



## CANADA-EUROPE TRANSATLANTIC DIALOGUE: SEEKING TRANSNATIONAL SOLUTIONS TO 21ST CENTURY PROBLEMS<sup>1</sup>

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*CETA Policy Briefs Series  
May 2014*

### **The Common European Asylum System: Achievements, Failures, Outlooks and Policy Learning for the EU and Canada**

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The relevance of asylum and refugee policies could not be pointed out more clearly than in a recent incident on the coast of the island of Lampedusa. In October 2013, more than 360 refugees died in the Mediterranean Sea on their way to Italy. Even worse, the refugee boat that sank off Lampedusa Island is only the tip of the iceberg. According to UNHCR (2013) estimations, 1,500 refugees lost their lives on their way to Europe in 2012 alone. More than 20,000 people have died in the past twenty years.

International and non-governmental organizations, both in Brussels and in the EU Member States, as well as the Commission and the European Parliament, have demanded that European asylum and refugee policy be radically reconsidered. These demands are as legitimate as they are desirable. However, they could not have picked a worse time; after all, the European Union passed the new “Common European

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<sup>1</sup> This policy brief is part of a series funded by the Centre for European Studies (EUCE Centre of Excellence at Carleton) and the Canada-Europe Transatlantic Dialogue (CETD). The EUCE Centre of Excellence is funded, in part, by a grant from the European Union. CETD receives funding from the Social Sciences and Humanities Research Council of Canada (SSHRC). The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Union, of CETD, or of SSHRC.

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Asylum System” (CEAS) only three months before the incident. The CEAS is a set of regulations and directives that had tediously been negotiated over more than five years, taking into account the divergent interests of the European Commission as the agenda-setter, the Member States represented in the Council, and the European Parliament, with its newly-gained competences in this area. Given this marathon of bargaining, the package will certainly not be opened up for reconsideration.

I am going to assess the outcomes of this policy package, its achievements, and its failures in light of the EU’s self-proclaimed goals of harmonization, and the rise of protection standards, responsibility sharing, and solidarity among the EU Member States. Taking into account the complicated power relations in Brussels, I will then take a short glimpse into the policy instruments that are likely to be integrated into the Post-Stockholm Program – the program for the next five years in EU Justice and Home Affairs, to be negotiated in 2014.

Whereas harmonization of laws and solidarity among the Member States are probably exclusively European problems, the requirement of protecting people in need is not. It is based on international law and human rights standards, and as such, provides important benchmarks for the EU Member States, and the EU itself, as well as for Canada. If it is true that “[a]sylum policies seem to migrate across borders with notably greater ease than asylum seekers themselves” (Macklin 2013: 99), we will have to closely monitor and evaluate their development and implementation in order to learn lessons about borders and continents.

### **1. The new Common European Asylum System: harmonization, protection standards, solidarity?**

In the first phase in which the EU Member States tried to harmonize asylum laws, between 1999 and 2007, they failed to establish a common system. Its result was more often than not harshly criticized for representing a “protection lottery” (UNHCR 2010); it does, indeed, make a very big difference in your chances if you arrive in Greece, in Malta, or in Finland to get your asylum claim processed, and it does definitely make a difference with regard to reception conditions and asylum procedures (comp. ECRE et al. 2013).

The recast of the CEAS, passed in June 2013, aimed at ending this asylum lottery by further harmonizing legislation, raising the common standards for refugee protection, and establishing a system of responsibility and solidarity among the Member States. It basically consists of two regulations – Dublin III (Regulation (EU) No. 604/2013) and EURODAC (Regulation (EU) No. 603/2013), which determine the EU Member State responsible for examining applications for asylum seekers, and the data collection necessary for this process. It further consists of four directives that are to be transposed and implemented

by the end of 2013 and by the middle of 2015 respectively into national law in the Member States. They lay down the standards for qualification as a refugee (Directive 2011/95 EU), the status of third-country nationals who are long-term residents (Directive 2011/51/EU), standards for the reception and treatment of applicants and refugees (Directive 2013/33 EU), and standards of common asylum procedures (Directive 2013/32/EU).<sup>3</sup>

An assessment of this whole set of common rules (comp. ECRE et al. 2013) following the above-mentioned criteria fixed by the EU itself surely has to remain provisional, because the transposition and implementation of the directives is now incumbent on the Member States – as is jurisdiction on the different levels.

