Solidarity as a challenge for the EU:  
The case of justice and home affairs

Jörg MONAR

1. Introduction

There are not many terms which can generate more emotions in political debates than that of ‘solidarity’. It belongs to those concepts which—like ‘equality’ and ‘justice’—touch the very foundations of any organised human community, and can as such be used (and abused) with an enormous range of different political meanings. However, while the different forms solidarity might take and its extent will always be open to debate there can be no denying that that without at least some degree of solidarity—understood in the basic sense of mutual support amongst its component members—a community lacks a basic condition for its credibility and sustainability: Solidarity in terms of mutual support and burden-sharing is not only needed to pursue objectives of common good but also—and ultimately in a more critical way—to make sure that in a situation of pressure and crisis one or more members of the community are not left to their own means and fate. A failure on either account puts into question the very rationale and existence of the respective community. Solidarity can thus be regarded as an essential value, a constitutional conditio sine qua non, for any form of human community.

The European Union (EU) may be regarded as a community of advanced legal and political complexity, but given that its component
members have established it to pursue a number of objectives of common good the question of solidarity applies to it no less than to other forms of human community. The Preamble to the European Coal and Steel Community (ECSC) Treaty of 1952 already referred to the creation of “real solidarity” as a primary aim of the nascent European construction, and—although solidarity was not defined as a formal legal principle—the ECSC Treaty provided already for a number of mechanisms and instruments, such as the financial levy and aid system of the ECSC, which clearly followed a logic of solidarity. Following the gradual expansion of de facto solidarity primarily through the European Community budgetary framework in the 1970s and 1980s, the treaty reforms of the Single European Act (1987), Maastricht (1993), Amsterdam (1999) and Lisbon (2009) have each amended and/or added new treaty provisions relating to solidarity, this to the extent that the principle is now explicitly referred to in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) in no less than 18 different preamble and substantive provisions.

It has rightly been observed that one of the main evolutions brought by the Treaty of Lisbon with respect to the codification of the principle of solidarity in the EU Treaties has been its extension from a principle applying to the relations between the EU Member States to one also applying to relations between EU citizens. This is exemplified, in particular, by the references to solidarity as a societal principle in Art. 2 TEU and to “solidarity between generations” in Art. 3(3) TEU as well as Title IV on “solidarity” of the Charter of Fundamental Rights of the European Union. However, the EU remains constitutionally a Union of the Member States which have established it “among themselves” (Art. 1 TEU) and hence, if at all, only indirectly—via the Member States—one of citizens. Solidarity in a constitutional sense remains primarily a principle applicable to the relationship which the Union has created between the Member States, both directly and via the political,
legal and institutional framework of the Union. The promotion of “solidarity between Member States” has—in relation also with economic, social and territorial cohesion—been enshrined amongst the fundamental treaty objectives defined in Art. 3 TEU, and in the context of the principle of loyal cooperation Member States are also expected to “assist each other, in full mutual respect, in carrying out tasks which flow from the Treaties” (Art. 4(3) TEU).

If a principle is referred to as often in the Treaties as is the case with that of solidarity this can be taken as a clear indication that it is still far from being taken for granted. In a Union in which Member States retain not only primary constitutional and fiscal powers but also large margins of national policy-making autonomy solidarity continues indeed to be a constant challenge. Yet this challenge—and the responses given by the Union to it—varies considerably from one policy field to the other. If one wants to assess the progress made by the EU as well as its persisting limitations in meeting the challenge of solidarity one therefore best looks at one or more specific policy domains. EU justice and home affairs, since the Treaty of Amsterdam regrouped under the fundamental treaty objective of the “area of freedom, security and justice” (AFSJ), can in this context be regarded as one of the most interesting domains to explore: It is not only the EU policy domain which has expanded most since the Treaty of Amsterdam in terms of new structures, mechanisms and legislation, but also one in which Member States are exposed to considerable asymmetric pressures which have made solidarity emerge as a key political issue which has even led to special provisions being included in the TFEU. In the following we will first identify the nature and extent of the asymmetric pressures within the AFSJ context, then analyse and critically assess the legal, political, financial and operational solidarity responses given to those pressures by the EU, and end with conclusions on what the case of the AFSJ means more generally for the progress and limits of solidarity within
2. Asymmetric pressures within the AFSJ

