

The principle of solidarity - an instrument for managing migration and asylum at European Union Level¹

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Abstract

The management of migration at European Union level has been and continues to be a goal of the Member States and the Community institutions, and the application of the principle of solidarity can be an appropriate instrument for managing this area throughout the European Union. The paper presented is intended to be a comprehensive presentation of the role of applying the principle of solidarity in managing migration in the European Union, but also an analysis of the effectiveness of the mechanisms used in applying the principle at Member States level, by public administration. Identifying the similarities and differences in the applicability of the principle of solidarity in the management of migration at EU Member State level is a clear way of establishing the effectiveness of this principle, but also of establishing the possibility for its development. As a result, the paper aims to help complete existing theory and practices in the field, as well as to provide a set of alternatives to the current problems in society with regard to migration.

Last but not the least as a general conclusion of the document, it should be noted that the principle of solidarity in the Member States in the field of migration would be an eloquent proof of the functioning of the European Union and an instrument for the development of the European community.

Key words: *Public Law; migration, solidarity; asylum; secondary movements; human rights.*

JEL Classification: [K33, K37, K38]

1. Introduction

First of all, it should be noted that since 2015, the number of immigrants who arrived from outside the European continent illegally crossing the external

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border of the European Union has increased significantly, with over 2,4 million immigrants registered in the European Union during 2015².

This growth has also been recorded in the coming years at the same time as the number of registered migrants worldwide, with more than 258 million migrants registered in 2020³, while over 2.7 million migrants were registered at European level during 2020, even in the context of the spread of the Covid-19 virus.

Given the increase in the number of people who crossed the external borders, migration has led to an increase in the concern of actors involved in managing the phenomenon, especially at the level of public administration, so that the phenomenon of migration can be turned into a benefit (Zlătescu, 2015). It should be noted that a number of factors have contributed to this increase, among them enumerating the evolution of society, both from an economic and social point of view, as well as multicultural and political, which has amplified economic migration (Zlătescu et al., 2019) but also the conflicts around the world (for example the conflicts in Syria or Afghanistan, the unrest in Iraq).

In order to respond to the wave of immigrants, the actors directly involved in managing migration at European union level, and here I would list the Union's institutions, as well as the Member States identified the instruments to be used to eliminate the pressure exerted in particular on the Member States at the external border of the union which faced pressure both in the area of migration and asylum⁴.

One of the instruments has been the using of the principle of solidarity, which ensured that the pressure on migration in particular in certain Member States at the external border of the European Union could be reduced, reducing at the same time the secondary movements of migrants and their abuse of asylum procedures, and ensuring also the right framework for an effective asylum procedure and a coherent integration procedure for beneficiaries of international protection, as well as the proper use of the return mechanism.

It could be considered that the application of this principle as a whole by all Member States can guarantee that migration can be managed at European Union level, but, above all, that the negative effects of illegal migration can be reduced in social, economic, political area and, more recently, medical management taking into account the effects generated by the spread of Covid 19.

2. Applying the principle of solidarity in the area of migration - role and effectiveness

On the basis of the definition of solidarity which is *the political and ethical unit of a social group or class, which is based on the Community of interests, objectives and*

² European Commission - Eurostat - Immigration in EU Member States - 2020

³ International Organization for Migration, World Migration Report 2020, OIM, Geneva, 2020, p. 19

⁴ Council Decisions no. 2015/1523 and 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece

standard, it is clear that the functioning of the European Union is based on the unity of the Member States, which is their solidarity, the solidarity that must also be demonstrated in the areas of migration and asylum.

The solidarity is also mentioned as the instrument within the provisions of The Treaty of Functioning of the European Union, which stated that *the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter (the second chapter of Title V) shall contain appropriate measures to give effect to this principle*⁵.

Therefore, the application of the principle of solidarity must be both an integral part of the policy of the European Union and its Member States, and an instrument contributing to the implementation of policies in the areas of reference, implicitly in the areas of migration and asylum.

In other words, the principle of solidarity, together with the principle of responsibility, must govern the actions of the mechanisms involved in managing migration, either as a response to exceptional situations occurring within the EU or as a constantly applicable instrument to prevent the occurrence of migration risk factors.

A key role in the implementation of the policies of the European Union, but also of the Member States, has the public administration which can ensure the transposition of policies, but also the effectiveness of their implementation. Consequently, public administration also has a key role to play in implementing the principle of solidarity in the area of migration, aiming to make its implementation more effective across the European Community.

Even since the moment of coming into force of the Treaty on the Functioning of the European Union -

January 2009, we have been able to talk about an exceptional situation in the migration field in some Member States, characterized by the high number of illegal arrivals of aliens coming from outside the E.U..

