



INSIGHT

THE REGULATION ON THE PROVISION OF EMERGENCY SUPPORT WITHIN THE UNION: HUMANITARIAN ASSISTANCE AND FINANCIAL SOLIDARITY IN THE REFUGEE CRISIS

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ABSTRACT: Regulation 2016/369 establishes an emergency support mechanism for the provision of humanitarian aid in response to natural or man-made disasters giving rise to severe wide-ranging humanitarian consequences within the European Union. Although its scope of application is much broader, the Regulation has been adopted as an emergency measure for the management of the ongoing refugee crisis. It is therefore promising to look at the newly established mechanism against the background of other measures adopted or proposed in response to the crisis. In this perspective, the Regulation appears to fit within an overall strategy whereby Union funding is used as an instrument of policy-making to bring about further centralization. Finally, the analysis of the mechanism, which is meant to provide support to Member States “in a spirit of solidarity”, suggests a few conclusions on the meaning of the principle of solidarity and its implications in the context of the refugee crisis. It is suggested that two very different visions of solidarity, an emergency-driven and a structural one, coexist and may interact with each other in two ways.

KEYWORDS: refugee crisis – humanitarian assistance – solidarity – emergency support – Art. 122 TFEU – Regulation (EU) 2016/369.

I. INTRODUCTION

The massive inflow of migrants and asylum-seekers has put under unprecedented strain the resources of Member States at the southern borders of the Union (notably Greece), already hit by the economic and financial crisis.¹ Not only it has affected their

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¹ For a comprehensive view of the phenomenon and its implications on European integration see B. NASCIMBENE, *Refugees, the European Union and the “Dublin system”. The Reasons for a Crisis*, in *European Papers*, 2016, www.europeanpapers.eu, p. 101 *et seq.*

ability to effectively control their external borders, leading to a worrying crisis of the Schengen system, since the abolition of border controls at internal borders is intertwined with, and premised upon, the effectiveness of external border controls. It has also generated a serious humanitarian crisis. According to United Nations High Commissioner for Refugees estimates, more than 210,000 migrants reached Greece in October 2015 alone, and in spite of a significant reduction in the number of arrivals, another 158,000 crossed the Greek border between January and June 2016.² With hotspots and refugee camps overcrowded³ and the likely increase of refugee flows following the recent failed coup in Turkey,⁴ the need for more efficient cooperation at European Union level for the provision of humanitarian assistance to asylum-seekers has become evident.

It is against this factual background that the impact of Regulation (EU) 2016/369 of the Council of 15 March 2016 on the provision of emergency support within the Union should be assessed. The present contribution provides an analysis of the main features of the newly-established mechanism and examines its relationship with other EU instruments, assessing its place within the overall EU strategy for the management of the refugee crisis. Finally, since Regulation 2016/369 is admittedly based on the principle of solidarity, some tentative conclusions are drawn as to the possible significance of this principle for the EU common migration and asylum policy and on the role financial support mechanisms such as the one provided for by the Regulation play with a view to tackling the refugee crisis.

II. THE LEGAL BASIS

Regulation 2016/369 is based upon Art. 122, para. 1, TFEU, which authorizes the adoption of financial assistance measures “in a spirit of solidarity between Member States”. This provision grants the Council, upon proposal by the Commission, the power to adopt “measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy”.

Art. 122, para. 1, TFEU derives from Art. 103 EEC, a provision that allowed for the adoption of measures to mitigate difficulties arising in connection with the supply of products. However, this provision has now a much broader scope: since it refers to

² *Greece data snapshot*, 7 July 2016, data.unhcr.org.

³ See, for instance, *Detention condition in the Malakasa camp: fit for children?*, in *Statewatch*, 22 July 2016, statewatch.org. Living conditions in the Malakasa camp have been the object of an individual application before the European Court of Human Rights: see European Court of Human Rights, application of 15 March 2016, no. 14165/16, *Sh. D. and others v. Greece*.