According to Art. 3(2) TEU the Union shall offer its citizens an AFSJ “without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”. Art. 67(2) TFEU defines as objectives to be achieved within the context of the AFSJ the ensuring of the absence of internal border controls (which is the primary purpose of the Schengen system) and the framing of a common policy on asylum, immigration and external border control. Art. 67(3) TFEU adds to those the aim of a “high level of security” which—as this objective is to be achieved essentially through explicitly mentioned measures in the fields of police and judicial cooperation in criminal matters—is clearly to be understood in the sense of internal security through protection against crime. The AFSJ thus constitutes according to the Treaties a common “area” without internal borders based on common approaches regarding (a) asylum, (b) immigration, (c) external borders and (d) internal security. The concept of a common “area” would ideally imply a fairly equal distribution of the benefits and burdens from this “area” amongst all Member States. Yet precisely this is in practice rendered very difficult by major asymmetric pressures on Member States which exist in all four fields:

(a) In the asylum field the pressure on Member States measured in terms of numbers of asylum application per million inhabitants varied in 2013 from 50 (Portugal) and 65 (Czech Republic) in the case of the two least exposed Member States to 5330 (Malta) and 5680 (Sweden) in the case of the two most exposed with an EU average of 860. This makes in the case the two extremes—Portu-
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Map 1: Detections of EU illegal external border crossings in 2013 (Frontex)

Source: FRAN data as of 10 February 2014

gal and Sweden—a difference in the exposure ratio of 1:114. This is not the place to explore the variety of factors, differences in geographical exposure, national policies, and other, which can explain such huge differences in asylum application numbers. Suffice here to state that such differences have inevitably given rise to tensions over the question of solidarity through burden-sharing amongst Member States given that a “common asylum policy” is one of the core objectives of the AFSJ.

(b) In the immigration field the illegal immigration pressure on Mem-
ber States measured in terms of recorded illegal border crossings between legal border crossings points—a major indicator also reveals major asymmetries. In 2013 Italy and Malta alone accounted for 42.7% of the total of such reported illegal crossings, and Greece, Bulgaria and Cyprus—most affected by what is commonly called the “Eastern Mediterranean Route”—for another 31.1%, figures which have brought out once more the hugely asymmetric exposure of southern and south-eastern Member States to illegal immigration pressures (see also map 1).

(c) In the external borders field there are not only major differences between the length and nature (land and/or sea) of external borders which Member States have to control and manage in the common interest but also in the density of the migration and crime challenges which they have to face. The asymmetries in the field of illegal immigration have already been highlighted, but they are not less extensive as regards crime challenges at external EU borders. Spain, for instance, remains a major target for the criminal trade of cannabis and cocaine into the EU, and Bulgaria and Greece are primary entry point targets of the heroin trade of the “Balkan Route” via Turkey. Asymmetric pressures on the EU external borders have a particular solidarity dimension as the Member States with longest and/or most exposed external borders have obviously a greater external border management burden to shoulder. As they do so in the interest of the entire AFSJ and all other Member States (which—because of the high permeability of internal borders—will be affected negatively if external borders are not managed effectively) those Member States can make a particularly strong case for solidarity through burden-sharing.

(d) In the internal security field the challenges posed by serious forms of cross-border crime such as organised crime and terrorism present unsurprisingly a picture of great diversity. The extent to
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which these tend to be asymmetric too are most clearly exemplified in the counter-terrorism domain: In 2013 only five of the 28 Member States reported terrorist incidents, and out of those five three—France, the United Kingdom and Spain—accounted for 86.2% (131) of the total of 152 incidents. The asymmetry was nearly as pronounced in the same reporting period as regards the number of arrests of suspected terrorists—an at least equally important indicator, with the same three Member States accounting for 73.3% (392) of a total of 535 arrests in the only 14 out of 28 Member States affected overall. While terrorism has been repeatedly recognised at EU level as a major common threat to the AFSJ—especially since the 9/11 attacks—it is evidently quite unevenly distributed amongst the Member States.