This was particularly the case in the area of the Mediterranean basin States. The high number of

illegal arrivals of non-EU foreigners on Community territory started to increase in the coming years, in particular as a result of protest movements in several Middle East and North African countries at the end of 2010, known as the *Arab Spring*, but also as a result of the *Syrian Civil War* outbreak in 2011, or *the Afghan war* resulting in a record number of people from outside the EU entering the Union during 2015 - over 2,4 million people.

⁵ The Treaty on the Functioning of the European Union - art. 80

This situation was the spearhead which generated a whole series of actions by the actors involved in managing the phenomenon of migration, some of which have been more or less successful. At that time, was promoted the idea that the European Union showed its own weakness and that the management of migration was witness to the ineffectiveness of the functioning of the European Union.

A swift and effective response by the European Union was needed to manage the situation which the Union institutions have created, recognizing immediately the fact that the Mediterranean Sea region was facing exceptional migratory flows and calling for concrete solidarity measures with frontline Member States. These measures were to be based on the provisions of articles 78(3), 79(1) and 80 of the Treaty on the Functioning of the European Union, the principle of solidarity being the main instrument used to respond to the new migration challenge, while the Member States' public administrations were the main mechanism used to implement this instrument.

A first concrete action to implement the principle of solidarity within the migration and asylum areas were the development of two instruments by the Council of the European Union, which established the provisional measures in the area of international protection for the benefit of Italy and Greece, namely Council Decisions 1523 and 1601 of 2015 instruments that aimed at effectively implementing the solidarity promoted in the European Union's Treaty on the Functioning of the European Union.

The effective role of these two instruments was, on the one hand, to provide support to the Member States listed in difficulty with applied solidarity, and, on the other hand, to ensure management of the area of migration in relation to the applicability of the solidarity principle in the asylum area. In fact, the vast majority of irregular migrants arrived in the European Union have applied for international protection, over 1,35 million⁶ applications for international protection being registered throughout the Union during 2015.

The application of the two instruments required the use of temporary derogations in the application of other instruments specific to asylum and migration (i.e. Regulation (EU) no. 604/2013 and Regulation (EU) no 516/2014), at the same time with a close administrative cooperation between Member States. As a result, the role of Member States' public administrations, identified as the main actors involved in the implementation of the two instruments dedicated to managing migration and asylum, was evident.

The solidarity of the Member States had to be ensured beyond the provisions of the two instruments, and it was necessary to take account of the policy applicable at EU level in the field of asylum, where it was intended to develop a common policy for all the Member States under the title of today's Common

⁶ Executive Summary of EASO Asylum Report 2021 – pg. 369

European System for Asylum – the CEAS. Again, the role of public administration was essential also in the implementation of the common asylum policy at Member States' level ensuring that the necessary information is provided for the evaluation and development of these instruments, at the same time as adapting public administrations to newly developed or promoted instruments.

The application of the principle of solidarity promoted in the two decisions required, together with taking over 160.000 applicants for international protection from Greece and Italy, to ensure respect for human rights and fundamental freedoms promoted by instruments such as the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union mandatory.

They were also bound by the obligation to respect the rights and guarantees provided to applicants for international protection under instruments such as the Convention relating to the status of Refugees done at Geneva on 28 July 1951, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, the need to ensure special procedural and reception guarantees for applicants for international protection, as well as the application of the fundamental principles of family unity, the best interests of the child, but also of return.

This was the scenario whereby the public administrations of the Member States had to act congruently and to show continuous solidarity so as to ensure that the two instruments are applicable, taking into account the national reference aspects and characteristics of the social, economic, cultural and political areas.

In their actions, the constituent structures of the public administration of each Member State were also to be seen as a whole, taking into account the application of the principle of solidarity at local level, also taking into account the reception and accommodation capacity of foreign applicants for international protection, the ability to further process applications for international protection and the ability to ensure integration conditions for aliens who would have been granted international protection.

It should be noted that each Member State of the European Union had a well-defined number of applicants for international protection who had to be taken over from Greece and Italy⁷, and those who were taken over were to be applicants for international protection whose recognition rate of some form of international protection at administrative level was to be 75% of the total number of asylum

⁷ Report from the Commission to the European Parliament, the European Council and the Council - Fifteenth report on relocation and resettlement COM/2017/0465 final - annex 3 https://eur-lex.europa.eu/resource.html?uri=cellar:9ca86f51-93d9-11e7-b92d-01aa75ed71a1.0001.02/DOC_4&format=PDF

seekers at EU level. At the same time, priority should be given to the cases of migrants falling under the category of vulnerable persons to whom a rapid and efficient procedure had to be applied.

