



We're in this boat together Time for a Migration Union Sergio Carrera and Karel Lannoo

Summary

Despite the political impasse reached among certain EU member state governments in their attempts to reform EU asylum policy, this Policy Insight argues that 'we're in this boat together'. The EU needs a Migration Union, with all that that implies. Furthering institutional centralisation in the areas of asylum and migration could benefit from the 'lessons learned' from the EU's response to the eurozone crisis.

In the run-up to the European Council meeting of June 28th and 29th and looking ahead to the EU inter-institutional renewal slated to take place in mid-2019, this Policy Insight puts forward three main courses of action for a common EU policy approach on asylum and search and rescue (SAR) addressing the double gap in solidarity afflicting EU asylum policy. Given the likelihood that many of these issues will remain unresolved, it also constitutes an early contribution towards future reflections on policy priorities on asylum for the new European Commission and the EU inter-institutional setting, which will emerge in mid-2019.

The debate should move from 'asylum quotas' towards building an intra-EU institutional solidarity framework covering both asylum and SAR operations. A new EU Asylum Agency should be formed and tasked with implementing a permanent distribution model of asylum responsibility, according to a distribution key and the supervision and support of all EU member states' reception systems. This initiative should be coupled with a reinforced role for the European Border and Coast Guard (Frontex) on SAR in the Mediterranean.

The practice of 'offshoring' asylum and SAR responsibilities to African countries presents deep challenges in terms of its practical feasibility as well as its respect for the rule of law. To return rescued people to unsafe environments, with the risk of arbitrary and inhumane detention, would incur liability for grave human rights violations before international and European instances. Such actions fall far short of securing a stable, long-term asylum policy and they make the EU highly vulnerable to and dependent on third countries.

Any way forward for the EU must be anchored in a solid EU institutional response to asylum and SAR, which would be accompanied by robust financial support from the Multiannual Financial Framework (MFF). The goal should be to establish a common European Border and Asylum Service (EBAS), bringing together under the same roof the responsibilities currently borne by Frontex and the European Asylum Support Office (EASO), thereby creating a fully-fledged EU civil service on asylum.

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1. Introducing a double gap in EU solidarity

The [Aquarius boat controversy](#) has tested the very principles on which European integration is founded. The unilateral response by the newly elected Italian government, with its populist Minister of Interior, and its Maltese counterpart to reject their commitments and decline to provide a port of safety to people on the Aquarius has evoked a wave of reactions. The new Spanish government has shown a [humanitarian response](#) by welcoming over the 600 people in its ports.

The background to the Aquarius affair and the reactions is a long tale of unresolved dilemmas that call for swift resolution. Since its inception in the early 1990s, the effectiveness of the Common European Asylum System (CEAS) has been undermined by a *systemic double gap in solidarity*: first, among the member states and secondly towards asylum seekers and refugees.

The *first gap* relates to the uneven distribution of responsibilities for asylum and SAR among the member states. The criterion for determining responsibility in assessing asylum applications specified in the [EU Dublin Regulation](#) has imposed [unequal and disproportionate responsibilities](#) on front-line Southern European countries, far exceeding their capacities to carry them out.

These have mainly emerged from the inadequate asylum reception extended to irregular migrants arriving in Europe from across the Mediterranean Sea. They also stem from the automatic linkage between SAR and the member states' obligation to assess asylum applications of those rescued.

The *second gap* arises from a structural incapacity to observe EU standards and rights in processing individuals seeking international protection in the EU. The EU Dublin system has also led to largely unresolved structural deficiencies in providing well-functioning and equitable asylum systems for processing asylum seekers, who consequently may have little incentive to remain in the first country of entry.

This same gap is also revealed in the non-existent EU policy response on SAR in the Mediterranean, and the [lack of incentives](#) for EU countries to fulfil by EU and international commitments. The vacuum has been filled in by civil society organisations which, despite playing a central humanitarian role, have been threatened with [criminalisation](#) in some of these countries.

The first EU rule on irregular entry – according to which the Member State through which an asylum seeker has first entered irregularly in Schengen territory - has been a major point of political controversy in past and current EU discussions. This was witnessed during the so-called European refugee humanitarian crisis, which emerged in 2015, where a few member states such as Hungary or Slovakia failed to loyally comply with their quota obligations under [the EU temporary relocation asylum scheme](#) in Italy and Greece.

We are now three years into the 'crisis' and there has been no progress in reforming the European asylum system. The [European Council meeting of 28 and 29 June 2018](#), at the close

of the Bulgarian Presidency of the Council, has been perceived by some as a last political chance to move towards a much-needed reform of the EU Dublin regime.

The beginning of July 2018 will see the start of the Austrian Presidency of the EU, which is expected to give priority to externalising or [‘offshoring’ asylum responsibilities](#) to third countries, an expediency we have strongly criticised in previous [analyses](#). The offshoring concept includes the idea of a system that would return asylum seekers rescued in the Mediterranean to African countries instead relocating them within the EU.

According to a recently [leaked document](#), the idea of “regional disembarkation platforms” in Africa appears to be part of the upcoming European Council meeting’s agenda. As we argue here, EU member states and other Brussels actors are mistaken in thinking that they can evade their own responsibilities by externalising their SAR and asylum obligations to unsafe third countries. It would lead to grave human rights violations and incur legal liabilities for the actors involved.

This Policy Insight aims at providing an input to current debates ahead of the upcoming European Council June meeting. As many of these issues will remain unresolved, it also constitutes an early contribution towards future reflections on policy priorities on asylum for the new European Commission and the EU inter-institutional setting which will emerge as from mid-2019.

A message is sent to all the relevant actors and institutions: *we’re in this boat together*. The double solidarity gap is not a ‘problem’ for any one or group of member states. It concerns us *all* in the EU and is inherently embedded in the Schengen (internal border-free) system. Building a common EU policy on asylum constitutes a condition for continuing to benefit from Schengen, which is [highly valued by citizens across the entire EU](#).

Only a radical European solution can prevent the unfolding of another refugee crisis in the EU, provoking the closing of national borders. Analogies can be drawn with the way the EU reacted to the eurozone crisis, only six years ago, with the creation of [banking union](#) in 2014 and placing the largest banks under the supervision of the [European Central Bank](#).

A way forward could consist of a three-course action aimed at *boosting intra-EU institutional solidarity*, as follows:

The first action entails establishing a new EU asylum agency and fully operationalising Frontex (EBCG) in the SAR domain in the Mediterranean. The new agency would be equipped with a well-qualified EU staff and budget and be formally assigned the centralised competence to support member states’ asylum and reception systems and to relocate asylum applicants on the basis of a distribution key.

Secondly, member states would be enjoined from offshoring SAR and asylum to third-country states in Africa, as it would be unfeasible and entail legal and financial responsibilities and liabilities for the EU and the member states involved.

Thirdly, a European Border and Asylum Service (EBAS) would be progressively established in the form of a new EU civil service with competences to implement EU border and asylum law across the Union.

2. Saying goodbye to the EU Dublin system: A New EU asylum agency

Despite expectations to the contrary, the EU Dublin system is still very much alive and kicking. The current EU asylum system still functions under the principle that first irregular entry is one of the main criteria for determining responsibility for asylum seekers among EU member states. This has led to an unfair distribution of responsibilities among member states that are also members of the Schengen (internal-borders free) system.

Since the inception of the EU Dublin regime, countries in southern Europe have repeatedly expressed concerns over the disproportionate responsibilities that this rule, along with holding the common EU external borders in Schengen, imposes on their domestic asylum and SAR regimes. These same countries have often [called for more 'EU intra-solidarity'](#) in the areas of SAR and asylum but received *no EU response*.

The first irregular entry criterion has proved to be inefficient in the face of massive humanitarian challenges, such as those evidenced during [the European refugee humanitarian crisis](#). This uneven responsibility-sharing leads inextricably to very poor first-reception conditions in a majority of EU member states. The consequence is failing domestic asylum systems and an incapacity to deliver EU standards and fundamental rights towards asylum seekers and refugees.

A crucial issue is the linkage that the first entry rule creates between those people who are rescued in the Mediterranean and the state that is responsible for assessing their asylum claims. Each person saved and rescued is taken to a 'port of safety', which automatically makes that member state responsible for assessing the asylum claim. It also carries an obligation for asylum seekers to stay in that country regardless of their wishes.

SAR in the Mediterranean is not carried out as a shared EU response. Rather, it has been dealt with via a succession of unilateral or ad-hoc responses by countries like Italy. An illustrative example was the [Italian Operation Mare Nostrum \(OMN\) in October 2013](#), which mainly focused on SAR and extended over an operational area in SAR zones in Libya and Malta.

The end of the OMN in 2014 was not followed up by any EU initiative taking over this humanitarian SAR role. The Frontex Agency Triton Operation (recently renamed as ['Themis'](#)) in Italy did not aim to fill that SAR gap in the Mediterranean. Similarly, the main focus of [the EUNAVFOR operation Sophia](#) (Common Security and Defence Policy Operation) has been "fighting the migrant smuggling model" through a military approach that falls outside EU rule of law and democratic scrutiny by the European Parliament.

None of these major EU responses has had SAR at the core of their mandate. That function was then performed by NGOs, which despite playing a fundamental role in filling the vacuum have

been exposed to increasing policing and criminalization. Some have even been falsely accused and stigmatised as 'smugglers'.

As a result of these various developments, a consensus has emerged among European institutions, notably the [European Commission](#) and the [Court of Justice](#) of the European Union, as well as [experts](#) that the current CEAS is not fit for purpose and that it should be progressively changed.

The [European Parliament \(MEP Cecilia Wikström Report\)](#) has called for the setting up of a permanent corrective allocation mechanism, putting an end to the first irregular entry rule. After first entry, responsibility for processing asylum applicants would be automatically shared among all EU member states in accordance with a 'distribution key' of criteria such as GDP, population, past asylum applications and applicants' preferences. This should also mean de-linking SAR from the allocation of responsibility in assessing asylum.

Discussions inside the Council rooms, and between the Visegrad countries and southern European countries have mainly centred on this solidarity mechanism and its balance of responsibilities. As an alternative to these discussions, calls have also been made to invite a 'coalition of the willing' (or a small group of member states) to move forward on this file. However, any such initiative would *de facto* be an acknowledgement of EU's failure to provide a common political answer to address the current double gap in EU solidarity. If adopted outside the current EU framework, it would also effectively lead to reversing Europeanisation or 're-nationalising' what is already a *common* EU asylum policy.

We should take this occasion to heed the lessons learned from the EU's response to the eurozone crisis. The [single supervisory system](#) for banks, now operational for only three and a half years, is running smoothly. No one questions its accomplishments, with a single language, single template and single structure for all member countries. Non-euro-zone countries are even considering the merits of joining the system.

Only six years ago, the EU was in dire straits. By the end of 2011, the eurozone was close to collapse and the single banking market was under threat, with the Spanish banking crisis and huge differences in funding costs between the northern and southern member states. With a quantum step, the single supervisory system, the EU managed to overcome the huge doubts about the soundness of EU banks, and restored trust in the financial system, allowing it to operate normally.

The EU should therefore put all its efforts in developing a *Migration Union* based on more intra-EU institutional solidarity and supervision. As a first step, this would mean adopting the mandate of an EU asylum agency, which would be entrusted with coordinating and applying a new model for distributing responsibility for processing asylum applications and supervising member states in carrying out that responsibility. The allocation model would follow the distribution key proposed by the above-mentioned Wikström EP Report, in close cooperation with the UNHCR and civil society organisations and under a clear EU legal framework. As

outlined in a [non-Paper](#) by Cyprus, Greece, Italy, Malta and Spain, that distribution key should take into account the efforts deployed by frontline member states on SAR activities.

The [new EASO mandate](#), currently under negotiation, provides a window of opportunity to further boost the Agency's competences to deliver the change needed to deal with the double gap in solidarity. In 2016, the [European Parliament adopted a Resolution](#) (MEP Péter Niedermüller) calling for a new agency that would ensure a uniform application of CEAS rules, further convergence in asylum assessments, a role in responsibility for allocating asylum seekers and the monitoring of EU asylum standards.

The adoption of the proposal to create a new EU asylum agency should no longer depend on a successful revision of the EU Dublin Regulation. Such an agency could play a critical role in supporting all member states in examining applications for international protection (including their admissibility) and implementing a new asylum distribution key for the benefit of all EU member states.

Inspiration could also be taken from the cooperation framework that EASO has developed with the Greek authorities since the 2015 European Refugee Humanitarian crisis. Since then, [the agency has been involved in assessing asylum applications](#) and supporting the Greek asylum system. Such model should indeed take place and be further developed under a robust and clear legal and accountability framework ensuring [effective remedies](#) of asylum applicants having received negative decisions by the Agency.

The EU should deploy all its available financial tools for this proposed plan to move forward. The European Parliament has already proposed in its 2018 [Annual Report on the Functioning of the Schengen Area](#) (rapporteur MEP Carlos Coelho) to set up an EU SAR Fund . The Report also acknowledged that SAR now constitutes a key component of European Integrated Border Management (IBM), as laid down in the mandate of the EBCG (Frontex) agency and the Schengen system.

The same Parliament Report called for a permanent, robust and effective Union response in SAR operations at sea and recommended the EBCG to play a crucial role in its implementation. The new EBCG should indeed be formally put to work on SAR in the Mediterranean. The practical operability of the system should go hand-to-hand with the new EU Asylum Agency mandate. [In practice, this would mean](#) that each person disembarking from a Frontex EBCG SAR operation would be taken directly into the scope of application and mandate of the new EU Asylum Agency and the new distribution key model.

In any case, all member states should be reminded that even in the absence of legislative reform, they already are obliged to accept a set of legal responsibilities in the scope of the CEAS and Schengen, which they should implement in full spirit of sincere and loyal cooperation and solidarity obligations in the Treaties. This has been clearly upheld by the [Luxembourg Court of Justice ruling against Hungary and Slovakia, following](#) their failure to implement the EU temporary relocation system. The Commission should do more to rigorously enforce and bring before the Court these and other outstanding infringement cases.

3. Stopping the practice of offshoring SAR and asylum to countries in Africa

Relying on third countries for solving internal EU dilemmas is not a panacea. The idea of [‘regional disembarkation platforms’ in third countries](#) is fraught with many risks. Sending people rescued at sea back to countries such as Libya to have their asylum applications assessed there would be tantamount to denying these people their rights to international protection and condemning them to inhumane and degrading treatment and torture. Past experiences with ‘offshoring asylum’ have not only proved inefficient in decreasing the number of irregular entries but have also led to unlawful/arbitrary detention under inhumane conditions. The case of the [Choucha camp](#) in Tunisia constitutes a case in point, which has been very damaging for the host government and the UNHCR.

As asserted in a [Joint Statement](#) signed by 29 leading academics, Libya is not a place of safety as required by international law. Returning immigrants to that country would amount to grave human rights violations and even crimes against humanity. This would in turn expose countries and EU institutions involved to liabilities before the UN Security Council, the International Criminal Court and the European Court of Human Rights.

Despite the fact that these disembarkations would be expected to occur in third countries, EU and member states would still be responsible for human rights violations, in light of the *extraterritorial scope* of the European Convention of Human Rights. The implementation of these ‘platforms’ would effectively make EU member states and its institutions and agencies [legally and financially liabilities for complicity](#) in directly or indirectly supporting ‘push backs’, which are illegal in light of the 2013 European Court of Human Rights ruling in [Hirsi Jaama and other v Italy](#).

These preventive measures in the form of interceptions at sea and removal would still fall within the scope of EU asylum law or relevant EU financial instruments and would automatically unlock responsibility for *any actor* involved through the applicability of the EU Charter of Fundamental Rights. The latter prohibits EU institutions and member states from preventing people to have access to their right to seek asylum and *non-refoulement*. And this is the case irrespective of the degree of ‘control’ or authority directly exercised by member states, EU bodies or international organisations.

As [Articles of State Responsibility \(ASR\)](#) of the International Law Commission (ILC) have confirmed, *responsibility* follows even in instances of indirect EU or member state support through the provision or ‘support’ of tools, funding or ‘training’ to these third states, as they would be consciously facilitating “internationally wrong acts” or human rights violations.

The third countries involved would also need to agree to carry out these questionable tasks. Yet, what would be the motivation for them to actually commit to do so? Moreover, nor is it clear *whose law* would apply in these ‘disembarkation platforms’. If EU asylum standards would not be applicable, this would mean ‘less EU’ in this area. It would make the sustainability of the system entirely dependent on third states’ willingness to cooperate over time. The proposed

platforms would put a disproportionate weight on third countries' asylum reception systems, thereby diminishing their capacity to respect human rights.

EU and international law does not allow member states and EU actors to incur on legal and fundamental rights violations that are impermissible 'inside' the Union, when they cooperate with third countries. Also, SAR has become a key component of the EU's Integrated Border Management (IBM) Schengen regime, and any new EU initiative must be implemented under EU legal remits and the EBCG (Frontex) mandate. Regional disembarkation platforms would be by and large *unfeasible* and highly risky for the EU's legitimacy and international standing.

4. Ways forward towards an EBAS

The EU needs now to concentrate all its political and financial efforts on boosting intra-EU institutional solidarity on asylum and SAR. There is an urgent need to develop a common EU institutional, financial and operational response to secure its daily implementation; a common EU SAR response in the Mediterranean; and to insist on the observance of professional EU standards at all levels in asylum reception and processing inside the EU.

The implementation of a truly EU asylum system by a European asylum agency, and an EBCG with a fully operational SAR mandate, could neutralise the different national debates and demonstrate Europe's value added. Looking ahead to the upcoming critical period of EU institutional renewal in 2019, a central priority should be the progressive establishment of a [new European Border and Asylum Service \(EBAS\)](#). Ultimately, this initiative would evolve into a new EU civil service, bringing together what is currently Frontex (the European Border and Coast Guard) and the European Asylum Support Office (EASO, soon to be re-baptised as 'EU Asylum Agency').

EBAS would basically mean establishing an EU civil service of officials that is not dependent on member state contributions and personnel. While the main EU policy focus so far has been on 'border control and surveillance', priority should be now given to establishing a Common EU Asylum Service, as also suggested by Emmanuel Macron in his speech on ["Initiative Europe" of 26 September 2017](#).

EU officials would be permanently deployed in all EU member states and tasked with centralised decision-making on asylum and the implementation of EU asylum standards in close cooperation with national asylum authorities. This would need to be reinforced by a solid and robust framework ensuring accountability and respect for fundamental rights, [in close cooperation with the UNHCR and local civil society actors](#).

Intra-EU institutional solidarity, if well designed, could help in addressing the EU's double solidarity gap in light of EU standards. EU values on asylum and SAR are a direct expression of the lessons learned from recent European history and place the protection of individuals and respect for the rule of law at the heart of peaceful and principled European cooperation.



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