", which in several EU states include paramilitary or military authorities.<sup>107</sup>

These innovations also aim at ensuring better information sharing between such domestic actors, as well as between the new Frontex and other EU agencies, such as the European Maritime Security Agency and the European Fisheries Control

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(b) search and rescue operations for persons in distress at sea in accordance with Regulation (EU) No 656/2014 and with international law, taking place in situations which may arise during border surveillance operations at sea; and

(c) analysis of the risks for internal security and analysis of the threats that may affect the functioning or security of the external borders.

<sup>105</sup> Art. 5 states that "Member States shall retain primary responsibility for the management of their section of the external border".

<sup>106</sup> See the numbers below 40 border/coast guards attributed to the other member states in the annex of the Regulation. On the technical equipment pool, refer to Arts 37 and 38 of the proposal.

<sup>107</sup> Refer to Art. 3(1) of the Regulation.

Agency, including the organisation of multi-purpose operations.<sup>108</sup> When it comes to other national operational initiatives among member states, or between them and third countries at the external borders, “including military operations with a law enforcement purpose”, the Regulation states that they will now be able to continue “to the extent this cooperation is compatible with the action of the Agency”.<sup>109</sup>

For any joint border operation to take place, including those at sea involving coast guard functions, the Regulation still leaves the decision to the member state concerned, which will need to request assistance from the new Frontex. The executive director will be responsible for taking the decision to launch the operation after evaluating the proposal by the state(s) concerned.<sup>110</sup>

The EBCG will also have a new competence to monitor regularly the management of the external borders<sup>111</sup> and ‘migration flows’ (risk analysis) and to evaluate EU member states’ implementation of the EU border standards enshrined

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<sup>108</sup> According to para. 44 of the Preamble,

[n]ational authorities carrying out coast guard functions are responsible for a wide range of tasks, which may include maritime safety, security, search and rescue, border control, fisheries control, customs control, general law enforcement and environmental protection. The Agency, the European Fisheries Control Agency established by Council Regulation (EC) No 768/2005 and the European Maritime Safety Agency established by Regulation (EC) No 1406/2002 of the European Parliament and of the Council should therefore strengthen their cooperation both with each other and with the national authorities carrying out coast guard functions to increase maritime situational awareness as well as to support coherent and cost-efficient action. Synergies between the various actors in the maritime environment should be in line with the European integrated border management and maritime security strategies.

<sup>109</sup> See para. 9(d) of the Preamble.

<sup>110</sup> See Art. 14(3) of the Regulation. According to Art. 15, these proposals will need to count with an operational plan

regarding sea operations, specific information on the application of the relevant jurisdiction and legislation in the geographical area where the joint operation takes place, including references to national, international and Union law regarding interception, rescue at sea and disembarkation. In that regard the operational plan shall be established in accordance with Regulation (EU) No 656/2014 of the European Parliament and of the Council.

<sup>111</sup> Para. 12 of the Preamble.

in the SBC. The EBCG Agency will carry out ‘vulnerability assessments’ “to assess the capacity and readiness of the Member States to face challenges at their external borders, (...) as well as their contingency plans to address possible crisis at the external borders”.<sup>112</sup>

The vulnerability assessment will identify measures to be taken and make recommendations to the member state, with a time limit for them to be implemented. In cases where these are not complied with by the member state concerned, the Regulation envisages a procedure granting the Agency the ‘right to intervene’.

The Agency has been recognised as having the ‘right to intervene’ (send EBCG teams) in cases where ‘urgent action’ is needed in EU member states facing profound deficiencies in addressing ‘migration pressures’ and carrying out effective border controls so as to put “in jeopardy the functioning of the Schengen area”. The procedure will be activated where the member state does not follow or adopt the recommended measures or actions in the vulnerability assessment, even in cases where that state has not requested the support of the Agency.

The original Commission proposal had positioned the Commission and the Agency in the driver’s seat of this procedure. Council negotiations have changed it as follows: the Commission will identify and propose to the Council the measures to be implemented by the Agency and “require” the member state concerned to cooperate. The power to take this decision is now in the hands of the Council “because of the politically-sensitive nature of the measures to be decided, often touching on national executive and enforcement powers”.<sup>113</sup> Importantly, the assessment will feed into the evaluation carried out in the scope of the so-called ‘Schengen evaluation mechanism’. In cases where the member state does not comply, the Regulation foresees the application of the Art. 29 SBC procedure.