In other words, it can be said that the application of the principle of solidarity in the area of migration and asylum through the use of the two instruments could have only been achieved through solidarity between the mechanisms used, solidarity both at European regional and local national level, in which the public administration of the Member States plays a key role at all levels.

We can also talk about the internal factors that have affected the result of the implementation of the two instruments, and here we refer to the political approach of Member States such as Hungary and Poland which did not actually participate in the implementation of the two instruments, although they had such obligations in the decisions.

The real challenge was thus the success of the public administrations in the Member States in implementing the two decisions as proof of their cooperation and collaboration, but also as proof of the application of the principle of solidarity at European Union level. While the two instruments were being implemented, it has been demonstrated that there can be no a completely effective matching in the action of the mechanisms involved.

This was due both to the social, political and economic factors specific to individual Member States, but above all to the influence of sudden, external factors that prevented public administrations from achieving their targets.

Among these external factors, it may be listed the disappearance of migrants from the territory of the beneficiary Member States - Greece and Italy just before their transfer to the territory of other Member States, reluctance and even refusal of many migrants to be transferred to some Member States, at the same time as their preferences to be transferred in particular to some Western Member States - Germany or France - the lack of cooperation of migrants or even their abuse of the asylum procedure by promoting false identities and nationalities, but also the identification of many migrants who were a real danger to the national security of the Member States, which excluded them from being subject to the two instruments.

The procedure was also difficult due to the instruments themselves which required constant changes to the applicable framework in relation to the persons eligible for relocation, in particular as regards their nationalities which were partially changed every quarter, which has made it even more difficult for member states' public administrations to implement the two instruments.

After the first six months of the application of the two instruments, it could be said that there was a low implementation rate, but that relocation was functioning, based on the statistical data presented by the Commission in the framework of the first report on relocation and the resettlement process being

used⁸. Moreover, as observed throughout the period of application of the two decisions, the relocation process has worked as a whole, highlighting that the principle of solidarity can be applied at Member State level in the area of migration and asylum, the component functional structures of the public administration of the Member States was ensuring this functionality.

The application of the principle of solidarity in the area of migration and asylum through the use of the two Decisions as instruments has proved to be useful in supporting the efforts of the Member States and the European Union as a whole to manage migration and asylum.

Even though the figures resulting from the end of the application of the two instruments indicated that only 26% of applicants for international protection were taken over by other Member States out of the total number committed and indicated in the two Decisions, - fig.1⁹, this showed the functioning of the solidarity principle at EU level and the possibility for public administrations to apply it despite the impediments to the implementation of the two decisions.

Fig. 1 Relocations from Italy and Greece by the 4th of September 2017

Member State	Effectively Relocated from Italy	Effectively Relocated from Greece	Total effectively relocated	Commitment legally foreseen in the Council Decisions ¹⁰
TOTAL	8,451	19,244	27,695	98,255

It should be noted that in the relocation exercise of applicants for international protection from Greece and Italy, the contributions from non-Member States of the European Union were retained, which on the basis of the voluntarily solidarity assumed the responsibility to analyze the asylum applications lodged by around 2700 applicants - for example Norway took over 1509 foreigners, Switzerland took over 1237 foreigners and Liechtenstein 10 foreigners. These actions have indicated the possibility of applying the principle of solidarity through a common interest between the European Union and non-EU countries. At the same time this exemplified the possibility of using voluntary character in

⁸ Communication from the Commission to the European Parliament, the European Council and the Council - First report on relocation and resettlement, pg.5

⁹ Report from the Commission to the European Parliament, the European Council and the Council - Fifteenth report on relocation and resettlement COM/2017/0465 final - annex 3 https://eur-lex.europa.eu/resource.html?uri=cellar:9ca86f51-93d9-11e7-b92d-01aa75ed71a1.0001.02/DOC_4&format=PDF/

¹⁰ It does not include around 8,000 persons still to be allocated under the First Council Decision and the allocations under 54,000

the application of the solidarity principle, which will also be applicable at EU level after the end of the relocation exercise.

In the same context, it should be noted that some Member States opposed this exercise, for example Hungary and Poland, by not taking over any applicants for international protection from Greece and Italy, which even led to an inequality created with regard to the other Member States, this is in the context where the provisions of the Council Decisions were binding. Moreover, the inaction of Hungary and Poland to take over applicants for international protection has created a prerequisite for not respecting mutual trust between Member States, with mutual trust being an expression of the principle of loyalty¹¹.