⁴ See P. OLTERMANN, *Germany expects rise in political asylum claims after Turkish coup attempt*, in *The Guardian*, 22 July 2016, www.theguardian.com.

difficulties in the supply of products only as an example, it seems perfectly possible for Art. 122, para. 1, TFEU, to apply to different situations.

The broadening of its scope of application will arguably affect the interpretation of the provision by the Court of Justice. While in the past the case law has followed a restrictive approach, excluding that the mechanism could be invoked in areas falling within the scope of common policies,⁵ this reading may be no longer justified with regard to the phraseology adopted by the Lisbon Treaty. Indeed, it could be argued that today, more than a derogation from common rules, Art. 122, para 1, TFEU represents a tool to enhance integration by giving substance to the principle of solidarity.⁶

One might wonder whether the Regulation could not have been based upon Art. 122, para. 2, TFEU, which authorizes the Council, following a similar procedure, to grant financial assistance to a Member State “in difficulties or [...] seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”.⁷ Arguably, however, the choice of the legal basis is correct, since Art. 122, para. 2, only envisages the granting of financial assistance to Member States, whereas the “measures” to be adopted under para. 1 may encompass a broader range of instruments. Indeed, as will be seen, emergency support under the mechanism established by Regulation 2016/369 is not confined to financial contributions to Member States’ budgets.

III. THE MAIN FEATURES OF REGULATION 2016/369

Although the Regulation finds its *raison d’être* in the refugee crisis, it has a much broader scope, being potentially applicable to any natural or man-made disaster giving rise to “severe wide-ranging humanitarian consequences” (Art. 1, para. 1).

Since the Regulation does not define the notion of “disaster”, it will have to be determined by reference to other legal texts. A definition is provided by Art. 4 of Decision 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, which states that “disaster” means any situation which has or may have a severe impact on people, the environment, or

⁵ Court of Justice, judgment of 24 October 1973, case 5/73, *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, para. 13; Court of Justice, judgment of 24 October 1973, case 9/73, *Carl Schlüter v. Hauptzollamt Lörrach*, para. 13; Court of Justice, judgment of 23 January 1975, case 31/74, *Filippo Galli*, para. 24.

⁶ See, *infra*, para. VII.

⁷ This provision was triggered during the first acute phase of the debt crisis for the establishment of the European Financial Stabilisation Mechanism (EFSM), the first facility for lending liquidity to Member States in financial difficulties.

property, including cultural heritage". It is a rather broad and generic definition, in line with international practice.⁸

Since the disaster justifying the need for emergency support may be "ongoing of potential", it should be assumed that the mechanism may be activated on a preventive basis. However, the wording of Art. 1, para. 1, of the Regulation may effectively limit the preventive use of the mechanism. Indeed, the very prospect of activating emergency support in view of a "potential" disaster appears to be in contradiction with the requirement that its consequences reach a certain scale, unless it is considered that also the effects can be potential and that the measure may be authorized on the basis of an *ex ante* assessment of their likelihood.

The procedure for the activation of the emergency support reflects the urgent need for intervention: the Council shall examine the Commission proposal "immediately" and its decision must be taken "in accordance with the urgency of the situation".⁹

As to the actions that are eligible for funding, the Regulation states that emergency support may be provided for the same humanitarian aid actions envisaged by Regulation (EC) 1257/96 of the Council of 20 June 1996 concerning humanitarian aid,¹⁰ i.e. assistance, relief and, "where necessary", protection operations to save and preserve life in disasters or in their immediate aftermath.¹¹ It is furthermore required that the measures adopted be "appropriate to the economic situation", a condition that echoes a proportionality assessment but specifically focuses on the economic consequences of the event justifying the granting of emergency support.