The asymmetry of pressures on Member States in all of the above primary fields of action in the AFSJ is therefore considerable, and this to an extent that it can put its functioning at risk. This was shown in 2011 when the Italian Government, faced with a significant inflow of refugees due to the “Arab Spring” developments, asked in vain for EU solidarity in the form of substantial financial means and an activation of Directive 2001/55/EC on temporary protection in the event of a mass influx of displaced persons which provides for a mechanism of burden-sharing through voluntary transfers of displaced persons. Having met little support in the Council-most other Member States considered the Italian threat perception and demands exaggerated and only Greece and Spain supported the Italian position—the Italian Government adopted on 5 April 2011 a decree providing for a six months visa for North African citizens present on Italian soil who could either not be returned back to their country of origin granting its holders the right to free movement in the European Union under Schengen rules. As most of the likely beneficiaries were Tunisian the French Government immediately
saw a risk of large numbers of the refugees/migrants moving across the 'open' internal Schengen borders to join the large French Tunisian immigrant community—with the result that the French ministry of interior issued on 6 April an instruction clearly aimed at the beneficiaries of the Italian measure under which Schengen visa holders not able to justify sufficient means of subsistence would be returned to the Schengen country they were coming from. This led to tensions with Italy which further escalated when France temporarily suspended the rail traffic at the Franco-Italian border at Ventimiglia on 17 April. Italian Foreign Minister Franco Frattini declared this to be a violation of the Schengen rules and openly questioned the continuing sustainability of the Schengen free movement regime. In the meantime the Franco-Italian issue was spreading to other Member States, with the Bavarian Interior Minister Joachim Herrmann threatening the introduction of controls at the border towards Austria if the Italian visa issuing practice would continue and the Danish Government finding in this resurgence of national border protection measures an additional justification for announcing in May 2011 increased border checks in response to crime and illegal immigration risks. What has been termed the 2011 'Schengen crisis' was subsequently brought under control, but at its height it looked as if Italy’s reaction to the asymmetric pressure it was subject to as an EU/Schengen external border country could lead to a widespread reintroduction of internal border controls and thus put into question what can arguably be regarded as the core element of the AFSJ.

3. Solidarity within in the AFSJ: the legal framework

The special solidarity challenges relating to the AFSJ were already recognised at the political level at the time of the negotiations on the Draft Constitutional Treaty 2002–2004, and specific provisions addressing those made their way via the Draft Constitutional Treaty into the Tre-
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ty of Lisbon. In addition to the aforementioned general solidarity and mutual assistance clauses of Art. 3(3) and 4(3) TEU—which do not provide any indication of the content or reach of solidarity between the Member States—there are now two specific AFSJ provisions on solidarity:

The first is to be found in Art. 67(2) TFEU according to which the “common policy on asylum, immigration and external border control” is to be based on “solidarity between the Member States”. This reference to solidarity in the “general provisions” on the AFSJ is complemented by a second specific provision applying to the TFEU chapter on asylum, immigration and border control, Article 80 TFEU, which is one of the most extensive on the principle of solidarity in the Treaties: It provides 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 shall contain appropriate measures to give effect to this principle.” These provisions justify several considerations:

On the one hand Art. 67(2) and 80 TFEU can be regarded as a quite forceful affirmation of the principle of solidarity: Solidarity among Member States is not only declared to be a basis for the common policy in the respective three major AFSJ fields but also linked explicitly to burden-sharing (“sharing of responsibility”) between the Member States. To be noted is also the direct reference made to the use of financial instruments (“financial implications”) for the implementation of the principle of solidarity. Most other EU Treaty provisions on solidarity lack such an explicit reference to the possible use of EU budgetary means so that solidarity is given here at least one dimension of more concrete meaning in terms of its application.