As to **harmonization**, it can be stated that the Union took the line away from previous minimum requirements to common standards. Nevertheless, with regard to some directives, there is still relatively ample room for manoeuvre left to the Member States, which enables them to cement existing asynchronicities. This becomes obvious with matters having an extreme focus on sovereignty, where the Member States continue to cling to their exceptional rules, such as access to the labor market for asylum seekers or the duration of asylum procedures. The Asylum Procedures Directive especially will probably not lead to uniform common standards, due to many optional regulations, the possibility of maintaining current rights, and the numerous exceptions to good principles (Vilmar 2013).

The **protection standards** of those Member States, which until now have used very rudimentary asylum systems, will undoubtedly have to be raised. Various legal texts improve the rights of especially vulnerable persons and unaccompanied minors. This is a sign of a decisive change from past practices of mind. The procedural laws for asylum seekers have been improved on all levels, and here, as well, special protection measures for vulnerable groups have been established.

The recast Qualification Directive ensures that, for persons eligible for subsidiary protection, the rights in the receiving country are adjusted to those of refugees. Gaining access to their rights and the services of the receiving country should mean a decisive improvement for these people. Access to the labor market has become faster and easier for asylum seekers, which is allowed after nine instead of twelve months now (with several loopholes), although, in comparison to EU citizens, asylum seekers are still

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<sup>3</sup> Moreover, the European Asylum Support Office established in 2010 in Valetta/Malta is also part of the asylum system (Regulation 439/2010), as well as a directive dating back to 2001 that has not been applied up to now, defining the minimum standards for giving temporary protection in the event of a mass influx of displaced persons (Council Directive 2001/55/EG), and the European Refugee Fund (ERF), which in 2014 will be replaced by the Asylum and Migration Fund (COM 2011/751 final).

disadvantaged. The asylum procedure in the Procedures Directive was accelerated. For many asylum seekers, this will probably be an improvement, but is not valuable per se, if it turns out to reduce the quality of the procedures.

On the other hand, the asylum package sanctions the existing procedures of detention in some Member States, accepting grounds for arrest by tolerating a lot of reasons for arresting people. The EURODAC regulation trades off higher efficiency of the control and deportation system for remarkably lower data protection standards for third-country nationals. Accelerated procedures provide only lower procedure guarantees when a great number of people are involved at a border or transit. Furthermore, the principle of the “safe countries of origin” (SCO) is maintained, although there is still no common EU-list for the countries considered “safe”. The logic underlying this idea is based on the fear that asylum seekers from “unsafe” countries might be persons who abuse the existing asylum system and can be easily rejected and returned to their countries of origin.

It is no coincidence that some of these instruments are reminiscent of the 2012 Canadian Bill C-31 amending the Immigration and Refugee Protection Act (IRPA). They seem to be imports from the EU asylum system: “Here, then, is what appears to be a textbook case of Canada emulating Europe: The SCO principle is directly traceable to ‘white lists’ of safe countries introduced by several European States in the 1990s, including Canada’s imperial progenitor, the UK. Indeed, the Canadian government explicitly invoked the UK, Ireland, France, Germany, the Netherlands, Norway, Switzerland and Finland as precedents” (Macklin 2013: 101).

With regard to **solidarity** mechanisms among the Member States, the oft-quoted Dublin III system – a system whose predecessor, too, Canada unsuccessfully attempted to “import” in the early 1990s, but was followed by an agreement with the United States of America on Safe Third Countries, a German “export product” - is by no means a solidarity system. It only aims at determining which of the EU Member States is responsible for examining an application for asylum seekers – usually the one where an asylum seeker has first entered territory of an EU Member State. It was precisely with regard to solidarity mechanisms that the tragedy at Lampedusa, for a short moment, seemed to have opened a window of opportunity, but which, at a European Council meeting just weeks after the incident, closed again, when it became clear that some Member States had no interest whatsoever in debating criteria for an eventual relocation or redistribution of refugees in the EU. This was reconfirmed by the meager results of the so-called Task Force Mediterranean, installed by the Commission, in December 2013 (COM 2013/869 final).

