

Second Common Market Law Review Conference
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***Managing borders at times of crisis:
a tale of fences, hotspots and agencies***

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The end of Schengen as we know it?

- 1) Short overview of past events and developments
- 2) Measures that have been adopted in response to the “refugee crisis”
- 3) From *ad hoc* to permanent crisis management mechanisms
- 4) Strengthening of existing supervisory mechanisms

Short overview (2015): annus horribilis

- 1) Multiple shipwrecks of the coast of Libya (mid-April)
- 2) Joint Foreign and Home Affairs Council: Ten point action plan on migration (20 April)
- 3) European Agenda on Migration (13 May)
- 4) Launch of first phase of EUNavfor Med (22 June)
- 5) “Wir schaffen das” (31 August)
- 6) Photo of Alan Kurdi shocks the world (2 September)
- 7) Relocation decisions of 14 September and 22 September
- 8) Reintroduction on checks at the internal borders: DE, AUT, HU, SL, SV, NO, DK ((from mid-September)
- 9) First hotspots in Italy and Greece inaugurated (mid-October)
- 10) Paris Attacks (13 November)
- 11) Greece requests Rapid Border Intervention (10 December)

Short overview (2016)

- 1) Council Recommendation to Greece addressing serious deficiencies (12 February)
- 2) Closing of the Balkan Route (9 March)
- 3) EU-Turkey statement, 18 March (applied as of 20 March)
- 4) Council Recommendation prolonging checks at the internal borders for six months: DE, AUT, DK, SV, NO (12 May)
- 5) Brussels attacks (22 March)
- 6) Second phase EUNavfor Med (20 June)
- 7) Entry into force of the EBCG regulation (4 October)
- 8) Expansion of mandate EUNavfor Med (7 October)
- 9) JHA Council in Luxembourg (13-14 October)

COM(2015) 240 final: Agenda on Migration

Four pillars to manage migration better

1) Reducing the incentives for irregular migration:

root causes, fight against smugglers, return

2) Border management

Frontex, Coast Guard, Smart Borders, Third Country cooperation

3) Strong common European Asylum Policy

Implementation, abuse, country of origin, Eurodac and Dublin

4) New policy for legal migration

Blue card, migration and development, remittances

Reinstating border checks

Schengen Borders Code: Chapter II

Article 25:

- Threat to public policy and public security
- Foreseeable and unforeseeable events
- 30 days, renewable with periods of 30 days up to six months

Article 29:

- Exceptional circumstances putting the overall functioning of the area without internal border control at risk
- 3 months, three times renewable (so max. 2 years)

Article 23:

- Checks within the territory

COM(2016) 120 final: Back to Schengen

1) Ensure the protection of the external borders

Address deficiencies in Greece's external border management with the help of Frontex

Proposal for a European Border and Coast Guard

2) Apply the rules and stop the wave-through approach

Reform of the Dublin system

Resuming Dublin transfers

3) Internal border controls: from patchwork to coordinated approach

Schengen evaluation

Council recommendation to reinstate internal border checks

Merkel

“If it is not possible to achieve a fair allocation of refugees within Europe, then some people will want to put Schengen on the agenda. That is not our aim. We want a fair allocation of refugees and we won't have to discuss Schengen.”

Rutte

“The Dublin system at the moment is not working. So before we kill Schengen, we have to make Dublin work and reform the Dublin system”

Schengen and Asylum

Hotspot area

“Area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders”

First mentioned in the 2014 Unisys Study on the feasibility of a European System of Border Guards

Schengen and Asylum

Relocation Decisions 2015/1523 and 2015/1601

- Relocation of 160.000 refugees in Greece, Italy (and Hungary)
- Distribution key: 1) population size (40%), GDP (40%), number of asylum applications 10-14 (10%) and unemployment rate (10%)
- Average recognition rate of over 75%

See Case C-647/15, *Hungary v Council*

Schengen and Asylum

EU-Turkey Statement

- 1) Return of every new arriving refugee/migrant
- 2) Turkey will prevent new routes from arising
- 3) Resettlement (“1 for 1”)
- 4) 6 billion euro refugee support
- 5) Visa liberalisation
- 6) “Upgrading” Customs Union
- 7) Relaunch accession talks