The Regulation also confers on the new Frontex the competence over SAR. Art. 4 of the Regulation includes as part of the concept of European integrated

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<sup>112</sup> Para. 13 of the Preamble.

<sup>113</sup> Para. 17 of the Preamble.

border management the dimension of SAR operations for persons in distress at sea, “in situations which may arise during border surveillance operations at sea”.

The Agency will ensure a stronger fundamental rights monitoring of its activities. This is also a welcome development in comparison with the current Frontex Agency. The Regulation foresees the development of a code of conduct that will apply to all its border control operations as well as a new complaint mechanism in cases of alleged rights violations.

The Regulation converts Frontex into an EU returns agency. The EBCG has been granted the power to conduct joint return operations and be involved in national return procedures, including cooperation with third countries. A goal of this new task will be to ensure more ‘effective’ expulsion procedures in the EU,<sup>114</sup> so that the number of return decisions of irregular immigrants better matches the enforced expulsion orders.<sup>115</sup>

Art. 53 of the Regulation grants the Agency the competence to “facilitate and encourage technical and operational cooperation between Member States and third countries, within the framework of the external relations policies of the Union, including with regard to the protection of fundamental rights and the principle of non-refoulement”. This article clarifies that when cooperation takes place in the territory of third countries, the EBCG Agency and the participating member states “shall comply with Union law, including norms and standards which form part of the Union *acquis*”. The Regulation ties closely anything that the Agency will do abroad with compliance with protection of fundamental rights and the principle of *non-refoulement*.

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<sup>114</sup> For an in-depth analysis of the legal, political and practical obstacles of EU readmission and return policies, see S. Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, Springer Briefs in Law, London: Springer, 2016.

<sup>115</sup> This comes along with new tasks related to “preventing and detecting serious crime with a cross-border dimension” – para. 11(a) in the Preamble of the Regulation states that this will include “migrant smuggling, trafficking of human beings and terrorism”, which are considered to be “crimes linked to the unauthorised crossing of the external border”.

Still, the European Border and Coast Guard is just a ‘name’.<sup>116</sup> The new Agency will be still dependent on EU member states’ contributions, political willingness to cooperate and domestic capacities. It will not have its own personnel, nor will it have the power of command over national authorities. The new EBCG will not ensure a permanent and stable institutional response to the implementation of the common EU border policy. Similar to the nature of the proposal for a new EU Agency for Asylum, its more far-reaching operational and support tasks have been framed into cases where there is a ‘crisis’ or ‘emergency’ in specific member states. The proposed Agency therefore will not ensure a regular and stable presence across the EU external borders.

Despite all these innovations, the EBCG Agency in fact merely provides for measures to reinforce cooperation among national authorities and a pool of technical material and border experts available in cases of sudden surges. It does not provide Frontex with its own staff or direct executive powers in the EU member states concerned. A key limit to the authority of the Agency is the composition and functions that have been conferred on its Management Board, which perpetuate the high degree of dependency of the Agency on member states. According to Art. 62 of the Regulation, the Management Board will be composed of one representative of each member state and two representatives of the Commission, all with voting rights. Art. 61(3) provides a key limitation to the autonomy of the Agency by stating that “[p]roposals for decisions of the Management Board on specific activities of the Agency to be carried out at, or in the immediate vicinity of, the external border of any particular Member State shall require a vote in favour of their adoption by the Member of the Management Board representing that Member State”.

When it comes to the right to intervene, the Regulation stipulates that decisions on conducting vulnerability assessments or on corrective measures will need to be adopted by a majority of two-thirds of the Management Board members.<sup>117</sup> In addition, the Regulation leaves open the question as to why any member state would ask for support from the revamped Frontex, especially for

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<sup>116</sup> Carrera and den Hertog (2016), op. cit.

<sup>117</sup> Art. 61(1)(c) of Regulation 2016/1624.

SAR, if it risks increasing the number of asylum seekers reaching its shores falling within the Dublin scheme.

SAR operations are likely to be necessary for a long time and to represent a large share of the continuing influx via the central Mediterranean. A common effort to guard and police the external border will only exacerbate these dilemmas and common SAR operations could see the challenges multiply: any member state that accepts support from the EU, or has an EU-led mission patrolling close to its borders, would see the number of persons for which it has to care and to which it might have to grant protection increased. What should the EU do then?