On the other hand, however, the drafters of the Treaties have made no effort to give a mandatory content to the principle of solidarity.
There is no duty to assist a Member State exposed to an asymmetric pressure, there is no right to be assisted which such a Member State could invoke, and the importance of the aforementioned reference to “financial implications” finds itself reduced by the absence of any defined right to financial assistance. To be “governed” by the principle of solidarity is clearly to be understood in a political rather than a legal sense, and when it comes to assessing the substance of solidarity as a political guideline one is immediately confronted with vagueness of the undefined term “fair” which precedes the “sharing of responsibility”. To add an even wider margin for manoeuvre for EU policy-makers Art. 80 TFEU specifies that Union acts in the fields of asylum, immigration and border control shall contain appropriate measures (only) “whenever necessary” without any criteria being added on the circumstances under which this might indeed be “necessary”.

It should also be noted that the solidarity principle is only explicitly referred to as regards the aforementioned three fields of asylum, immigration and border control. There are no special provisions for the other fields of the AFSJ dealt with in Chapters 3 (judicial cooperation in civil matters), 4 (judicial cooperation in criminal matters) and 5 (police cooperation) of Title V Part Three of the TFEU. While there may be no obvious need for solidarity between Member States in response to asymmetric pressures in the field of judicial cooperation in civil matters the same can clearly not be said about the fight against cross-border crime which concerns both judicial cooperation in criminal matters and police cooperation. As has been shown in the case of terrorism some Member States can be significantly more exposed to certain internal security threats than others, which inevitably results in a higher pressure on their police forces and judicial systems. As cross-border crime is seen as a common challenge the Member States trying to tackle higher pressures of such crime arguably do so in the interest of the Union and all Member States—so that a case for solidarity could be made in
this respect as well. The AFSJ provisions, however, remain silent in this respect. The “solidarity clause” of Art. 222 TFEU, it is true, provides that the Union and its Member States “shall act jointly and in a spirit of solidarity if a Member State is the object of a terrorist attack”, but there is no reference to the AFSJ and its “high level of security” (Art. 67(3) TFEU) objective, and the obligation of the other Member States is only in case of an attack and at the request the political authorities of the attacked Member State (Art. 222(2) TFEU).

Overall, therefore, the Treaty provisions on solidarity between the Member States within the AFSJ do not go beyond a strongly worded, but fairly general and legally undefined and not enforceable affirmation of solidarity as a political principle of common policy development in the fields of asylum, immigration and border controls. In addition this affirmation covers the AFSJ only partially as no similar affirmation has been provided for the most directly internal security related AFSJ fields, police and judicial cooperation in criminal matters, although asymmetric pressures can be found there as well.

4. Solidarity within the AFSJ: The political dimension

The strong political rationale for solidarity within the AFSJ has already been underlined: Faced with asymmetric pressures within a ‘common area’ in which they are also expected to fulfil tasks in relation with ‘common objectives’ (such as effectively securing their part of EU external borders) Member States can arguably make a strong case for solidarity to help them with the greater ‘burdens’ they have to cope with as a result of these pressures. Unsurprisingly there is no lack of references to solidarity in political and programming documents relating to AFSJ issues. The probably most dramatic political affirmation so far has been the “Declaration of solidarity against terrorism” adopted by the European Council on 25 March 2004 in response to the Madrid ter-
rorist attacks at the Atocha station and based on the “solidarity clause” of the (although not yet ratified) Draft Constitutional Treaty. Another major example of the affirmation of political solidarity are the “Council conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows” which were adopted on 8 March 2012 largely in response to the aforementioned ‘Schengen crisis’ of 2011 and provided the European Commission with a wide-ranging political mandate on monitoring and furthering solidarity in the fields in question. It seems fair to assert that today there is no major political programming text regarding the AFSJ which does not also reaffirm the importance of solidarity, the most recent being the Conclusions of the European Council of 26/27 June 2014 on the “strategic guidelines” for legislative and operational planning for the coming years within the AFSJ which duly emphasize in paragraph “the Treaty principles of solidarity and fair sharing of responsibility”.