The implementation of the mechanism is entrusted to the Commission or partner organizations it selects. Art. 3, para. 4, of the Regulation includes a non-exhaustive list of entities that the Commission may select as partner organizations: it includes NGOs, "specialized services" of the Member States or "international agencies and organizations having the requisite expertise". The provision also adds that "in doing so" the Commission shall closely cooperate with the affected Member State. The wording is somewhat ambiguous in that it might refer either, more generally, to the implementation of the emergency support mechanism or to the selection of partner organizations. While a textual reading suggests the latter interpretation, it is the entire procedure, as prescribed by art. 1, para. 2, that shall be based on cooperation between the Commission and the Member State. The need for cooperation with national authorities is especially acute considering that the Union intervention is only

⁸ M. GESTRI, *La risposta alle catastrofi nell'Unione europea: protezione civile e clausola di solidarietà*, in M. GESTRI (a cura di), *Disastri, protezione civile e diritto: nuove prospettive nell'Unione europea e in ambito penale*, Milano: Giuffrè, 2016.

⁹ Art. 2, para. 2, of Regulation 2016/369, cit.

¹⁰ Art. 1 and Art. 2 of the Regulation define humanitarian aid by reference to its objectives, whereas Art. 4 contains a list of actions eligible for funding under the Regulation.

¹¹ See Art. 3, para. 2, of Regulation 2016/369, cit.

complementary to measures adopted by the Member States and in order to enhance the overall effectiveness of the instrument.

As to the methods of implementation of Union funding, the Regulation refers to the procedures laid down by Regulation (EU, Euratom) 966/2012 on the financial rules applicable to the general budget of the Union (so-called financial regulation),¹² complemented by very few specific rules.¹³ The resources used to implement emergency support operations shall come from the general budget of the Union or from contributions made by public or private donors (art. 4, para. 2). According to Art. 5 of the Regulation, EU funding under the emergency support mechanism may cover up to the entire amount of eligible costs, to be determined by reference to Regulation 966/2012.

Since the entire scheme is based upon EU funding of actions carried out by third parties, the Regulation also includes some provisions aimed at protecting the financial interests of the Union. With a view to preventing and combating fraud, Art. 8 authorizes the Commission to take “appropriate measures” ensuring that both preventive actions and effective checks, assisted by administrative and financial penalties, are put in place. The Regulation also extends to the management of funds under the emergency support mechanism the investigative powers of the European Anti-Fraud Office (OLAF). It shall further be ensured that clauses empowering such institutions and bodies to conduct audits and investigations are provided for in contracts and agreements concluded with third parties for the management of funds.

IV. COMPLIANCE WITH INTERNATIONAL LAW AND THE IMPACT ON THE SCOPE OF APPLICATION OF EU LAW

Art. 3, para. 3, of the Regulation mandates respect for humanitarian principles. It echoes Art. 214, para. 2, TFEU, concerning the operations in the field of humanitarian aid conducted by the EU in third countries. Together with the principles of impartiality, neutrality and non-discrimination, the Regulation also mentions the principle of independence, which was omitted by the drafters of Art. 214, para. 2, TFEU. Conversely, the latter prescribes “compliance with the principles of international law”, not explicitly mentioned by the Regulation. However, as any other EU secondary law act, the implementing measures will still have to comply with the international agreements to which the EU is a party and with customary international law. Additionally, they will have to be consistent with EU primary law, including, obviously, the Charter of Fundamental Rights of the European Union (Charter).

¹² Regulation (EU, EURATOM) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, EURATOM) 1605/2002.

¹³ See Regulation 2016/369, Art. 4, cit.

An interesting question is whether the granting of emergency support is enough to trigger the application of EU law (including the Charter) to actions taken by Member State authorities and funded through the mechanism. In this regard, it should be recalled that, according to Art. 51, para. 1, of the Charter, its provisions are addressed to the Member States “only when they are implementing Union law”. The Court has interpreted this requirement rather extensively, especially in *Åkerberg Fransson*, where it assumed that even a tenuous link could trigger the application of EU law.¹⁴ Therefore, it can be safely argued that the Charter applies in such situations.