## 4. Proposals and recommendations

This report has examined the legal, political and ethical challenges characterising the current phase and institutional configurations of EU border and asylum policies, particularly in relation to their application to the EU's southern maritime border. This chapter outlines proposals and recommendations to address the challenges identified in this report. It highlights some key findings resulting from the CEPS Task Force discussions and identifies avenues for further research and policy debates.

A recurrent point in the discussions during the Task Force was the parallel between the European monetary and banking crisis and the current state of affairs on border management in the EU, providing a mirror for reflection about the point at which we find ourselves as regards the future EBCG development. The adoption of Regulation 2016/1624 means that the EU already counts with – at least formally – a new EBCG. This is a welcomed development.

Still, the current EBCG is encumbered by far-reaching limitations and a prominent level of dependency on member states. It does not satisfactorily address the policy challenges studied in this report, especially those related to the EU Dublin system. The question remains open as to what the EU should do to address the systemic asymmetries inherent to the EU Dublin system and notably in the responsibility gaps in the Mediterranean context.

One of the most relevant points emanating from the Task Force was the high degree of agreement among the members and participants about the need to give priority to new substantive and institutional initiatives aimed at alleviating the causes of humanitarian crisis and systemic deficiencies, and enhancing the EU's legitimation in these policy domains. The current set of asymmetries and the wrong kinds of incentives given to EU member states holding the external Schengen borders in the Mediterranean call for a new political compromise in the EU, covering the dimensions outlined below.

### 4.1 Delinking search and rescue from asylum responsibility

The first step would be a change to the EU Dublin asylum system, according to which those persons rescued by EBCG operations at sea would be assigned to all member states (and hence become a shared responsibility) according to the

reference key already agreed in the Commission's 2016 proposal to recast the Dublin system.

This should be accompanied by an independent and in-depth (social science) assessment of the challenges, lessons learned and existence of any 'promising practices' in the running of the current, temporary EU relocation model, as well as the roles and contributions of EU agencies like Frontex and EASO in the hotspots.

The general principle underlying the new EU political compromise should be that anybody rescued by the EBCG in the Mediterranean should become a responsibility for the entire EU. There would be two alternative scenarios for delinking SAR and asylum responsibilities.

*In a first scenario*, the roles of the new EBCG and the (planned) EU Agency for Asylum could be further fine-tuned and enlarged to effectively meet this goal. The tasks of the EBCG and the EU Agency for Asylum could be developed in their respective operational plans with the member state involved, so as to expand the reach of their competences in sharing the responsibility with national authorities within the remits of the proposals envisaged in section 4.3.

In accordance with the 2016 EBCG Regulation, SAR is now a key component of the EU concept of integrated border management. A dedicated and reinforced institutional SAR mechanism should therefore be ensured. In line with the call raised in the 2015 European Agenda on Migration, the scope and thematic priorities of Frontex JO Triton should be enlarged to formally cover SAR. In any case, whatever role the EU takes in SAR, it should be complimentary and without prejudice to the SAR regime under international law.

An EBCG sea operation would ensure an EU response under the Community method of cooperation and be subject to EU rule of law and democratic control envisaged in the EU Treaties. The geographical area of the EBCG Med operation should be expanded so as to also include international waters, as a large majority of asylum seekers do not reach Italian waters and keeping the current operational area of Frontex JO Triton would make EBCG activities in the central Mediterranean meaningless.

These steps would mean in practice the development of a 'hybrid model' of responsibility between the EBCG and the member states concerned, whereby the

latter (and/or any other member state participating in the operation) would provide the necessary vessels and the EBCG itself (and not the relevant member state authority) could act as the main coordinator of the operation and all the relevant domestic border, coast guard and defence authorities involved in SAR-related activities.

**A second scenario** would be that if the EBCG rescued people they would directly become a shared responsibility for the entire EU. Hence, they would not necessarily be 'assigned' to the 'closest port or place of safety'. That notwithstanding, this model would need to take due consideration of situations where there are emergency medical reasons that would necessitate swift disembarkation at the nearest port. This model has already been applied in EUNAVFOR Operation Atalanta,<sup>118</sup> in which the operation commander made the final decision on whether suspected pirates were transferred to Kenya.

According to the international law of the sea, it is for the MRCC of the state concerned to take decisions on SAR situations. In this second option, the MRCC proposal would not apply and the disembarkation would in fact occur in quotas in various other EU countries. Under this option, for instance, if Italy rescued 1,000 people in a week, they could be transferred to countries like France or Spain in 'equal quotas'. Here again, there would need to be good and effective relocation schemes (see section 4.2 below). This could go along with the establishment of a SAR fund.