Schengen and Asylum

Safe Third Country concept

Article 38 Procedures Directive (2013/32)

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined in Directive 2011/95/EU;
- (c) the principle of non-refoulement in accordance with the Geneva Convention is respected;
- (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

Reality Check

- Relocation has failed:
 - Relocated from Italy (1,196 of 39,600)
 - Greece (4,399 of 66,400)
 - Combined: 5,595 of 160,000
- Uncertain future of EU-Turkey statement, implementation failing:
 - Mainland Greece: 47,000, Islands: 12.515 (capacity 7,450)
 - Resettled from Turkey: 1614
 - Returned to Turkey: 578 (of 18,000 + 54,000 pledged)
- Old routes see increasing numbers, new routes are emerging

From *ad hoc* to permanent

- Role of hotspots has been defined in the EBCG Regulation
- Solidarity mechanism: Dublin IV Proposal (COM(2016) 270 final)
 - a. “automatically triggered corrective allocation mechanism”
 - b. Reference key: population size (50%) and GDP (50%) established by EASO
 - c. Corrective mechanism kicks in when applications surpass 150% of reference key
 - d. 12 month opt-out at 250,000 Euro per refugee
(See on EASO’s role: COM(2016) 271 final)
- Role of hotspots has *de facto* changed (from relocation to return)

From *ad hoc* to permanent

- Turkey deal now considered an example for relations with other countries
- Safe Third Country Concept:
 - a. Existence of a 1st country of asylum or safe 3rd country as mandatory admissibility criterion (Dublin IV Proposal: COM(2016) 270 final)
 - b. Common European list of safe 3rd countries (Reform Procedures Directive: COM(2016) 467 final; EASO)
- Council Decision (EU) 2016/1754 of 29 September 2016 amending relocation Decision

Strengthening existing mechanisms

1) External Border Management

2007: Irregular landings

Frontex Rapid Border Intervention Teams

2011: Franco-Italian Affair

Schengen Governance Package:

- a) Introduction Article 29 SBC
- b) Reinforcement of the Schengen Evaluation Mechanism

Strengthening existing mechanisms

2) European Asylum System

2010: faulty implementation and disproportionate pressure

EASO (2010)

- Voluntary relocation
- Assist in early warning mechanisms
- Support in case of particular pressure

2011: M.S.S. v Belgium and Greece / N.S.

Dublin III (2013)

- Article 3(2): No transfer in case of systemic deficiencies
- Article 33: A mechanism for early warning, preparedness and crisis management

Frontex is dead... long live Frontex

Article 13: **Vulnerability Assessment (yearly)**

Recommendations Executive Director
Binding Decision Management Board

Article 19: **Situation at the external borders requiring urgent action**

MS does not comply with MB Decision *or*
MS does not request assistance
Council Implementing Act
ED and MS concerned agree on Operational Plan

Ultimately: **Article 29 SBC**

EASO is dead... long live EASO?

Article 13: **Monitoring Mechanism (once per 5 years)**

Article 14: Draft recommendations Executive Director

MB adopts recommendations

MS adopts action plan

Article 15: **Situation jeopardizing the functioning of the
CEAS**

Commission adopts recommendations

In case of non-compliance: Article 22(3)

EASO is dead... long live EASO?

Article 22: Disproportionate pressure

Agency plans operational and technical support (either at request MS or own initiative)

In case the MS does not accept or request assistance *or* follow the Commission's recommendations:

Commission implementing decision outlining measures to be taken

Executive Director and MS concerned agree on Operational Plan

NB: No sanction comparable to Art. 29 SBC!

Plus ça change?

- No collapse of the system, but back to Schengen?
- Internal border checks remain in place, but: within the legal framework of the Schengen and *Asylum acquis*
- Major legislative activity reshaping Schengen and Asylum
- Establishment of more permanent crisis management mechanisms
- Reinforcement of Frontex and EASO
- Stronger supervision, more hierarchy
- Shared responsibility, *but* primary responsibility with MS



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