V. THE IMMEDIATE IMPLEMENTATION OF THE MECHANISM: EMERGENCY SUPPORT AS AN INSTRUMENT TO FACE THE REFUGEE CRISIS

The immediate aim of the Regulation is to provide funding for humanitarian aid to refugees, in order to support Member States facing large inflows of asylum-seekers.¹⁵ It is a situation that one of the recitals describes as “a notable example” of disaster directly affecting the economic situation of Member States, hence justifying the activation of the mechanism.¹⁶ It is therefore not surprising that, in addition to establishing the mechanism in general terms, the Regulation directly authorizes the provision of emergency support for the current influx of migrants, for a period of three years (Art. 9).

Following its entry into force, the Commission promptly adopted an implementing decision in mid-April 2016.¹⁷ It provides for the financing of the mechanism for 2016, making immediately available an amount of 100 million euro and authorizing further expenditure from the general budget of the Union up to the overall amount of 300 million euro, of which 3 million are specifically dedicated to technical support.

VI. COMPLEMENTARITY AND CONSISTENCY

In several instances the text of the Regulation refers to its complementarity vis-à-vis other measures.

Firstly, in accordance with the principle of subsidiarity, expressly recalled by recital 13, it is complementary to Member States’ actions, which the mechanism does not replace (Art. 1, para. 2). Member States thus remain chiefly responsible for addressing the consequences of events justifying activation of the emergency support and notably,

¹⁴ Court of Justice, judgment of 7 May 2013, case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, para. 25-27.

¹⁵ See recital 3 of Regulation 2016/369.

¹⁶ Recital 2 of Regulation 2016/369.

¹⁷ Decision C(2016) 2214 final of the Commission of 15 April 2016 on the financing of emergency support in favour of the affected Member States in response to the current influx of refugees and migrants into the Union to be financed from the 2016 general budget of the European Union.

in the context of the refugee crisis, for providing humanitarian assistance to migrants and asylum-seekers.

Secondly, the Regulation is also complementary to other EU measures, as it is neither the only instrument for granting support of a macro-financial nature to the Member States nor the only measure for the provision of humanitarian assistance.

Interestingly, the complementarity relationship existing between the emergency support mechanism and other EU measures is explicitly mentioned by Art. 6 of the Regulation, which provides that “synergies and complementarity shall be sought with other instruments of the Union”. Art. 6 lists some of those acts: Regulation (EC) 2012/2002,¹⁸ Decision (EU) 1313/2013/EU,¹⁹ Regulation (EC) 1257/96,²⁰ Regulation (EU) 223/2014,²¹ Regulation (EU) 513/2014,²² Regulation (EU) 514/2014,²³ Regulation (EU) 515/2014²⁴ and Regulation (EU) 516/2014.²⁵

Among the measures the provision refers to, the most significant is arguably Regulation 2012/2002, which established a solidarity mechanism for the provision of coordinated responses to natural disasters. Additionally, mutual assistance can be provided under the Union Civil Protection Mechanism, but this tool is deemed insufficient²⁶ since it is based on voluntary contributions by Member States.

The emergency support mechanism introduced by Regulation 2016/369 is equally complementary to assistance and support that may be provided through existing Union instruments in the context of the Area of Freedom, Security and Justice. For instance, EU measures on border control, such as the Regulation (EU) 1052/2013 of the European

¹⁸ Regulation (EC) 2012/2002 of the Council of 11 November 2002 establishing the European Union Solidarity Fund.

¹⁹ Decision (EU) 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism.

²⁰ Regulation (EC) 1257/96 of the Council of 20 June 1996 concerning humanitarian aid.

²¹ Regulation (EU) 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived.

²² Regulation (EU) 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA.

²³ Regulation (EU) 514/2014 of the European Parliament and of the Council laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management.

²⁴ Regulation (EU) 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision 574/2007/EC.

²⁵ Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions 573/2007/EC and 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

²⁶ See Regulation 2016/369, recital 5.

Parliaments and of the Council of 22 October 2013 establishing the European Border Surveillance System (EUROSUR)²⁷ and the proposed Regulation for the establishment of a European Border and Coast Guard (EBCG) that should replace European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX),²⁸ do provide support, although of a different kind, to Member States and appear to be premised on a certain degree of solidarity.²⁹ Assistance and support under such instruments, however, is limited and only ancillary to the pursuit of their primary policy goals.