## 2. The next steps in light of new power relations in Brussels

For the Post-Stockholm Program to be presented by the **European Council** in 2014, therefore, no big strikes can be expected: The integration phase of the EU asylum system has been finished. After negotiations full of mistrust between the security-oriented Ministers in the Council, a more progressive Commission, and an increasingly politicized and split European Parliament, there is certainly no political will left to legislate on this topic. Nor does the continuing economic and financial crisis point to further legislative innovations in asylum matters.

Refugee and asylum policies will therefore concentrate on a consolidation of the achieved targets. In order to successfully adopt common standards, the Post-Stockholm Program could concretize issues such as mutual acceptance of the established protection standards by the Member States, respect of the freedom of movement of recognized refugees within the European Union, and eventually, if the political intention can be achieved, establishment of common asylum procedures. In the operational area, especially in view of the principle of solidarity among the Member States, cooperation must concentrate on an expansion of the EASO and FRONTEX agencies.

Both the outcomes of the December 2013 Task Force Mediterranean and the priorities of **the Greek Presidency of the Council** as another important agenda setter for the first half of 2014 (<http://gr2014.eu/>) point at a prevalence of security in the broader policy field: foster border security, confront “illegal” migration, and facilitate mobility of EU citizens. The European External Border Surveillance System (EUROSUR), the Entry-Exit-System (EES), and the Registered Traveler Programme (RTP) are the pillars of the already-existing plans for “smart borders” (Hayes/Vermeulen 2012, Bigo/Carrera/Hayes et al. 2012). They include border surveillance with elaborate technology including unmanned drones, the scanning of cross-border movements into and out of the Schengen Area by registering biometrical identification data of so-called “overstayers,” and facilitating immigration of bona fide travelers into the EU.

For the **Council**, of course, security issues will also continue to be on top of the agenda. Member States, nevertheless, differ between each other on many subjects, depending on their political (left-right) ideology, their geographical position (with or without external borders), and their existing borders and asylum systems (more or less developed). On November 1, 2014, new voting rights might also lead to new majorities.<sup>4</sup> Here, it may become interesting to see which constellations of Member States form these

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<sup>4</sup> From that date onward, a qualified majority of 55% of the Council members will be necessary, provided that the Member States represented by them stand for at least 65% of the population in the participating Member States.

majorities, although to date, it has been the Council's tradition not to marginalize certain states, but to look for broad majorities.

Against this traditional block in the Council, the **Commission** has quite unsuccessfully struggled for a broader immigration concept with its comprehensive approach in the Global Approach to Migration and Mobility concept (COM 2011/743). Instruments it (together with many other actors) demanded after Lampedusa, for covering the prevention of and struggle against root causes for migration, the access to the sovereign territory of a Member State, and better sea rescue systems, as well as new criteria for a redistribution and relocation system, do not seem enforceable against this background.

Last but not least, we have to take into account the 2014 election of the new **European Parliament**, which after its "Lisbonization" has become a very important decision-maker. With regard to immigration issues however, its positions no longer correspond to the "old" image of a liberal, pro-immigrant Parliament, and above all, a liberal LIBE-Committee (Acosta 2012, Ripoll Servent/Trauner forthcoming). Its readiness to pass less controversial policy positions than before may be explained by its eagerness to become a legitimate actor within the European institutions (Carrera et al. 2013), where Parliament no longer forms a monolithic block against the Council. Its majorities during the negotiations of the CEAS have cracked along party lines (Bendel 2013). This may lead to greater dynamics and correspond to a stronger politicization of the European Parliament. It also makes political decisions more incalculable and dependent on the respective majorities. This, of course, will be of utmost importance after the forthcoming elections in 2014; opinion polls have nourished the fear that populist or even xenophobic and extremist political parties might gain a high vote share.

Therefore, it remains all the more important to continuously judge the European Union and its Member States according to their self-set goals and obligations in the field of refugee and human rights, and to remind them of the principles of responsibility and solidarity. This is, of course, a task for NGOs that closely monitor the implementation process, but also our task as researchers in Think Tanks and Universities. If the EU has "imported" some of its policy instruments to Canada, as we saw earlier, this monitoring is more than a self-evaluation; it serves as a possible policy lesson for the future.

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Moreover, there is also a blocking minority of Council members, which represent more than 35% of the population in the participating Member States, plus one member.

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