Moreover, the failure of Hungary and Poland to fulfill obligations arising from the content of the two instruments used to support Greece and Italy in the area of migration and asylum can even be considered a breach of the principle of solidarity by the two Member States, but, at the same time, we can even speak of a discredit of trust between states, which was essential in the context of migration and asylum management.

On the other hand, referring to the inaction of Hungary and Poland to take over the responsibility within the provisions of Council Decisions, The Court of Justice of the European Union (CJEU) in joined cases of *Commission v Poland, Hungary and the Czech Republic* (C-715/17, C-718/17 and C 719/17) ruled that these Member States They have not fulfilled their obligations under EU law, disadvantaging the relocation mechanism. Through this Decision it has been confirmed that the principle of solidarity is a legally binding obligation under Article 80 of the TFUE.

The application of the solidarity principle through the two decisions was also subject to another instrument applicable at Member State level, represented by the EU-Turkey statement of 18 March 2016, by which Turkey and the European Union have reconfirmed their commitment to the implementation of their Joint Action Plan, activated on 29 November 2015. According to this instrument, for every Syrian citizen returned from Greece to Turkey following the illegal entry of the foreigner into Greek territory, a Syrian citizen was to be resettled from Turkey to the European Union. The effect of this instrument was to reduce the number of persons that a Member State committed to admit under Council Decision No 1601 of 2015 by the number of persons resettled from Turkey.

In other words, the public administrations of the Member States were to apply the principle of solidarity with Greece's urgent migration needs and through the application of a instrument represented by the Joint Declaration of the European Union and Turkey, at the same time as the amendments to the EU

¹¹ Moroianu Zlătescu, I., Bucur-Ioan, A. (2020), „Inclusion and solidarity”, EU-Diversity and Solidarity under Migration Pressure, Saarbrücken: Lambert Academic Publishing (LAP).

Council Decision No 1601 of 2015¹². It can be considered that this was a first proof of the applicability of the principle of solidarity at European Union level in the area of migration and asylum by using the external dimension as the main driver for preventing illegal migration, at the same time as well as in connection with the application of the two Council decisions.

It should also be underlined that the contribution made by Member States in implementing the principle of solidarity through the two instruments was also supported by the continuation of actions by public administrations in these States to resettle refugees from third countries where foreigners first applied for asylum (first asylum state), with the aim of granting the protection requested. The use of this instrument has supported the implementation of the solidarity principle by reducing the number of foreigners who could have entered illegally into the territory of the Member States for the purpose of applying for international protection. Thus, it was shown once again that, In order to ensure the effectiveness of the implementation of the principle of solidarity in the area of migration and asylum, it was necessary to ensure that the public administrations of the Member States act congruent both at the territorial level of the European Union and in its immediate neighborhood and at the level of the first States of asylum, acting not only to combat illegal migration, but also to prevent this migration

Taken as a whole, applying the principle of solidarity by using the two instruments represented by Council Decisions (EU) No 1523/2015 and (EU) No 1601/2015 have been supported by the actions of the mechanisms involved and, in particular, by the actions of the public administration of the Member States and other related instruments, the synergy of the efforts of the actors involved in the implementation of the two decisions being an evidence of their responsibility in the management of migration and asylum at EU level.

The responsibility of the Member States in managing the migration and asylum phenomenon was also apparent after the end of the relocation exercise for the benefit of Greece and Italy, from 2018 through a voluntary solidarity that is expressed in the take-over of applicants for international protection rescued and disembarked on the territory of Italy and Malta by Member States as Germany, France, Portugal, France, Sweden or Romania (the listing can continue without being restrictive) which have contributed and contribute directly to the implementation of the principle of solidarity in the area of asylum and migration. Once again, it has been demonstrated that the implementation of the principle of solidarity is based on the application of the principle of responsibility by the Member States as a guarantee of the functioning of the European Union. It has

¹² Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

been demonstrated also during this exercise that the responsibility assumed by the governments of the Member States can only be ensured by actions of public administrations that can guarantee success in the implementation of the tasks undertaken by the governments, both at national and local level, by taking over aliens, carrying out the asylum specific procedures following by the integration process or, where appropriate, the return process for aliens.

In the same note of responsibility for the actions needed to manage migration and asylum, we can see the actions of Member States' public administrations throughout the pandemic caused by the spread of the Covid 19 virus, since its onset, even if this epidemiological crisis created pressure on the governments of the Member States, with particular impact on the category of vulnerable persons, including migrants.