Finally, and most importantly, the Regulation is complementary to other measures adopted or planned for the management of large migration flows from third countries. The Regulation should thus be viewed as part of a wider picture comprising a variety of measures, the main features of which have been outlined in a Commission Communication adopted in September 2015 and dedicated to the management of the refugee crisis.³⁰ The Communication, which complements the previously published Agenda on Migration,³¹ sets priorities and guidelines on three levels: operational, legal and budgetary.

First, on the operational side, the Commission strategy provides for a variety of actions, including the full implementation of the “hotspot” approach, schemes for the relocation of people in need of international protection and measures improving the effectiveness of return decisions.

The second pillar of the Commission strategy aims at ensuring full implementation of EU law. In addition, a number of measures have been adopted or proposed that not only address issues of operational nature but also modify the relevant legal framework.³²

²⁷ For a critical comment on the Regulation, see J. RIJPMAN, M. VERMEULEN, *EUROSUR: Saving Lives or Building Borders?*, in *European Security*, 2015, p. 454 *et seq.*

²⁸ Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) 2007/2004, Regulation (EC) 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final.

²⁹ See P. DE BRUYCKER, *The European Border and Coast Guard: A New Model Built on an Old Logic*, in *European Papers*, 2016, www.europeanpapers.eu, p. 566 *et seq.*

³⁰ Communication COM(2015) 490 final/2 of 29 September 2015 from the Commission to the European Parliament, the European Council and the Council, *Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration*. For a comment, see S. CARRERA, S. BLOCKMANS, D. GROS, E. GUILD, *The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities*, in *CEPS*, 16 December 2015, www.ceps.eu.

³¹ Communication COM(2015) 240 final of 13 May 2015 from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, *A European Agenda on Migration*.

³² The complete list, including many soft law instruments, is available on the Commission website: ec.europa.eu.

Finally, the Commission strategy also comprises a financial and budgetary dimension, which has so far attracted much less attention³³ compared to the well-known deficiencies of asylum policy — aptly described as being far from a truly common asylum system³⁴ — and the increasingly “securitarian” trend in the management of external borders.³⁵ Yet, the scale of resources that the Commission has mobilized or envisaged to mobilize is unprecedented. The Commission indicates that a total of 1.7 billion euro have been or will be devoted to the management of the refugee crisis in 2015 and 2016.³⁶ Despite contentions that “there is a fair amount of double counting”,³⁷ the figures are certainly impressive.

The emergency support mechanism established by Regulation 2016/369 is part of this effort and could be seen as a component of an overall strategy aimed at making funding an instrument for policy-making.³⁸ This view assumes that, by using funding as a leverage, the Commission will be able to gradually push for further centralization in the management of the refugee crisis. Apparently, a similar trend is also noticeable in the field of external border control policy, as exemplified by the EBCG proposal, which some commentators view as an intermediary step towards further centralization of border controls at the EU level.³⁹

VII. THE AMBIGUITY OF SOLIDARITY: EMERGENCY TOOL OR STRUCTURAL PRINCIPLE?

There is, however, a missing piece in this jigsaw. Solidarity is expressly mentioned, both in the legal basis and in the text of the Regulation, as the underlying principle the emergency support mechanism is built upon. The reference to solidarity elicits interesting questions on the meaning and of this principle. Is it possible to draw any conclusions as to the structure and significance of the principle of subsidiarity from the analysis of its implementation through the establishment of the emergency support mechanism? More specifically, how does the reference to solidarity in the Regulation relate to the role subsidiarity plays in the context of asylum and migration law? Do they express a similar understanding of the concept, or rather evoke different dimensions of

³³ For an exception, see L. DEN HERTOOG, *EU Budgetary Responses to the 'Refugee Crisis'. Reconfiguring the Funding Landscape*, CEPS Paper in Liberty and Security in Europe, in CEPS, May 2016, www.ceps.eu.