The boats used in these operations would still need to be those of the relevant EU member states. The EU is not a 'state of registry' for vessels nor a member of the International Maritime Organisation. The Union could not be considered a 'flag state' and therefore the new EBCG operation would need to use member state vessels. That would not prevent this second scenario from working in practice, yet a clear division of responsibilities between the Agency and relevant member states should be defined for such operations.

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<sup>118</sup> Refer to E. Papastavridis, "EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters", *International and Comparative Law Quarterly*, Vol. 64, No. 3, 2015, pp. 1-36.

Furthermore, while some Task Force members referred to the potential risks or fears related to the call or ‘pull effect’ of SAR in the Mediterranean, research and interviews conducted for the purposes of this report found no evidence of past or current efforts having an impact on the number of irregular entries and sea arrivals. The reasons why people (including highly vulnerable individuals) try these dangerous routes seem to go beyond expectations of being saved at sea.

More qualitative research is needed regarding three key elements: first, on the effects of anti-smuggling policies on people’s choices to risk their lives in seeking international protection or better economic opportunities (or both); second, on the negative effects of criminalising migration policies<sup>119</sup> on the essential humanitarian assistance and rescue at sea work provided by civil society organisations; and third, on the effectiveness of these same policies in addressing irregular entries.

## 4.2 Asylum and relocation

Irrespective of which of the two scenarios envisaged above is chosen, the EU Agency for Asylum should be actively involved. It should be granted the necessary staff to coordinate the running of the corrective mechanism as well as to carry out centralised EU-wide decisions on asylum applications,<sup>120</sup> which would also incorporate a ‘free choice’ approach for asylum seekers in cooperation with UNHCR and relevant domestic asylum authorities and civil society actors.

The new proposal to recast the Dublin regime could include a new SAR component as a constitutive part of the EU corrective mechanism. The provision could stipulate that in light of the vulnerability assessment conducted by the EU Agency for Asylum, those member states facing a ‘disproportionate’ number of entries and serious flaws in their asylum and reception systems which jeopardise the functioning of the CEAS (e.g. Italy and Greece) would fall outside it. In such

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<sup>119</sup> V. Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, Springer Briefs in Law, London: Springer, 2015.

<sup>120</sup> EASO has already played a very active role in the running of the hotspot and temporary relocation model in Greece. This has even included conducting admissibility and eligibility procedures with the Greek authorities.

circumstances, the criterion of the first country of entry under the EU Dublin system would not be applied.

The people rescued would still need to be disembarked in the territory of a member state. The new compromise would mean that every person disembarked by the Frontex EBCG operation would directly fall into the scope of application of the corrective mechanism model envisaged by the 2016 proposal to recast the Dublin system, irrespective of his or her nationality. The beneficiaries should go beyond the current limited set of nationalities in the temporary relocation system. This would significantly reduce incentives to resist fingerprinting and thus the need for coercive identification practices.

The financial costs incurred from accepting asylum seekers picked up by a common EBCG sea operation should logically also be borne by the common EU budget. One way to do this would be for each member state accepting an applicant resulting from a common SAR operation to be provided directly from the EU budget a fixed lump sum per head, which is high enough to defray the likely actual costs.<sup>121</sup> Furthermore, as several international organisations have emphasised<sup>122</sup> and as corroborated in 2016 by the UN New York Declaration on Migration and Refugees,<sup>123</sup> there is a need to carefully reflect on and to develop ways to

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<sup>121</sup> A sum of €6,000–10,000 per applicant would result in a total expenditure for the EU budget of between €1.5 and 2.5 billion per annum if the numbers picked up were to stay at 250,000. The cost for the EU budget would of course not represent an additional cost, but merely a reimbursement to member states for expenditures they incur in the name of the EU.

<sup>122</sup> United Nations, *Banking on Mobility over a Generation: Follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, Report of the Special Rapporteur on the Human Rights of Migrants, New York, 8 May 2015, para. 55.