The measures taken by the governments of the Member States during the Covid 19 crisis imposed primarily a restriction on movement at European level, as well as measures to prevent the spread of this pandemic, and here should be mentioned the measures to test aliens or to vaccinate them, the use of the green certificate, measures which have led to a reduction in the actions of the mechanisms involved in the application of the principle of solidarity in the area of migration and asylum, but have increased the role of public administration in managing the pandemic phenomenon. In this context, the responsibility of the public administrations of the Member States has turned to ensure that migrants have access to health services, education and, last but not least, access to asylum-specific procedural guarantees. At the same time it is worth noting that the asylum procedure in Romania even took place during the state of emergency and state alert declared during the pandemic period, the national public administration authorities taking the specific measures in this domain¹³.

The more responsibility and solidarity in the actions of the public administration in the area of migration and asylum is needed taking into account the pandemic context and its effects, the synergy of their efforts being the only alternative to ensure the respect of the fundamental rights of the migrants.

The question of effectiveness of applying the principle of solidarity in the field of migration and asylum at European Union level remains valid, with reference to the results and the framework effects of the application of the two instruments represented by Council Decisions, but also to the period immediately following their application, to the pandemic context and the reference to the legislative framework proposed by the Commission with the publication on 23 September 2020 of the new Pact on Migration and Asylum, the latter bringing

¹³ Moroianu Zlătescu, I., Bucur-Ioan, A. (2020), „Immigration at european level and Covid-19 pandemic”, EU-Diversity and Solidarity under Migration Pressure, Saarbrücken: Lambert Academic Publishing (LAP).

innovative elements as legislative content adapted to the reality of the European Union and its external borders, but also at the level of the migrants' Member States of origin.

The progress made in the negotiation of the constituent laws of the new Pact promoted by the Commission remains to be monitored. This comes in the context of new developments in the area of migration at the external borders of the European Union - see the case of Poland facing a large number of migrants trying to unlegitimately enter the territory of that Member State from Belarus, Or the case of Member States in the Mediterranean basin that still face a high number of migrants trying to enter their territory illegally across the sea where they are rescued in many cases by NGO vessels.

An important first step in the implementation of the new Pact on Migration and Asylum and, in a related way, in providing the framework for impacting the principle of solidarity is the approval of the Regulation establishing the European Asylum Agency, an agency which will replace the current European Asylum Support Office and whose role will be essential in the management of migration and asylum at European Union level.

Therefore it can be considered that in the near future the efforts of the actors involved, and here we specifically point to the public administrations of the Member States, must be made through cohesion, convergence and sustainability, so that the application of the principle of solidarity is effective and so that the specific situation of asylum and migration at European Union level can be managed.

Conclusions

We can have two distinct approaches in analyzing the results of the implementation of the intra-EU relocation procedure. If we refer to the figures indicating the number of people relocated under the two decisions.

If we are strictly referring to the quantifiable results of the relocation process, we will be able to talk about a result that is below expectations compared to the total number of people actually supposed to be taken over from Greece and Italy according to the two council decisions. However, the analysis should not forget that external and unlikely factors which affected the transposition of the two decisions previously mentioned.

If we look at the implementation process of the two instruments, we will talk about a positive result, even above expectations, in terms of applying the principle of solidarity, taking into account the cooperation of the public administrations of the Member States among themselves, or the collaboration of the public administrations with other actors involved in the implementation of the two instruments (international organizations, non-governmental organizations or european institutions), the actions of public administration at regional and local

level undertaken to ensure the take-over, reception and accommodation of aliens, as well as to conduct the asylum procedure and the return procedure applicable to the aliens.

In other words, the use of the two instruments could be seen as an example and a basis for ensuring the application of the principle of solidarity in the area of migration and asylum at European Union level, and could be seen as a beneficial exercise for the actions and functioning of public administrations, but also as a rapporteur on the functioning of the European Union, actions and positions taken by some Member States in the implementation of the two instruments were subsequently found in other areas.

The application of the solidarity principle through the two instruments is also a model for the analysis, evaluation and follow-up of the concept of solidarity applicable in the reference areas and can be seen as a source of law for the instruments subsequently applied - the Malta Declaration, or for the instruments proposed in the new Pact on Migration and Asylum.

Thus, international, regional and national institutions and bodies need to cooperate and interpret their competences in a broad way, allowing efficient management of migration and asylum. This cooperation undoubtedly reflects a certain weight and coordination of the authorities' responses to asylum and migration pressure and crisis situations, but it can also suppress a mechanism to prevent the major risk factors that can give rise to pressure and crisis situations. Last but not least, the need for flexibility in the action of the mechanisms involved in managing the area of migration and asylum should be mentioned, while developing the instruments applicable at regional and national level with prospects of involving the mechanisms and addressing the external dimension.

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