³⁴ M. DEN HEIJER, J. RIJPMAN, TH. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, p. 607 *et seq.*; see also B. NASCIBENE, *Refugees, the European Union and the "Dublin system"*, *cit.*, p. 105 *et seq.*

³⁵ See S. CARRERA, L. DEN HERTOOG, *A European Border and Coast Guard: What's in a name?*, CEPS Paper in Liberty and Security in Europe, in CEPS, March 2016, www.ceps.eu, p. 2.

³⁶ Communication COM(2015) 490 final/2, *cit.*, p. 9 *et seq.*

³⁷ L. DEN HERTOOG, *EU Budgetary Responses*, *cit.*, p. 6.

³⁸ L. DEN HERTOOG, *EU Budgetary Responses*, *cit.*, p. 1.

³⁹ See P. DE BRUYCKER, *The European Border and Coast Guard*, *cit.*, p. 568.

the solidarity principle? If the latter is true, how do different understandings of solidarity relate to one another?

Solidarity is undoubtedly an important principle in the European legal order and is mentioned by several Treaty provisions across a wide range of policy fields, from the Common Foreign and Security Policy (CFSP) to the energy sector. Yet, whereas solidarity is widely regarded as a fundamental principle, there is no uniform understanding of this notion. Solidarity has thus been described as a “paradoxical figure”, which underpins the entire architecture of the European Union but defies definition.⁴⁰ Apart from a few bold references in the early years, where the Court of Justice referred to it as a foundation of the Communities,⁴¹ solidarity also plays a very limited role as an autonomous principle in the case law.⁴²

The difficulty in defining the principle of solidarity may at least partially depend on the fact that it includes several dimensions.⁴³

In most instances, the Treaties refer to an inter-State dimension of solidarity, such as in the solidarity clause enshrined in Art. 222 TFEU⁴⁴ or in the context of the Common foreign and security policy, where EU action shall be “based on the development of mutual political solidarity among Member States” (Art. 24, para. 2, TEU). Here solidarity, requiring “joint action” by the EU and its Member States, is clearly understood as solidarity *between* Member States (and possibly, between Member States and the Union).

Other provisions, however, introduce a different reading of the notion, referring to solidarity as a principle governing the joint production of collective goods within Member States, such as where the Treaty mentions solidarity between generations (Art. 3, para. 3, TEU). In addition, the Treaties sometimes also refer to “solidarity among peoples” (Art. 3, para. 5, TEU), a wording that may indicate either solidarity within

⁴⁰ S. DE LA ROSA, *La transversalité de la solidarité dans les politiques matérielles de l'Union*, in C. BOUTAYEB (ed.), *La solidarité dans l'Union européenne. Éléments constitutionnels et matériels*, Paris: Dalloz, 2011, p. 165.

⁴¹ Court of Justice, judgment of 10 December 1969, joined cases 6 and 11/69, *Commission v. France*, para. 16; Court of Justice, judgment of 29 June 1978, case 77/77, *Benzine en Petroleum Handelsmaatschappij BV and others v. Commission of the European Communities*, para. 15.

⁴² A. VON BODGANDY, *Founding Principles*, in A. VON BODGANDY, J. BAST (eds), *Principles of EU Constitutional Law*, Oxford: Hart, 2010, p. 53.

⁴³ See A. SANGIOVANNI, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, p. 221 *et seq.*

⁴⁴ It provides that “[t]he Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster”. See M. GESTRI, *EU Disaster Response Law: Principles and Instruments*, in A. DE GUTTRY, M. GESTRI, G. VENTURINI (eds), *International Disaster Response Law*, The Hague: T.M.C. Asser Press, 2012, p. 109 *et seq.*; S. BLOCKMANS, *L'Union fait la Force: Making the Most of the Solidarity Clause (Article 222 TFEU)*, in I. GOVAERE, S. POLI (eds), *EU Management of Global Emergencies*, Leiden: Brill Nijhoff, 2014, p. 111 *et seq.*

Member States or cross-border solidarity between citizens of different Member States – transnational solidarity, according to the classification proposed by Sangiovanni.⁴⁵