<sup>123</sup> United Nations, New York Declaration for Refugees and Migrants, General Assembly, 13 September 2016 ([http://www.un.org/ga/search/view\\_doc.asp?symbol=A/71/L.1](http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1)).

operationalise regular and fair channels ('legal pathways') for access to international protection<sup>124</sup> and economic migration (at all skill levels) to the EU.<sup>125</sup>

The development of safe and legal pathways is key to offering alternatives to dangerous sea crossings, thereby ultimately limiting the need for SAR, while providing for more responsibility sharing and predictability. More research is needed as regards the political, legal and practical feasibility of existing and alternative new proposals.<sup>126</sup> Legal pathways offer great potential to contribute most effectively to responses to the migrant smuggling phenomenon and preventing deaths in the Mediterranean Sea.

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<sup>124</sup> Refer to para. 77 of the Declaration, which states that "[w]e intend to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries. In addition to easing the plight of refugees, this has benefits for countries that host large refugee populations and for third countries that receive refugees". Para. 78 says

[w]e urge States that have not yet established resettlement programmes to consider doing so at the earliest opportunity. Those which have already done so are encouraged to consider increasing the size of their programmes. It is our aim to provide resettlement places and other legal pathways for admission on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met.

<sup>125</sup> According to para. 57 of the Declaration,

[w]e will consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities. We will pay particular attention to the application of minimum labour standards for migrant workers regardless of their status, as well as to recruitment and other migration-related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people.

The European Commission is currently studying the possibility of establishing an EU "pre-screening mechanism enabling the creation of a pool of candidates accessible to Member States and employers in the EU". See European Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6.4.2016, p. 19.

<sup>126</sup> See for example Guild et al. (2015b), op. cit.; refer also to UNHCR, *Better Protecting Refugees in the EU and Globally, UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, Geneva, 2016.

### 4.3 A European border and asylum service

Effective common border and asylum policies are part of the common EU good. The specific challenges inherent to sea borders accentuates some of the migration and asylum issues studied in this report. The establishment of an EU federal agency could here play a decisive role in addressing some of them.

Concerning the issue of legal competence for the EU to act in these domains under current Treaty configurations, the management of the common EU external borders has been recognised as a 'shared legal responsibility' between the new EBCG Agency (Frontex) and member states' national authorities in Regulation 2016/1624. Asylum is an area where a wider range of competences has already been transferred to the EU level as part of the CEAS. The Treaty of Lisbon acknowledges that the Union shall adopt any measure necessary for the gradual establishment of an integrated border-management system.

The goal should be to devise the right institutional design and establish common EBCG and EU asylum agencies that would be part of a wider EU professional civil service or administration, which could be called a European border and asylum service (EBAS). A majority of Task Force members and participants endorsed this proposal. The EBAS would mean the establishment of an EU civil service of officials no longer solely dependent on member states' contributions. The EBAS would aim at gathering the highest level of professional experience and skills in light of EU law and fundamental rights standards.

EU law requires that the main objective of EU border policy is to ensure the effective monitoring of the crossing of external borders, including through border surveillance, while contributing to the protection and saving of lives at sea.<sup>127</sup> This goes hand in hand with the obligation that any measure taken during the course of a border control/surveillance operation must be proportionate, non-discriminatory and fully respect human dignity and the rights of asylum seekers and refugees.

Task Force members reached a large degree of consensus that to duly ensure the implementation of these principles and rights, and in line with Schengen standards, EU border authorities should be of a predominantly civilian nature so as to ensure a professionalised and well-trained border service using the same

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<sup>127</sup> See the Preamble of Regulation 656/2014, *op. cit.*

principles and objectives, and subject to full EU democratic accountability and judicial scrutiny.<sup>128</sup>

Discussions during the Task Force also focused on the possible benefits and obstacles generated by civil–military cooperation. More research and reflection is needed as regards such cooperation (the legal challenges and effectiveness) between the EBAS and other relevant EU agencies, notably the European Fisheries Control Agency, the European Maritime Safety Agency and the European Defence Agency. This would be of particular interest when it comes to matters that have an increasing civil–military dimension or ‘dual use’ implications in terms of capability development, fundamental rights and SAR training, as well as information sharing and maritime surveillance instruments.

EBAS officials would permanently be deployed on the ground in the form of EU regional task forces. They would be tasked with centralised decision-making/competence on border control/surveillance and asylum, as well as ensuring implementation of EU standards, in cooperation with all the relevant member state authorities, international organisations and NGOs.