Yet, however often solidarity within the AFSJ is reaffirmed in a political context its substance can ultimately only be ascertained in actual EU policy outputs, and in this respect it is useful to distinguish between a financial and an operational dimension of solidarity:

5. Solidarity within the AFSJ: The financial support instruments

Responding to asymmetric challenges through the provision of financial support can be regarded as the oldest solidarity instrument of the EU as it was first used already under the 1952 ECSC through the aforementioned system of ECSC levy and aids: The levy consisted of a tax on coal and steel output whose revenue was used to help with the —asymmetric-social and restructuring costs in the Member States’ declining coal and steel sectors. While the revenue base for today’s EU budget has been considerably widened since the early times of the
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ECSC and a host of other financial support mechanisms have been introduced the overall financial framework for solidarity through the EU budget remains a very modest one: It should be recalled that the total financial commitment under the EU’s Multiannual Financial Framework (MFF) for the years 2014 to 2020 amounts to €960 billion which accounts for only 1.0% of Gross National Income (GNI) in the Union. In response to the insistence of several Member States on budgetary austerity in the wake of the sovereign debt crisis the GNI share of the 2014–2020 MFF has actually declined from 1.12% under the 2007–2013 MFF to now 1.0% -which has reduced the margin for financial solidarity even further.

Within the context of the 2014–2020 MFF Member States can benefit from financial support measures primarily under three financial programming instruments:

1. the “Asylum, Migration and Integration Fund” (AMIF) with a financial envelope of €3.137 billion, which aimed at contributing to the management of migration flows and the development and implementation of the common policy on asylum and immigration;

2. the “Internal Security Fund” (ISF) with a financial envelope of €3.764 billion, which is divided between an “ISF-Borders” part covering measures in field of external border management, visa policy and fight against illegal immigration (€2.76 billion) and an “ISF-Police” part covering measures, under the EU objective of a “high level of security”, measures in the field of crime prevention, combating serious forms of cross-border crime, cooperation between law enforcement authorities and internal security related risk and crisis management (€1.004 billion);

3. the “Justice Programme” (JP) with a financial envelope of €0.337 billion, which is aimed at supporting judicial cooperation in civil and criminal matters, judicial training and measures to increase access
to justice.

The total amount of financial support available under these three instruments amounts thus to €7.238 billion, which makes 0.75% of the total 2014–2020 MFF framework. Given the fact that the AFSJ is a fundamental Treaty objective and that there is—as indicated above—no lack of asymmetric challenges to Member States which more than justify solidarity measures this financial envelope must be regarded as very modest indeed. If one compares the above amount with other large EU budgetary headings under the MFF—such as €450.8 billion for “smart and inclusive growth” (62 times more spending), €373.2 billion for “sustainable growth: natural resources” (52 times more spending) or €325.1 billion for “economic, social and territorial cohesion” (45 times more spending)—it may even be regarded as verging on the purely symbolic. It should also be noted that not the entire financial support envelope of the above programming instruments is available for measures in support of Member States. As regards the AMIF, for instance, only €2.752 billion, i.e. 87.7% of the total, is earmarked for projects directly supporting Member States, the remaining being reserved for various measures at EU level, including support for the European Migration Network.

The limitations of the financial solidarity instruments can be shown by a simple cost calculation example: The total length of the EU’s external land and sea borders being 78,433.7 km, the amount available per km of external border per year under the “ISF-Borders” instrument is €5,026.9. Given that the acquisition cost of only a single helicopter equipped to Schengen border control standards including training for the pilots is at least €8.88 million (i.e. the equivalent of yearly EU funding for 1,776 km of external borders) Member States would clearly be unwise to base their response strategies to pressures at borders on the expectation of significant EU funding.
However, while the total amount and share of the EU budget available for financial support measures in favour of the Member States are comparatively small two more positive trends from the solidarity perspective can be identified: One is the fact that under the new 2014–2020 MFF instruments mentioned above the maximum EU co-financing rate for national projects is generally 75%, in certain cases even 90%, which is higher than under the previous MFF instruments. The second and even more significant indicator is that, although the 2014–2020 MFF was subject, as already mentioned, to an overall reduction from 1.12% of GNI to 1.0% with regard to the previous MFF, the AMIF and ISF Funds have seen an increase of total allocations for the new MFF by around 50%. The financial dimension of solidarity within the AFSJ has thus clearly been expanded at a time when severe budgetary austerity has led to serious cuts in most other EU budgetary lines. This can at least partially be ascribed to the impact of the 2011 “Schengen crisis” which showed right at the start of the negotiations on the new MFF that the AFSJ could be put at risk without a reinforced solidarity dimension.

A final question which needs to be answered in relation with solidarity through financial support to Member States is whether the (limited) available funding is actually targeted at those most in need in the light of the above mentioned asymmetric pressures. The answer is yes, but with two qualifications. As there are not yet any annual figures for the first year—2014—of the current MFF available the multiannual break-downs for funding allocations to Member States under the AMIF Regulation can serve as sufficiently solid indicator:

These foresee the allocation of “average amounts” to Member States during the MFF based on the funding they received from 2011 to 2013 under the AMIF’s three predecessor instruments, the European Refugee Fund (EFR), the Integration Fund (IF) and the Return Fund (RF). The percentage figures clearly show that the amounts allocated are

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based to at least a considerable extent on 'burden' indicators rather than population size, GNI share or other 'size' criteria of Member States: 37.35% of the total are thus earmarked to the five southern geographical 'frontline countries' Spain, Italy, Greece, Malta and Cyprus heavily exposed to asylum and immigration pressures. Greece and the United Kingdom, which during the 2011–2013 period experienced both high asylum application and return numbers are listed with together 27.58% of the total, and the four countries with the highest numbers of asylum applicants and third-country nationals within their territories ─ France, Germany, Italy and the UK ─ reach together 50.5%.

Now to the two qualifications: The first, and more minor one, consists of the fact that a minimum amount of at least €5.0 million is foreseen for each Member State independently from its actual situation, a not untypical solution in the EU to ensure to satisfy the political consideration that each Member State should at least receive 'something'. The second, and more important one, is the distortion caused by Member States not having necessarily the 'absorption' capacity of EU financial means which corresponds to the extent of the asymmetric challenges they are facing. Malta is the most obvious case: As can be seen from Table 1 Malta, although a primary destination for asylum and refugee flows from Northern Africa received 2011–2013 only average allocations of 0.23% because of both organisational and financial limitations ─ national co-funding is always necessary ─ to implement larger EU funded projects. The AMIF Regulation foresees, therefore, a higher minimum amount for both Malta and Cyprus (which is in a similar situation), but this will still not exclude a continued distortion under the current MFF. It should be added that the earmarked average amounts can obviously vary in the light of Member States' funding applications and pressures until 2020.

Looking at the financial support framework overall one can conclude that the EU instruments provide indeed for a dimension of solidarity
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Table 1: Funding allocations to EU Member States under the AMIF Regulation
Multiannual breakdowns per Member State for the period 2014–2020 (in EUR)

<table>
<thead>
<tr>
<th>Member State</th>
<th>Minimum amount</th>
<th>% average 2011–2013 allocations ERF+IF+RF</th>
<th>Average amount 2011–2013</th>
<th>TOTAL</th>
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<tbody>
<tr>
<td>AT</td>
<td>5,000,000</td>
<td>2.65%</td>
<td>59,533,977</td>
<td>64,533,977</td>
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<td>BE</td>
<td>5,000,000</td>
<td>3.75%</td>
<td>84,250,977</td>
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<td>BG</td>
<td>5,000,000</td>
<td>0.22%</td>
<td>5,006,777</td>
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<td>CY</td>
<td>10,000,000</td>
<td>0.99%</td>
<td>22,308,677</td>
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<td>CZ</td>
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<td>0.94%</td>
<td>21,185,177</td>
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<td>DE</td>
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<td>9.05%</td>
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<td>208,416,877</td>
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<td>EE</td>
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<td>0.23%</td>
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<td>ES</td>
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<td>252,101,877</td>
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<td>FI</td>
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<td>0.82%</td>
<td>18,488,777</td>
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<td>260,565,577</td>
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<td>GR</td>
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<td>11.32%</td>
<td>254,348,877</td>
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<td>HR</td>
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<td>0.65%</td>
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<td>13.59%</td>
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<td>LT</td>
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<td>0.21%</td>
<td>4,632,277</td>
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<td>0.10%</td>
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<td>LV</td>
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<td>8,751,777</td>
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<td>MT</td>
<td>10,000,000</td>
<td>0.32%</td>
<td>7,178,877</td>
<td>17,178,877</td>
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<td>NL</td>
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<td>3.98%</td>
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<td>PL</td>
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<td>2.60%</td>
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<td>PT</td>
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<td>1.24%</td>
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<td>32,776,377</td>
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<td>0.75%</td>
<td>16,915,877</td>
<td>21,915,877</td>
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<td>SE</td>
<td>5,000,000</td>
<td>5.05%</td>
<td>116,536,877</td>
<td>118,536,877</td>
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<td>5,000,000</td>
<td>0.43%</td>
<td>9,725,477</td>
<td>14,725,477</td>
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<td>SK</td>
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<td>0.27%</td>
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<td>10,980,477</td>
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<td>UK</td>
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<td>67,042,557</td>
</tr>
<tr>
<td>MS Totals</td>
<td>14,500,000</td>
<td>100.00%</td>
<td>22,470,000,000</td>
<td>2,392,000,000</td>
</tr>
</tbody>
</table>
among Member States in response to asymmetric pressures and that this dimension has been strengthened under the new 2014-2020 MFF. But at the same time it is also evident that this solidarity dimension remains comparatively limited, and also that it does not fully reflect the diversity of asymmetric pressures on Member States.

6. Solidarity within the AFSJ: The operational instruments

Operational solidarity within the AFSJ can be analytically divided into two different categories. The first is the provision of support to Member States in need by way of other Member States putting part of their operational capabilities at their disposal within the framework of EU legal instruments and mechanisms. The second form is the provision of operational support to Member States in need directly by EU bodies having appropriate capabilities.

Direct operational support between the Member States appeared as a concept already in the 1990s as an option for burden-sharing in the asylum policy field by Member States with lower asylum seeker numbers agreeing to receive more asylum seekers via intra-EU relocation in order to reduce the pressure on those exposed to much higher numbers. Yet the potentially high costs involved, national reception capacity problems and also the concern that Member States exposed to higher pressures in this field may take less action against abuses of the asylum system and also invest less into their own reception capabilities if they know that they can pass asylum seekers on have kept this form of solidarity firmly in the realm of voluntary action by the Member States. Some Member States also take the view that firmly established intra-EU relocation schemes might serve as a ‘pull-factor’ for even more refugees coming to the EU. That this voluntary option does not go very far is shown by the currently only fully-fledged intra-EU relocation scheme, the EUREMA II pilot project for intra-EU relocation of asylum
seekers from Malta: In spite of EU funding out of the (now discontinued) European Refugee Fund only eight of the 28 Member States participated in the scheme 2012–2013, making a total of only 91 pledges to accept beneficiaries of international protection relocated from Malta. In 2013 only 39 persons were actually relocated under the scheme, which was partially due to the fact that eligible beneficiaries were not willing to relocate to some of the Eastern EU Member States. Denmark, Germany, Ireland and the Netherlands—which are not in favour of fixed EU schemes—agreed a total of 215 relocations from Malta outside of the EUREMA scheme for 2012 and 2013, but even if this additional effort is taken into account the relocation from Malta can hardly be regarded as a very substantial solidarity action given that Malta received 2060 new asylum applications in 2012 and 2205 in 2013.

There is one EU legal instrument in the asylum field which provides for at least some sort of mandatory solidarity: Under the heading of “solidarity” