

# European Union Migration Law and Policy

Written by Benjamin Hulme and Dora Kostakopoulou

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**This is an excerpt from *Critical Perspectives on Migration in the Twenty-First Century*. Download your free copy here.**

The creation and implementation of an area free of internal borders is reliant upon three foundations. First, the effective management of the now single European Union (EU) external border and its ability to withstand substantial external pressures fuelled by political instability and conflict in the EU's near neighbourhood. Second, a high degree of solidarity between the Member States, to ensure that those states primarily in the southern Mediterranean receive adequate support to protect their borders. Finally, the creation of a common EU migration and asylum policy, including a distribution mechanism, to ensure that migrants and refugees who enter through the external border receive the same standard of treatment across all the Member States. The recent 'migration crisis', although now abating to a degree, has placed substantial pressure on these foundations, and has necessitated the rapid creation of new EU policies in order to manage the current situation and also prepare for any future large-scale migratory movements. This chapter will first examine a number of the broader historical developments and the lenses through which the EU's migration policy has developed. The focus will then turn to a number of the more recent policy developments, from the creation of a new European Coast Guard to new forms of 'third country' agreements. It will be argued that although these developments are a shift in the right direction, there are still a number of concerns which affect the core of such developments.

The European Union's Area of Freedom, Security and Justice (AFSJ) – formerly known as Justice and Home Affairs Co-operation – has evolved in surprising ways. Its origins lie in the so-called third pillar of the Treaty on European Union (TEU) (in force on 1 November 1993) which was partially communitarised by the Treaty of Amsterdam (in force on 1 May 1999). The new Title IV EC contained provisions on migration, asylum, 'third country' nationals and civic law matters while criminal law matters and police cooperation remained in the third pillar. The latter became part of Community law a decade later when the Lisbon Treaty entered into force on 1 December 2009.

Although the Member States were initially reluctant to 'lose' sovereignty, they realised the importance of cooperation and mutual trust in dealing with transnational issues, such as policing, judicial cooperation in criminal law and migration and asylum policy. But their cooperation was premised on a security paradigm. Organised crime, migration and terrorism were placed on a single security continuum (Bigo 1992) since they were deemed to pose security threats. Therefore, the distinction between these areas was blurred, and required the creation of policies which could encapsulate these previously distinct concerns. Institutional factors, such as the intergovernmental character of the third pillar cooperation and the removal of internal frontiers in the European Union were partly responsible for the prevalence of the security paradigm (Kostakopoulou 1998 and 2001; Geddes 2001). Official discourses in the Member States depicting migration as a threat also played an important role.

Freedom and security became closely aligned following the 9/11 attacks and the Hague Programme, which was agreed upon by the Council in November 2004, and had a strong restrictive and security-based focus. But its successor, the Stockholm Programme (Council of the European Union 2010b) was more 'citizen-oriented' and liberal. In anticipating it, the Commission issued a Communication in 2009 that called for 'a dynamic and comprehensive migration policy which consolidates a global approach to migration' (European Commission 2009, 23-4). The latter was anchored on developing the external dimension of EU migration policy, the promotion of

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cooperation and dialogue with third countries and the development of an innovative and coherent framework (European Commission 2009, 23–4). An important aspect of the institutional framework was the drafting of an Immigration Code that would incorporate the existing sectoral directives and provide a uniform level of rights. The Commission's and the Stockholm Programme's vision of a 'dynamic and fair migration policy' in the twenty-first century was interrupted by the economic crisis in the Euro-zone, the rise of Eurosceptic and neo-nationalist political parties in Europe and a sudden increase in the number of migrants and refugees seeking admission. According to the Annual Report on Asylum produced by the European Asylum Support Office (2015, 13), more than 660,000 refugees sought protection in the EU in 2014. The war in Syria led to an unprecedented exodus of people and provided a catalyst for wide-ranging reforms and measures in the Area of Freedom, Security and Justice.