The opinion resulting from the discussions with Task Force participants was neatly divided as to whether a common (federal) EBCG with executive powers would require a Treaty change. For the sake of legal certainty and clarity, especially concerning compliance with the proportionality and subsidiarity principles, the setting up of the EBAS (and its executive powers) could in any case be formalised

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<sup>128</sup> This was previously recommended in S. Carrera, “Towards a Common European Border Service”, CEPS Working Document No. 331, CEPS, Brussels, June 2010. As Carrera (p. 28) points out,

the EU could develop a multilevel administrative service of European officials under the umbrella of a new, common, European border service (EBS). The main priority of the EBS would be to ensure high-standard and rule of law-compliant administrative checks on human mobility (in a respectful and professional manner in full compliance with fundamental rights) across the various European external borders. The uniform application of the SBC would be at the heart of its mandate. For the system to provide added value, the EBS should be composed of a three-layered (mutually interdependent and reinforcing) administrative service.

This recommendation was reiterated in S. Carrera et al. (2015), *op. cit.*, who said that “[s]uch a service should follow a predominantly civilian (non-military) nature and should come along [with] the establishment of a ‘border monitor’ to ensure administrative guarantees and fundamental rights”, p. 21.

and further fine-tuned in a near-future Treaty revision.<sup>129</sup> Such a revision could also take into account questions related to enhancing supranational judicial review of EBAS actions by the CJEU.

The EBAS would need to be accompanied by a higher framework of accountability and fundamental rights compliance. An EU border monitor should also be established.<sup>130</sup> The monitor would ensure that EU border controls, wherever they take place, are consistent with EU law and the Charter of Fundamental Rights. It would regularly monitor the conditions under which SAR, border controls and surveillance, and expulsions/cooperation with third countries take place under the framework provided by EU law.

A key part of the EU border monitor would be improving the current system of complaints regarding Frontex-led operations as envisaged in Regulation 2016/1624: under the current system agreed it is up to the individual member state to carry out investigations and then they have to report to the Frontex fundamental rights officer. This situation brings forward the question of how effective<sup>131</sup> and efficient are the national complaint mechanisms (if existing) covering law enforcement agencies, including the activities of border and coast guards as well as military actors. The monitor could be established under the auspices of the European Ombudsman.

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<sup>129</sup> While encompassing both the 'border' and 'asylum' angles, the service should ensure a clear division between border and asylum policies, which lies at the heart of EU and national, constitutional legal systems across the EU.

<sup>130</sup> See E. Guild, K. Groenendijk and S. Carrera, "Issues and Recommendations on Freedom, Security and Justice for the European Parliament Elections", CEPS Policy Brief No. 173, CEPS, Brussels, October 2008. This was also proposed in P. Hobbing, "The Management of the EU's external borders: From the Customs Union to Frontex and e-borders", in E. Guild, S. Carrera and A. Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme*, CEPS Paperback, CEPS, Brussels, 2010, pp. 63-72. Hobbing states that "[t]he borders, as high-risk spots for human rights-related offences ranging from privacy to refugee rights, require appropriate mechanisms of democratic control, possibly in the form of a border monitor".

<sup>131</sup> The criteria of effectiveness of investigations (as developed over the years by the ECtHR) have been usefully summarised in the Council of Europe Commissioner for Human Rights' Opinion of 2009 concerning independent and effective determination of complaints against the police, and which are applicable to all law enforcement bodies.

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## **Appendix. Task Force Members and Participants**

Chairman: Enrico Letta, Dean of the Paris School of International Affairs (PSIA) at Sciences Po, and former Prime Minister of Italy

Richard Ares Baumgartner, EU Affairs Strategic Advisor, Frontex European Border and Coast Guard

Marta Ballesterio, Senior Liaison Officer, United Nations High Commissioner for Refugees (UNHCR)

Marco Bertotto, Head of Public Awareness, Médecins sans Frontiers (MSF)

François Bienfait, Head of Centre for Training, Quality and Expertise, European Asylum Support Office (EASO)

Marlene Bonnici, Ambassador, Permanent Representation of Malta to the European Union

Peter Bosch, Senior Expert, European Commission

Zoe Campiglia, Associate Policy and Research Officer, United Nations High Commissioner for Refugees (UNHCR)

Carlos Coelho, Member of the European Parliament

Cathryn Costello, Professor, University of Oxford

Jorge Domencq, Chief Executive, European Defence Agency

Stephane Gay, Commandant de police, French border police (DCPAF)

Giuseppe Iuliano, Member, European Economic and Social Committee

Julien Jeandesbosz, Professor, Université libre de Bruxelles (ULB)

