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**Does Europe need a new legal framework to tackle
the crisis of mass migration?**

The idea of Europe is again in peril. Tensions between member states have risen; old walls thought long torn down reconstructed; the fraternity so central to the project lost. European citizens now rank immigration as the EU's most pressing challenge; more important than even the ongoing Eurozone crisis.¹ Federica Mogherini, the EU's foreign minister, has confessed “the crisis will get worse, with chain reactions between public opinion and national governments if we do not get the tools right... there is risk of disintegration”. And in the immediate wake of 13th November, the spectre of Europe's past hostility to minorities looms large.

Irrespective of often hyperbolic views on the impact of immigration, the bare figures paint a stark picture. So far in 2015 more than 700,000 migrants have come through Europe's external borders – the majority through Greece, Italy and Eastern states. Reform which combats the regressive, protectionist tendencies of many states is needed. And it is needed. The immediate reaction has been one of bickering, infighting and confusion. Sweden imposed border checks on arrivals from other EU countries; Slovenia has built razor-wire fences; France has blocked migrants travelling from Italy, and Hungary and Austria erected border walls. These measures are contrary to Schengen and TFEU Article 67 which sets the now lofty goal of ‘the absence of internal border controls’. There is an inevitable conflict, pitting solidarity between member states against solidarity with those fleeing conflict.

The absence of internal border controls, given practical effect through the Schengen programme, necessitated a common policy on external border control. In respect of migrants, this came through the Dublin regulation. Dublin grew from the 1980s, in a time when immigration control and asylum policy were unquestionably unsuitable for collective decision making at an EU level. The crisis has exposed a central weakness in the EU's division of powers. Just as the Euro has required a centralised fiscal system to operate effectively, the migration crisis has highlighted the need for a common immigration policy. But this is one which sits squarely within the sovereignty of the state and in the current political climate, post-Paris, not one member states will happily hand to Brussels.

1 Spring 2015 Standard Eurobarometer, 31 July 2015

The weakness of the Dublin regulation is its requirement that asylum seekers apply in their country of arrival, even if their eventual goal is another member state within the Schengen area. This places disproportionate burden on the initial recipient countries, coincidentally those already financially stricken by the Eurozone crisis. These countries have been caught twice by harmonised rules without a central decision maker. In the case of Greece, its financial state has exacerbated its inability to process asylum claims. The CJEU² and ECHR³ have found that the systemic failures of Greece mean it is not safe to receive asylum seekers, and so it cannot be made responsible under Dublin to receive those who first registered within its borders. This has undermined the trust and confidence which underpins Schengen, with migrants drifting through the zone with no member state willing to take responsibility for the migrants.

There are also weaknesses inherent in the rigidity of the Schengen system. It only permits signatories to reinstate border controls for up to a maximum of 2 months and even then only if strictly necessary for public policy or national security. These restrictions have been questioned in the wake of the Paris attacks. Yet reform of Schengen is not a debate Brussels wishes to entertain. Schengen has totemic status, among the most popular EU innovations, with Donald Tusk stating in November that “saving Schengen is a race against time, and we are determined to win that race... this includes, first and foremost, restoring external border control. Without effective border control, the Schengen rules will not survive.”

The sights have now been trained on Dublin. It is clear that, when faced with a choice between Schengen and Dublin, Schengen’s popularity will prevail. After Hungary unilaterally stopped accepting Dublin transfers back to its territory in June 2015, the Justice and Home Affairs Council held in October referred the Dublin regulation to the Commission to recommend legislative proposals to address its malfunctioning and address obstacles to effective returns. The decision has again been made: stronger external borders to save Schengen.

What should replace Dublin? The requirement is clearly a more equitable mechanism for determining the member state responsible for examining the application for protection. This cannot simply assess

2 Cases C-411/10 and C-493/10

3 MSS v Belgium and Greece (App. No. 30696/09)

the state in which the migrant registered, but must take into account the member state's ability to support the migrant, rather it should build on the quota agreement reached in September and utilise the same mechanisms. This is not the romantic idea of a joint migration and asylum policy. While one which would certainly solve many issues; European reform has always been about the art of the possible. Brussels will not want to, nor will it gain any traction, in pushing for common asylum policy. The possible has been the weak quota agreement which will divide a quarter of the actual migrants currently entering the EU between states will see migrants moved from Italy, Greece and Hungary to other EU countries. Yet this will not solve the crisis – simply deal with those who are already here.

So, what's the long term solution? The prime manifestation of the art of the possible has been found in the last weeks. EU leaders have agreed to speed up Visa liberalisation and EU membership talks if Turkey agreed to stem the influx, and will pledge around £2 billion in financial assistance, likely to be signed in late November. In return, Syrians will gain rights to work and education in Turkey, border controls will be tightened, and EU will eventually get to send thousands of migrants to Turkey. In effect, Turkey will become the 'buffer zone'; a role previously played by Greece, Italy and the eastern states. The external borders reinforced, and the issue simply pushed further away.

(1000 words)