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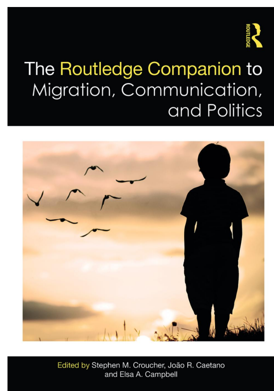

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Quo vadis ? The European Union's migration and asylum policy

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3

QUO VADIS? THE EUROPEAN UNION'S MIGRATION AND ASYLUM POLICY

Legal basis, legal challenges, and legal possibilities

Francisco Javier Donaire Villa

Does a European Union migration and asylum policy actually exist? If so, is it in crisis following the massive arrival of migrants from 2013 onwards (the so-called "Refugee Crisis")? This chapter intends to deal with these questions through a review of the most relevant EU legal frameworks, distinguishing between legislation enacted before and since the Refugee Crisis. It will also address the pragmatic programs and solutions devised thus far by the EU in the face of this complex scenario. Finally, this chapter will outline some conclusions and lines of reflection on the present and future of the EU migration policy.

Causes and origins of the EU migration and asylum policy: the internal market

Clearly, the internal market had the greatest effect on the EU's competences regarding migration. The initial draft of the treaty establishing the European Economic Community (EEC Treaty) laid down a principle of free movement of persons as a constituting element of the common market. The resulting freedoms of movement (of workers, establishments, and services) were conferred on European Community (EC) nationals, with an extension only to their non-EC national family members.

The 1960s and 1970s EC Regulations and Directives based on the EEC Treaty, as well as a broad understanding of these personal freedoms construed by the EC Court of Justice's case law, reduced border controls for EC nationals to the mere presentation of a passport or an identity card in order to gain access to a Member State other than that of origin. Non-EC nationals, by contrast, had no general freedom of movement within the EC.

In the mid-1980s, the Single European Act reframed the common market as an area without internal borders where the free movement of persons would be ensured. However, it did not introduce legal bases for the lifting of controls at these borders, nor for enacting the accompanying measures (including immigration issues). This was mainly due to the

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opposition of the UK, with unanimity being required for the amendment of the EEC Treaty. Subsidiary EC competences deriving from former Article 235 of the Treaty also required unanimity, which led to a deadlock.

This gave rise to the intergovernmental cooperation outside the EC among the other Member States, with the Schengen acquis (the rules regulating abolishment of border controls) standing out. The Maastricht Treaty maintained that approach, although it incorporated in the newborn European Union (EU) a non-communitarian pillar on justice and home affairs (a mechanism of intergovernmental cooperation among Member States within the EU, but without transfer of national competences to the EU institutions and based on the unanimous vote of ministerial representatives of all Member States meeting in the EU Council), which included the treatment of immigration issues.

The Treaty of Amsterdam 1999 was a landmark in the communitarian dealing with immigration matters. In exchange for the opting-out of the United Kingdom (UK) and Republic of Ireland, this treaty confirmed the lifting of intra-communitarian border controls as a legal consequence of the EEC Treaty's general principle of free movement of persons within the internal market. A new general objective of the EU, the completion of an area of freedom, security and justice, encompassed both the lifting of internal border controls and the adoption of the accompanying measures. New legal bases were provided to that effect, including in particular EU actions on migration and asylum of third-country nationals. An ad hoc protocol integrated the Schengen acquis into the EU as a form of reinforced cooperation among Member States others than UK and Ireland, with a special non-communitarian status for Denmark.

The Treaty of Nice 2003 introduced only minor amendments, whereas the Treaty of Lisbon, the last one redrafting EC and EU treaties for the time being, and in force since December 2009, communitarized all the EU policies in the area of freedom, security, and justice by eliminating the EU's former third intergovernmental pillar. Focusing on our particular interest here, this treaty widened the pre-existing legal bases of the EU's migration policy.

EU general legislation on migration policy: overview

Article 79 of the Treaty on the Functioning of the European Union (TFEU; also referred to as the Treaty of Rome), the former EEC Treaty, empowers the EU to establish a common immigration policy. Essentially, it covers legal immigration (entry and residence conditions, visas and permits, family reunification, rights including conditions for residence in other Member States, and the supporting of Member States' actions on integration) and illegal immigration (repatriation and expulsion, fight against trafficking of human beings, and agreements with non-Member States regarding their readmission of non-EU nationals).

Member States have themselves reserved the exclusive competence to establish volumes of admission of third-country nationals in their respective territories for the purpose of seeking work. They have also established a sense of solidarity in relation to an equitable sharing of responsibility among Member States (Article 80 of the TFEU) as common principles in migration issues, including the financial aspect.

Developments in secondary legislation essentially encompassed setting out rules on the uniform format for residence permits, the establishment of a single procedure to apply for a single permit allowing third-country nationals to reside and work, the rights of third-country nationals legally residing in a Member State, and the fight against illegal immigration, including expulsion and repatriation. Council Regulation 1030/2002 (Council of the EU, 2002a) established a uniform format for third-country nationals' residence permits to be used

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by all Member states, according to highly developed technical standards to prevent imitation and counterfeiting, and allowing the inclusion in the permits of relevant information from the perspective of combating illegal immigration. However, Directive 2011/98 (European Parliament & Council of the EU, 1998), on the single permit, does not determine the material conditions to be fulfilled by applicants in order to have the legitimate expectation of obtaining such a permit, leaving this issue to the law of the respective Member States, in correspondence with the fact that this is a field of shared competence between Member States and the EU, as provided for by Article 4 (2) (j) TFEU.

Both the procedure and the resulting permit refer to situations other than long-term legal residents. These have their legal framework in Council Directive 2003/109 (Council of the EU, 2003b). However, this directive only addresses the essential features of the procedure: application, issuance, refusal, or modification of the Single Residence Permit regulated therein, referring its format to Regulation 1030/2002 (Council of the EU, 2002a). In particular, Directive 2003/109 (Council of the EU, 2003b) establishes the minimum set of rights linked to the granting of the permit. This implies the recognition of a principle of non-discrimination on grounds of nationality with respect to nationals from the Member State that issues the permit (Article 12 of the directive).

Perhaps the most "productive" area in terms of translation into secondary legislation is that concerning the fight against illegal immigration. Part of it was enacted by the former EU third pillar, like the Council Framework Decision 2002/946/JHA (Council of the EU, 2002b), aimed at strengthening the national criminal legislation for the suppression of aid to irregular entry, movement, and residence. However, the EU's third pillar acquis was often complemented by EC legal instruments, such as Directive 2002/90 defining the facilitation of unauthorized entry, transit, and residence (Council of the EU, 2002c).

Two legal instruments of secondary law are outstanding in this area because of their general dimension and relevance. These are Directive 2008/115 (Council of the EU, 2002c), also known as the Return Directive, and Directive 2001/40 (Council of the EU, 2001) on mutual recognition of decisions to expel third-country nationals. Of particular importance, Directive 2008/115 (European Parliament & Council of the EU, 2008) established common rules on return, expulsion, use of coercive measures, detention, and prohibition of entry of third-country nationals.

Directive 2011/36 (European Parliament & Council of the EU, 2011a), combating trafficking in human beings, is also important here. Its content provides for strong protection of victims' rights, in particular for, but not limited to, minors, and especially if they are unaccompanied minors. Relatedly, Directive 2004/81 (Council of the EU, 2004a) regulates the issuing of a residence permit to third-country nationals who are victims of human trafficking.

The common European asylum system: the treaty, Dublin regulations and related acts

The EU asylum policy, as set out in Article 78 of the TFEU, essentially means that a single Member State examines and subsequently grants or denies the status of refugee or that of subsidiary protection (both legal notions lately recast under the single notion of "international protection"), the contents and procedures of which are likewise established or harmonized by the EU. As a general implementing secondary law measure, Regulation 604/2013/EU (European Parliament & Council of the EU, 2013b), also known as the Dublin Regulation, relies on the principle of the Member State of first entry as the only one responsible for the

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examination and resolution of all applications for international protection lodged by each third-country national in any, several, or all Member States. In addition, Eurodac Regulation (European Parliament & Council of the EU, 2013a) establishes the procedure for the computer registration of each applicant's fingerprints in order to help enforce the Dublin Regulation.

Applicants' reception conditions are provided for in Directive 2013/33 (European Parliament & Council of the EU, 2013d), whereas requirements for recognition as beneficiaries of international protection, and what such uniform status refers to, are currently laid out in Directive 2011/95 (European Parliament & Council of the EU, 2011b), also known as the Qualification Directive. The need for protection is a key element of that recognition. It is defined by this directive as the applicant's well-founded fears of being persecuted, or the actual risk of suffering serious harm. The directive also envisages the denial of the application if the risk of persecution was created by the applicant after leaving the country of origin.

Likewise, the Qualification Directive establishes the requirements for eligibility for subsidiary protection: being the subject of serious damage, such as being sentenced to the death penalty; suffering torture or inhuman or degrading treatment or penalty in the country of origin; or serious and individual threats to life or physical integrity in situations of armed conflict. As regards the content of the international protection offered by this directive, essentially it equals refugee status and that of persons requiring subsidiary protection, both structured as a set of rights. Among these rights are access to employment and related training, remuneration, social security, working conditions in accordance with national legislation, education (full access for minors and, for adults, the same access as that offered to third-country nationals legally residing in the relevant Member State), social assistance, health care, housing on the same basis as third-country nationals legally residing, and integration programs.

Procedural aspects, and the corresponding applicants' rights, are laid down by Directive 2013/32, also known as the Asylum Procedures Directive (European Parliament & Council of the EU, 2013c). Applicants have the right to see their applications and resolutions carried out individually, objectively, impartially, and within a reasonable time in language they understand, to receive all relevant information thereof, to contact the Office of the United Nations High Commissioner for Refugees (UNHCR) or other organizations, and to get legal assistance and free legal representation upon appeal. Specific guarantees are established for unaccompanied minors.

Applications may be refused if the Member State lacks competence for their examination, or be inadmissible if another Member State has granted international protection, or if a third state is considered safe for the applicant or his or her first country of asylum. Definitions thereof are provided. Applicants are allowed to remain temporarily in the Member State until a decision of first instance (or resolving appeal) is made, although not giving rise to the right to obtain a residence permit.

(Soft-law) measures on migrants' integration

The EU's competence to integrate legally resident immigrants is of a complementary and coordinative nature, and consists of the supporting of Member States' actions without harmonization of their respective national legislations, as provided for by Article 79.4 of the TFEU. Accordingly, the implementing measures adopted are essentially soft-law in nature. They are either measures to finance European and national programs fitting into the framework of principles set by the EU's non-binding instruments, or recommendations and similar documents aimed at promoting and supporting actions by Member States.

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The Council endorsed the common basic principles for the integration of immigrants in 2004 (Council of the EU, 2004b, p. 19). Based on this, the Commission adopted a Common Agenda on Integration in 2005 (European Commission, 2005) and a new European Agenda for the Integration of Third-Country Nationals in July 2011 (European Commission, 2011a), highlighting challenges and exploring the role of countries of origin in the integration process. An annexed Commission Staff Working Paper (European Commission, 2011b) contained a list of EU initiatives supporting the integration of third-country nationals. In 2016, the Council adopted its Conclusions on the Integration of Third-Country Nationals Legally Residing in the EU (Council of the EU, 2016).

Immediate and long-term EU actions in the face of the migrant crisis: the Commission's agenda on migration

In the aftermath of the shipwrecks off the coast of the Italian island Lampedusa, where hundreds of migrants lost their lives, the EU began to address what, at that time (2013), was first considered a maritime crisis, with the primary aim of saving immigrants' lives in the Central and Eastern Mediterranean. In April 2015, the Dublin ordinary system collapsed under the weight of the huge influx of migrants and refugees to the external borders of Italy and Greece. These had been unable to follow the principle of the Member State of first entry being responsible for the examination of third-country nationals' protection applications. This gave way to a "wave-out" policy of migrants and refugees to the northern Member States, opening new paths such as the Western Balkans migratory route. In response, internal border controls in the Schengen Area were reintroduced among several Member States, even by means of new physical barriers such as walls and fences that were hastily erected (European Commission, 2016a, p. 2).

As far as the EU's response to the migration crisis is concerned, a special meeting of the European Council in April 2015 (European Council, 2015a), the Commission's European Agenda on Migration (European Commission, 2015a), and a Eurochamber Resolution of April 12, 2016 (European Parliament, 2016) coincided on the necessary reinforcement of the principle of internal solidarity among Member States. This was to provide support to Italy and Greece as frontline countries facing the migratory challenge. All Member States agreed to organize an emergency relocation scheme on a voluntary basis, triggering the emergency clause enshrined in Article 78(3) of the Treaty. The European Council special meeting of April 2015 also agreed to tackle the core structural causes of "illegal migration," to enhance cooperation with states of origin and transit of the flows, and to prevent irregular migration (European Council, 2015a).

The Commission's European Agenda on Migration simultaneously addressed the "migration crisis" and developed the political priorities on migration set out by President Jean-Claude Juncker in his investiture speech at the European Parliament (Juncker, 2014, pp. 10–11). This agenda, on the one hand, outlined immediate measures to respond to the crisis situation in the Mediterranean and, on the other, the medium- and long-term initiatives to provide structural solutions for a better or more robust managing of all aspects of migration. On this basis, the European Commission issued a set of initiatives in 2015 that included:

1) A relocation scheme aimed at third-country nationals in need of international protection within the EU (for the first time within the EU's migration policy) from Member States under extreme migratory pressure (European Commission, 2015b).
2) A proposal for a common list of safe third countries of origin (European Commission, 2015c).

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3) The establishment of "hotspots," defined by the Commission as "a section of the EU external border or a region with extraordinary migratory pressure which calls for reinforced and concerted support by EU Agencies" (European Commission, 2015d).
4) A proposal for the establishment of a European Border and Coast Guard (EBCG) (European Commission, 2015f).

Immediate measures: the successive relocation and resettlement schemes

As part of the immediate measures to address the migration crisis, the Agenda on Migration announced that the Commission would propose a mechanism to trigger the emergency response system envisaged under Article 78(3) of the Treaty by the end of May. It would be a temporary distribution scheme for persons in clear need of international protection, with fair and balanced participation of Member States according to criteria such as GDP, population size, unemployment rate, and past numbers of asylum seekers and resettled refugees.

Soon afterwards, the European Council of June 25 and 26, 2015 agreed on the relocation from Italy and Greece to other Member States of 40,000 persons in clear need of international protection, over a two-year period. However, as this voluntary scheme soon revealed itself to be insufficient, the Council, at the proposal of Commission President Jean-Claude Juncker, adopted two legally binding decisions in September 2015, which established a temporary and exceptional relocation mechanism for 160,000 applicants from Greece and Italy that were in clear need of international protection: Decision 2015/1523 (Council of the EU, 2015b) and Decision 2015/1601 (Council of the EU, 2015c). These were accepted by Member States, with the exception of the Visegrad Group (Hungary, Czech Republic, Poland, and Slovakia).

In a nutshell, both decisions entailed a (temporary) derogation of the Dublin system, as Member States (or "member states of relocation") other than those of first entry (in this case, Greece or Italy) became responsible for examining the application of the person to be relocated. Their purpose seems to have been partially achieved in June 2017, according to the thirteenth Commission report on relocation and resettlement (European Commission, 2017e). Despite that fact, the Commission decided to launch infringement procedures against the Czech Republic, Hungary, and Poland in June 2017 for not fulfilling their obligations under both Council decisions (ibid, p. 9).

In July, besides the aforementioned measures, Member States agreed on an EU-wide Resettlement Scheme to Europe for 20,000 displaced persons in clear need of international protection from the Middle East, North Africa, and the Horn of Africa (Council of the EU, 2015a). This two-year scheme was supported by the EU budget. Finally, on July 13, 2016, the Commission proposed a permanent EU Resettlement Framework (European Commission, 2016i) to establish a common set of standard procedures for the selection of resettlement candidates and a common protection status. This initiative was intended to provide a better focus for European resettlement efforts in the future.

Recasting of the common European asylum system

In the wake of the 2015 European Agenda on Migration, on April 6, 2016 the Commission proposed a reform of the Common European Asylum System to render it a more humane, fair, and efficient policy, as well as a better managed legal migration policy (European Commission, 2016b). On May 4, 2016, the Commission presented the first set of proposals:

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1) Recasting Dublin III Regulation in search of a sustainable and fair system to determine the Member State responsible for examining asylum applications (European Commission, 2016c).
2) Creating a genuine European Union agency for asylum to ensure the efficiency of the European asylum system (European Commission, 2016d).
3) Reinforcing the Eurodac system to better monitor secondary movements and facilitate the fight against irregular migration (European Commission, 2016e).

The first package was followed by a second one on July 2016 for the Common European Asylum System's reform. It consisted of the following proposals:

1) Recasting the Reception Conditions Directive (European Commission, 2016f).
2) Replacing the Qualification Directive (European Commission, 2016g) with regulations affording deeper harmonization among Member States and the Asylum Procedures Directive (European Commission, 2016h).

The proposal to recast the Qualifications Directive aims at better preparation on the part of Member States to enable them to tackle massive arrivals of international protection seekers while safeguarding their fundamental rights in general and of children in particular. To avoid pressure on internal border controls and asylum-shopping, this proposal establishes new targeted restrictions, and negative legal consequences for applicants' secondary movement to any other Member State from that responsible for examining the application if those restrictions are not abided by. In a similar vein, reform of the Dublin III Regulation would result in a reduction of benefits for applicants who leave the Member State where they are required to be present. In turn, integration possibilities for well-grounded applicants would, for example, improve through easier access to employment and remuneration.

The European Parliament articulated a completely different focus for the reform of the Dublin system. Its Resolution of April 12, 2016 (European Parliament, 2016) goes further than the Commission's proposals and suggests the centralization of applications at the EU level, as well as the allocation of responsibility for any non-EU national asylum-seeker. The draft report of the Eurochamber's Committee on Civil Liberties, Justice, and Home Affairs criticizes the stress placed on sanctions and possible abuse of the Dublin system, and identifies the need for enhancing the integration of asylum and protection-seekers (European Parliament, 2017).

Enhancing the agencies: EASO and Frontex (reframed as the European Border and Coast Guard Agency)

In 2016, the Commission suggested the revision of the Common European Asylum System (CEAS) and the Dublin distribution mechanism to facilitate and improve their functioning (European Commission, 2016c). One of its proposals was amendment of the mandate of the European Support Asylum Office (EASO) to strengthen its operational profile "on the ground" and allow it to play an active new policy-implementing role.

This functional enhancement is even reflected in its new name, the European Asylum Agency, rather than the former Support Agency. Its general mission would be to ensure the efficient and uniform application of EU asylum law by and in Member States, and its tasks would mainly involve the following:

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1) Operating as the reference point for the fair and sustainable distribution of asylum and international protection applications among Member States according to the recasting of the Dublin legal system.
2) Monitoring Member States' implementation of the CEAS.
3) Providing operational assistance through the deployment of teams in hotspots experiencing extraordinary migratory pressure.
4) Organizing and coordinating operational and technical measures on its own initiative or by request of the corresponding Member State.

The proposal allows the Commission to adopt an implementing act choosing technical and operational measures to be executed by the Agency in support of a Member State whenever the CEAS may be in risk of collapsing. This Member State would in turn have the legal duty to cooperate with the Agency. Such an initiative (as of the end of June 2017) is still pending approval by the European Parliament and has raised reservations on the part of several Member States regarding the Agency's operational and implementation powers conferred by the Commission.

By contrast, the European Parliament and the Council adopted – in a record time of just nine months – Regulation 2016/1624 on the new European Border and Coast Guard Agency (European Parliament & Council of the EU, 2016b) from the Commission's proposal (European Commission, 2015f). It now brings together the recast and renamed Frontex and Member States' national border control services. The new Agency is endowed with a monitoring and risk analysis center, a pool of border guards and technical equipment, as well as the competences and resources to:

1) Conduct mandatory assessments on Member States' vulnerabilities or operational capacity.
2) Deploy supporting teams for joint operations and rapid border intervention even in the case of unwillingness on the part of the concerned Member State.
3) Mobilize European return intervention teams to return illegally-remaining third-country nationals, who must be provided with a Standard European Travel Document for Return envisaged by Regulation 2016/1953 (European Parliament & Council of the EU, 2016c).
4) Send liaison officers to launch joint operations with neighboring third countries, even on their own territory.

The European Border and Coast Guard became operational on 6 October 2016 (European Commission, 2017d).

The EU's international outsourcing of migration and asylum

Another cornerstone of the EU's migration and asylum actions lies in the "outsourcing" of both policies. The seminal Conclusions of the 1999 European Council of Tampere invited Member States to conclude readmission agreements, to include standard clauses in other European Community international treaties, and to establish partnerships with third countries concerned as key elements for the success of the migration and asylum policy (European Council, 1999).

The EU's Readmission Agreements (EURAs) impose reciprocal obligations on the contracting parties to readmit their respective nationals and also, more significantly, third-country nationals and stateless persons. To date, 17 EURAs have been signed, with Hong

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Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, and Cape Verde. Likewise, the inclusion of readmission commitments in general collaboration, cooperation, or association agreements of the EU with third countries is common (Díaz Morgado, 2015, p. 159).

By contrast, Mobility Partnerships (MPs) are not international treaties, but take the shape of joint declarations between the partner country, the EU, and Member States wishing to take part in the deal. In exchange for its promise to fight and prevent illegal migration to the EU, the signing third country benefits from technical and economic assistance to develop migration management capacities and legal paths for migration of its nationals to the EU.

This legal structure was chosen by Member States because of their rejection of legally-binding instruments, and also because an international treaty might find it difficult to be ratified by national parliaments (Reslow, 2012, p. 231). As non-desirable consequences, the European Parliament lacks participation, and the EU Court of Justice has no clear means of control (Carrera & Hernández, 2009, p. 30). MPs were initially signed with Cape Verde (June 5, 2008), Moldova (June 5, 2008), Georgia (November 13, 2009), Armenia (October 27, 2011), and Azerbaijan (December 5, 2013). Significantly, coinciding with the start of the migration crisis, a second wave of MPs has been agreed, with Morocco (June 3, 2013), Tunisia (March 3, 2014), and Jordan (October 9, 2014). More recently, an MP has been reached with Belarus (13 October, 2016).

The European Neighbourhood (ENP) is a similar outsourcing initiative. Their purpose (European Commission, 2016j) is to ensure the economic and political stability of the EU's surrounding non-Member States. The ENP resulted from the initial Barcelona Process created in Spring 1995, and became the Union for the Mediterranean in Autumn 2008 in conjunction with the Eastern Partnership initiated in Spring 2009 (Gylfason & Wijkman, 2012, p. 4). It was formally launched in 2003 (European Commission, 2016i), first reviewed in 2011 (European Commission & EU High Representative for Foreign Affairs and Security Policy, 2011), and then again in 2015 (European Commission & EU High Representative for Foreign Affairs and Security Policy, 2015).

The ENP includes measures to promote legal mobility and migration, diminish irregular migration, and conduct effective border management (European Commission, 2017c). Priorities are established in tailored soft-law action plans (APs) with every partner country, the legal basis of which lies in a previously bilateral association agreement between the EU and the corresponding Member State (Maggi, 2016, p. 85). ENP projects are funded by the European Neighbourhood Instrument (ENI) created by Regulation 232/2014 (European Parliament & Council of the EU, 2014); €15.4 billion was provided for the period 2014–2020.

The November 2015 Valletta Summit of the EU and African heads of state or government agreed upon the Africa–EU Partnership (European Council, 2015b), encompassing the 23 countries of Sahel/Lake Chad, Horn of Africa, and North Africa, and created an EU Emergency Trust Fund of over €2.5 billion to contribute to better migration management and address root causes of destabilization, forced displacement, and irregular migration in the area (European Commission, 2017b). November 2015 also witnessed, as an urgent measure at the height of the migration crisis at the South Eastern external border, the activation of an EU–Turkey Joint Action Plan (JAP) previously agreed upon in October. It offered EU support to maintain Syrian refugees in Turkish territory and set out a commitment to strengthen cooperation to prevent irregular migratory flows to the EU (European Commission, 2015e). As a result of this commitment, it would subsequently be agreed upon in the EU–Turkey Joint Statement (European Council, 2016), active from March 18, 2016, that for

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every Syrian national returned from the Greek islands, another would be resettled to the EU directly from Turkey (the so-called "1:1 mechanism"). Following this Statement, the Commission identified that irregular arrivals dropped by 97 percent, and that lives lost at sea also decreased substantially (European Commission, 2017a).

Concluding remarks

Returning to the questions raised at the beginning of this chapter, we can now claim that no real or complete EU migration and asylum policy exists. First, this is because it is a matter of the EU's shared competence. Second, it is because Member States, as masters of the EU Treaties, have individually reserved the exclusive competence to establish the volume of admission to third-country nationals that intend to seek work in the respective State territory, as provided for in Article 79(5) TFEU. This means, as Mistri and Orcally (2015, p. 243) point out, that "undoubtedly the EU has no jurisdiction in determining immigration flows, nor their composition." Such limits simply lead us to conclude that there is no general, comprehensive European Union migration policy, because the core of such a policy, the decision on the admission of third-country nationals, and how many of them, as well as the foundations of their very admission or exclusion, legally rests with the national competence of Member States.

Member States fashion their national migration policies according to varying models, with heterogeneous requirements for the access of immigrants to the respective national labour markets (Lahav, 2004, p. 8). This is further confirmed by the fact that the EU derivative legislation refers only to the admission of very specific groups of third-country nationals. Also, this legislation has been enacted in the form of directives, a source of EU law that does not result in the same legal harmonizing effect as that provided by regulations. These include the Students Directive 2004/114 (Council of the EU, 2004c), Researchers Directive 2005/71 (Council of the EU, 2005), Highly Skilled Workers (Blue Card) Directive 2009/50 (Council of the EU, 2009), and Family Reunification Directive 2003/86 (Council of the EU, 2003a), the latter recently repealed and recast by Directive 2016/801 (European Parliament & Council of the EU, 2016a).

Indeed, this national competence on the access of third-country nationals to each Member State's labour market could be transferred to the EU. This would even allow the EU to carry out a policy that would avoid spill-over across Member States as a result of divergence among national legislation on this matter and, at the same time, to use the same integration patterns that have successfully performed in the completion and functioning of the internal market. That would also mean the abandonment of the security logic with which the Treaty regulates migration policy, allowing it to become an EU policy in itself, with its own regulating Title within the Treaty, at the same level as other EU policies (such as those on the Internal Market, on the Area of Freedom, Security and Justice, on Transport, and so on). But, for that to occur legally and politically, an amendment of the treaties is required. So it is ultimately a question of political (democratic) will.

This chapter concludes by answering the second question posed at the beginning: Is the EU migration policy currently in crisis? On a more general level, this specific issue leads to the more generic issue of the EU in crisis itself (financial crisis, Brexit). However, in a more specific context, that of the current migration crisis (mitigated lately, as already seen in terms of the number of arrivals, although not in terms of the dramatic root causes such as the Syrian conflict and others), it has been said that it is not really a crisis of numbers but a crisis of solidarity (UN Secretary General, 2016). This also implies, in particular, that we are not

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witnessing a legal crisis, although legal amendment to the EU's secondary law is under way and may be necessary. However, certain aspects to be modified in the migration and asylum policy – for example, centralized implementation of the Dublin system or management of external borders on the part of EU institutions or agencies – would require an amendment of the TFEU, since Articles 4(2) and 72 set out "the constitutional principle that member states are responsible for their own internal security" (Den Heijer, Rijpma, & Spijkerboer 2016, pp. 638–641) .

In turn, other amendments require a change of politics without changing the policy, because the TFEU already provides suitable legal bases and procedures. That being the case, it is again a matter of political will. Such a thing may happen as a result of reverting the current restrictive rationales that underlie the Dublin recasting packages or by getting past the logic of mere containment of migratory fluxes inspiring the more than dubious EU outsourcing of migration and asylum described *supra*. In sum, it is about a refinement or change of these concrete politics into others. This is not only a serious and responsible response but is also in accordance with the EU's demographic needs (an aging population) and more sensitive to fundamental rights.

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