Nejra Kalkan, Executive Secretary, Meijers Committee

Stylianos Kourkoulis, Commander, Hellenic Coast Guard

Audunn F. Kristinsson, Deputy Chief of Operation, Icelandic Coast Guard

Michelangelo La Tella, Vice Questore Aggiunto della Polizia di Stato Direzione Centrale dell'Immigrazione e della Polizia delle Frontiere

Michele Levoy, Director, Platform for International Cooperation Undocumented Migrants (PICUM)

Vytautas Lukas, Operational Officer, Sea Border Sector, Joint Operations Unit, Frontex European Border and Coast Guard

Sophie Magennis, Head of the Policy and Legal Unit, United Nations High Commissioner for Refugees (UNHCR)

Fausto Matos, Assessor/Policy Advisor to MEP Carlos Coelho, European Parliament

Roly McKie, Deputy Head of Maritime Operations (International), UK Maritime and Coastguard Agency (MCA)

Valsamis Mitsilegas, Professor, Queen Mary, University of London

Christian Mommers, Adviser to the Commissioner for Human Rights, Council of Europe

António Mourinha, Portuguese Navy Staff, Plans and Policy Division, European Coast Guard Functions Forum (ECGFF)

Rainer Munz, Advisor on Migration and Demography, European Political Strategy Centre, European Commission

João Nascimento, Colonel, Chief of Staff from the Coastal Control Unit, Portuguese Coastal Control Unit

Nikolas Papageorgiou, Accredited Parliamentary Assistant to Birgit Sippel, European Parliament

Efthymios Papastavridis, Postdoctoral Research Assistant, Oxford University, Faculty of Law

Kris Pollet, Senior Legal & Policy Officer, European Council of Refugees and Exiles (ECRE)

Jorrit Rijpma, Associate Professor, University of Leiden, the Netherlands

Juan Santos Vara, Professor of Public International Law, University of Salamanca

Elly Schlein, Member of the European Parliament and the Committee on Civil Liberties, Justice and Home Affairs (LIBE), European Parliament

Pascal Schumacher, Conseiller Justice et Affaires intérieures, Permanent Representation of Luxembourg to the European Union

Oliver Seiffarth, Deputy Head of Unit, Directorate-General for Migration and Home Affairs (DG HOME), European Commission

Barbara Sellier, Deputy Head of Unit, Relations with the European Maritime Safety Agency, Directorate-General for Mobility and Transport (DG MOVE), European Commission

Birgit Sippel, S&D Coordinator, Committee on Civil Liberties, Justice and Home Affairs (LIBE), European Parliament

Nikolaos Sitaropoulos, Head of Division I – Deputy to the Director, Office of the Council of Europe Commissioner for Human Rights

Andrea Tassoni, Policy Advisor, European Maritime Safety Agency (ESMA)

Miguel Tell Cremades, Head of Department, European Parliament – Policy Department for Citizens' Rights and Constitutional Affairs.

Jacob Terling, Policy Officer for Maritime Safety, Directorate-General for Mobility and Transport (DG MOVE), D2, European Commission

Anna Terrón Cusí, Managing Partner, InStrategies

Vassilis Tsiamis, EDA Strategy and Policy Officer, European Defence Agency

Antonio Vitorino, Former Commissioner for Justice and Home Affairs, European Commission and former President of the Notre Europe–Jacques Delors Institute

Spyridon Voulgaris, Head of JHA and Schengen Unit, Permanent Representation of Greece to the European Union



The humanitarian refugee crisis in Europe of 2015-2016 has posed profound challenges to the legitimacy of the European Union's policies on migration, asylum and borders. It has also revealed unfinished elements and serious shortcomings in current EU policies and approaches, particularly those applying in southern EU maritime border areas and frontier states in the Mediterranean.

This book provides a critical examination of the lessons learned from this crisis and gives an up-to-date assessment of the main policy, legal and institutional responses that have been taken at the EU level. It further examines the extent to which these responses can be expected to work under the current system of sharing responsibility among EU member states for assessing asylum applications and ensuring consistent implementation of EU legal standards in compliance with the rule of law and fundamental rights.

The authors offer specific recommendations and possible scenarios for policy optimisation and assess the extent to which the establishment of a European Border and Asylum Service (EBAS) can address the current gaps and challenges in EU and member states' migration policies.

? Werde ich es überleben?



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