The European Union's actions in this field have taken place within the overarching framework of the European Agenda on Migration, which was introduced in May 2015 (European Commission 2015b). The Agenda included both immediate measures and medium-long term measures in order to allow the EU to transition from gaining an effective handle on the migration situation to, in the medium-long term, tackling the root causes and wider issues which are contributing to or causing the movement of so many individuals to the territories of the Member States. The European Commission proposed six different areas in which immediate measures were required, with three of these areas being at the external border or incorporating external dimensions (European Commission 2015b, 3–6). The first set of measures to be introduced immediately are focused on saving lives at sea, including an increase in the number of search and rescue operations in the Mediterranean and a tripling of the budgets for Frontex's Triton and Poseidon joint operations. The second set included measures to combat illegal smuggling into the Member States, including cooperation between Frontex and Europol in order to identify and apprehend smugglers. Third, the EU sought to strengthen its cooperation with third countries of origin and transit, in order to 'intervene upstream' and tackle the 'root causes' of the migration at their source, thereby preventing the need for individuals to migrate. Such measures included regional development and protection programmes to provide support to states with high refugee populations. It is interesting to note that the Commission proposed a linkage between these migration measures and the Union's Common Security and Development Policy (European Commission 2015b, 5), which is emblematic of the increasing blurriness between migration and security in EU policy. It has been argued that such 'blurring' weakens the human rights afforded to those individuals seeking protection in the EU (Amnesty International 2014, 20–25). Such blurring affects the mind-set of Member State governments, as they perceive an increased need to detain migrants, limit access to initial legal advice and ultimately infringe upon basic human dignity by treating all migrants with a heightened degree of suspicion and scrutiny.

In the medium term, the Agenda on Migration was separated into four pillars in order to effectively manage migration, with measures involving either the strengthening of the external borders or cooperation with third countries (European Commission 2015b, 6–17). Measures under the external borders included the strengthening of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders), particularly in light of the need for solidarity between Member States. Concerning the external dimension of the European Union Migration Policy, the Commission highlighted the need to address the root causes of irregular migration. It recognised that the cooperation of countries of origin and of transit would be necessary in order to combat people-smuggling and in order for such states to allow the EU to carry out the effective return of individuals who had no legal right to reside in the territory of the Union. As with many areas of the Common European Asylum System and the Area of Freedom, Security and Justice, more harmonisation would be required in order to make the policies more effective.

Continuing this vein of harmonisation, the EU has sought to establish a European Border and Coast Guard (European Commission 2015a), which received approval from the European Parliament in July 2016 (Council of the European Union 2016a). The new border and coast guard has been created 'in order to ensure a European integrated border management of the EU's external borders, with a view to managing migration effectively and ensuring a high level of security within the Union, while safeguarding the free movement of persons therein' (European Commission 2015a, 77). It is envisaged that the new border agency will create an overall external border management strategy and will cooperate with Member States' border authorities. The border management strategy comprises eight different components, which, in part, go beyond the typical understanding of border management (European Commission 2015a, Art. 4). The key components of the new border control strategy include: fighting trans-border crime; return operations; analysis of security threats and facilitating cooperation between the relevant

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authorities of the Member States. Although these are all elements within the remit of typical border management, it is also a function of the new coast guard to cooperate directly with the border agencies of third countries of origin and transit. It is important to recognise that the European Border and Coast Guard Agency's activities, known as joint operations (European Commission 2015a, Art. 14–15), require shared responsibility with Member State authorities (European Commission 2015a, Art. 5). Such shared responsibility is reliant on the Member States recognising the need for solidarity, and that the external border is now a single Union border and not 28 separate, distinct borders.

The Agency will further be responsible for establishing a monitoring and risk analysis centre to monitor migration flows, create European Border and Coast Guard and Rapid Intervention Teams, and provide technical and operational assistance to the Member States (European Commission 2015a, Art. 7). The Border and Coast Guard Teams are comprised of Member State officials who are second to the EU (European Commission 2015a, Art. 2(3)). Once deployed, they will receive their instructions from the Member State in question (European Commission 2015a, Art. 20). Rapid Intervention Teams, on the other hand, are drawn from a pool of border guards from Member States and can be deployed within three working days of a request received by a Member State, but only for a limited period of time (European Commission 2015a, Art. 18(5)). These teams may only be requested in the event that a Member State faces 'a situation of specific and disproportionate pressures' (European Commission 2015a, Art.14(2)). The creation of these specific teams is a significant step in addressing the problem at the external borders but risks being undermined by a lack of cooperation from Member States. For many Member States, immigration, particularly from non-EU countries, is an issue of significant political importance which may prevent the diversion of resources to what citizens may perceive as another Member State's problem. Therefore, in order to ensure success, the European Border and Coast Guard must be given the necessary resources and expertise from the Member States, no matter their geographical location. Furthermore, such teams do not operate in isolation, and will rely in the long term on Member States ensuring that their own national border and coast guards are adequately resourced and trained.