When one attempts to fit Regulation 2016/369 into this classification, one discovers, however, that these categories do not apply rigidly. Given that the legal basis refers to “solidarity between Member States”, it might be expected that this dimension be predominant. Yet, the Regulation evokes “solidarity between people”,⁴⁶ a wording which appears understandable since the aim of the Regulation, more than to ensure just a fair burden-sharing between Member States, is to directly mobilize resources for the provision of humanitarian assistance to disaster-stricken people. It appears, therefore, that different dimensions of solidarity are closely intertwined and coexist in the operation of the mechanism.

Furthermore, the assumption that the EU Treaties and secondary law refer to different meanings and dimensions of solidarity is also true in another sense, as suggested by an overall view of the implications this principle has in the field of asylum and migration policy.

Both Art. 67, para. 2, and Art. 80 TFEU recall the principle of solidarity, albeit in different ways. According to Art. 67, para. 2, TFEU, the common European policy on asylum, immigration and external border control shall be “based on solidarity between Member States”. Art. 80 TFEU articulates the concept in more detail, providing that EU policies in this area are guided by the principle of solidarity and fair sharing of responsibility, “including its financial implications”. Art. 80 TFEU is therefore more precise than Art. 67, para. 2, and arguably introduces a yardstick against which to assess the legality of EU measures.⁴⁷

It is thus clear that financial measures taken in response to a situation of emergency, such as those envisaged by Regulation 2016/369, are far from exhausting the legal implications of solidarity for the common asylum and migration policy.⁴⁸ To this aim, emergency-driven measures are simply not sufficient.

This very finding suggests a further reflection. The emergency support mechanism rests on a notion of solidarity which only surfaces under exceptional circumstances: solidarity is understood as a remedy to a situation of emergency, where intervention is required to redress the consequences of events beyond ordinary business. It is the same view of solidarity that appears, for instance, in the solidarity clause of Art. 222 TFEU.

⁴⁵ A. SANGIOVANNI, *Solidarity in the European Union*, cit., p. 232 et seq. On the notion of transnational solidarity see also F. DE WITTE, *Justice in the EU. The Emergence of Transnational Solidarity*, Oxford: Oxford University Press, 2015.

⁴⁶ See Regulation 2016/369, recital 1.

⁴⁷ See J. BAST, *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, in *European Public Law*, 2016, p. 292 et seq.

⁴⁸ See C. FAVILLI, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'«emergenza» immigrazione*, in *Quaderni Costituzionali*, 2015, p. 785 et seq.

The reference to solidarity as an underlying policy principle contained in Art. 80 TFEU, however, highlights the existence of a different and more comprehensive dimension of solidarity, one that addresses the relations between Member States beyond the emergency, in the ordinary process of decision-making and implementation of common policies. This “structural” dimension of solidarity is only slowly emerging and is facing strong resistance on the part of numerous Member States.

It appears, then, that the emergency-oriented and the structural dimension of solidarity could relate to one another in two different ways. On the one hand, they could be viewed as alternative: in this perspective, the provision of financial support, directly or indirectly, to the Member States most affected by the massive inflow of migrants would be a proxy for the adoption of common rules based on a more balanced burden-sharing between the Member States, especially as regards the distribution of asylum-seekers. However, the problem with this solution is that it rests on a short-term logic and fails to address systemic deficiencies in the reception of refugees and processing of asylum applications.

On the other hand, it is also possible to view the two dimensions of solidarity as complementary rather than alternative. In this vein, by conveying the idea that more solidarity is needed to face a given situation, emergency-driven crisis management measures may not only contribute to mitigate the consequences of the crisis, but also lay the basis for acceptance of common rules requiring a higher level of solidarity between Member States. The recent Commission proposal for the reform of the Dublin regulation⁴⁹ is certainly a step in the right direction, but it is well-known that it faces hostility from certain Member States and their public opinion. It is therefore still too early to predict whether this path will eventually be followed.

⁴⁹ Commission Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016)270 final.