In line with the principle of subsidiarity (Treaty on European Union 2010, Art. 5(1)), the role of the new Agency is to intervene when requested by the Member States. To this end, it may undertake vulnerability assessments of the external borders, the results of which will then be passed on to the Member State concerned so that it may introduce corrective measures (European Commission 2015a, Art. 12). If the Member State then fails to implement such measures (European Commission 2015a, Art. 12(6)), the European Commission may intervene and deploy Border Guard or Intervention Teams, or coordinate operations for that Member State (European Commission 2015a, Art. 18).

Operating in conjunction with the new Border and Coast Guard Agency is the EU's hotspot approach, which originates from the Agenda on Migration and involves cooperation among Europol, the European Asylum Support Office (EASO) and the Border and Coast Guard Agency. These bodies will cooperate in Member States to register, identify and fingerprint new migrants (European Commission 2015b, 6), with the aim of providing 'a platform for the agencies to intervene, rapidly and in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external borders' (Council of the European Union 2015a, 5). Registering, identifying and fingerprinting new migrants is necessary for the effective application of the Dublin System, in order to definitively establish which Member State should be responsible for an asylum application. EASO will consider the asylum claims of any individuals in these hotspot locations, with the new agency providing support in the return of irregular migrants or those who have not satisfied the criteria for protection in the EU (European Commission 2015b, 6). These teams are known as Migration Management Support Teams (European Commission 2015a, Art. 17). This hotspot approach is currently fully deployed in Leros, Lesbos, Samos and Kos in Greece, and Lampedusa, Pozzallo, Taranto and Trapani in Italy (European Commission 2016a) with significant human rights concerns over reception conditions and access to asylum procedures in the hotspots (ECRE 2016).

The process for the creation of a hotspot begins with the request of a Member State facing disproportionate migratory pressures (Council of the European Union 2015a, 6). The Commission then coordinates the various agencies that are involved, with an EU Regional Task Force coordinating on the ground (Council of the European Union 2015a, 6–7). Due to the differences in the number of migrants arriving in Italy and Greece, Italian hotspots currently have a combined reception capacity of 1600 people, whereas Greek hotspots have capacity for 5,450 people (Council of the European Union 2015a, 1–2). Despite these various measures, the hotspot approach has yet

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to be effectively implemented, with many areas still not yet completed (European Commission 2016b and 2016c). This is in part due to the need to distribute migrants from these hotspots across the EU, so Greece and Italy are not disproportionately affected. Despite agreements to redistribute 160,000 migrants from Italy and Greece being concluded in September 2015 (Council Decision (EU) 2015/1601 and Council of the European Union 2015b), as of December 2016 only 8,162 people have been resettled (European Commission 2016d).

EASO itself is currently the subject of a number of suggested reforms in order to aid the completion of the Common European Asylum System, with its mandate due to be increased from that given in 2010 (Regulation establishing a European Asylum Support Office, 2010). It is proposed that EASO will become the EU Agency for Asylum, with a focus on the effective implementation and functioning of the Common European Asylum System (European Commission 2016e, Art. 1(1)). Its specific tasks suggest widespread harmonisation between the asylum systems of the Member States, not only on reception, qualification and return, but also on the development of a core curriculum for the training of the judiciary and public authorities, the harmonisation of 'third country' information and of 'third country' cooperation in asylum matters (European Commission 2016e, Art. 2). These are significant developments in the EU's asylum and migration policy, particularly harmonisation of 'third country' information. This is an area where Member States' judicial and political differences come to the fore, with each Member State having different criteria and methods regarding how they decide which sources of information to use when assessing the situation in a 'third country'. The harmonisation of this area could, in theory at least, lead to the overall harmonisation of asylum cases and appeals, and their outcomes, in the Member States. Such an argument rests on the assumption that the new Agency for Asylum itself will conduct its own thorough research using a wide range of sources and subjecting them to the high level of scrutiny that is required. However, in practice it will still be left to the competent Member State authorities to make the asylum decisions, and they may be affected by the internal political situation in the Member State.

Apart from reforms at the external border and of EU agencies, developments have taken place with respect to the procedures required for the effective return of 'third country' nationals who do not qualify for protection or legal residency in the Member States. One of the most significant, and most controversial, has been the EU – Turkey Statement (Council of the European Union 2016b) for the return of all individuals who have entered the Union irregularly from Turkey and a new 'One-for-One' system, where the EU returns Syrian nationals who entered irregularly from Turkey in exchange for the resettlement of Syrian nationals who qualify for international protection (European Commission 2016f, 2). The legal underpinning of this arrangement is the EU – Turkey Readmission Agreement, which entered into force in 2014 and allows for the return of Turkish nationals and those of third countries who have no legal right of residency in the EU (Agreement between the European Union and the Republic of Turkey, 2014). Typically, EU readmission agreements contain a three-year delay between the return of a state's own nationals and the return of 'third country' nationals and stateless persons who have transited through the 'third country' in question.

However, in the case of Turkey, the 'third country' national element has been brought forward from 2017 to June 2016 (Council of the European Union 2015c). Concerns have been expressed about the ability of individuals to effectively claim refugee/asylum protection in Turkey, and whether Turkey may be classed as a safe country for such individuals (Amnesty International 2016). Furthermore, there are concerns about the effectiveness of the EU-Turkey deal, particularly regarding the reforms, which the agreement requires of Turkish domestic policy (Nielsen 2016). Such concerns are valid in light of the recent political crackdown and allegations of widespread, systematic human rights abuses committed by state officials (Human Rights Watch 2017, 600–607). Most significantly for individuals seeking protection, Turkey still applies its geographical limitation under the Refugee Convention, meaning that non-Europeans are unable to claim refugee status (Protocol Relating to the Status of Refugees, in force on 4 October 1967)

The EU has further deepened its relations with third countries on migration through the new Partnership Frameworks, announced in June 2016 (European Commission 2016f). These frameworks are targeted in the short and long-term at: Lebanon, Jordan, Tunisia, Mali, Niger, Nigeria, Senegal, Libya, Ethiopia, Egypt, Afghanistan, Iran, Morocco and Algeria (European Commission 2016g, 13–16). Like the European Agenda on Migration, the frameworks are comprised of immediate, short- and long-term objectives and measures. In the short term, the aim is to increase the

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number of successful returns to such states, as well as saving lives in the Mediterranean and taking action to reduce the number of people making the journey to the EU. These aims are to be achieved in the immediate future by improving capacity in border and migration management through increased economic resources and training, as well as offering improved legal routes for migrants to the EU (European Commission 2016g, 5–6).

In the field of return and readmission, the Commission proposed five areas of focus ranging from the identification of irregular migrants, to assisting individuals in voluntary returns and the provision of the appropriate documentation, which is required for an effective return (European Commission 2016g, 7). It may be noted that readmission agreements have not yet been agreed upon with any of the target states, with negotiations currently taking place with Jordan and Nigeria. Concluding a readmission agreement is difficult for the EU due to the inclusion of 'third country' nationals and stateless persons. For example, Morocco is primarily a transit state for migrants from Sub-Saharan Africa. If Morocco assumed legal responsibility for such individuals, and even facilitated their return from the EU, it would come at a significant economic and political cost in terms of reception and processing facilities and relations with neighbouring countries (Carrera et al. 2016, 5–6). In contrast to these states, the Partnership Framework communication provides a separate list of 16 states including Eritrea, Somalia, Afghanistan, Pakistan, Sudan and Ethiopia, which Member States have discussed for the conclusion of country packages that include cooperation on readmission and return (European Commission 2016g, 8). The human rights situation in many of these states is at best questionable, with many of them receiving particular attention from the United Nations (United Nations Human Rights Council 2015) and the European Court of Human Rights (*Sufi and Elmi v. The United Kingdom* 2012) for state sanctioned torture, inhumane and degrading treatment or punishment of citizens. The human rights situation in such states may operate to prevent the return of nationals where they are able to substantiate a claim that they face a real risk of being subjected to such treatment. The long-term aim of the Partnership Frameworks is to tackle the 'root causes' of migration, with a large focus being placed on financial investment into the third countries in question – €3.1 billion being provided for the period until 2020 under the External Investment Plan (European Commission 2016g, 11).

Aggregating these various policy developments, we can now observe the next stage of a truly Common European Asylum System, at the internal and external levels. The evolution of Frontex into the European Border and Coast Guard, in combination with the mooted reforms of EASO suggest that the EU and Member States are beginning to recognise that 'more Europe' is necessary in order to ensure the functioning of an area free of internal borders. However, in order to ensure the success of such policies the Member States must continue to recognise the importance of solidarity in the area of migration, not only on paper but in practice. These policies will require all the Member States to contribute more resources and expertise to the new agencies. The external dimension is one in which we may observe greater concern. Although we can recognise the political need to do more in order to ensure that irregular migrants who do not qualify for protection in the EU are returned, the shift towards political arrangements with third countries with questionable records on human rights raises concerns as to the EU's own commitment to protecting human rights. External cooperation is further complicated by each 'third country' having its own economic and political concerns to balance with those of the EU. As demonstrated by states such as Morocco, future developments in the policy will rely not only on the political goodwill of the 'third country', but also the EU being able to reconcile the often opposing interests at play in such a politically-sensitive area.

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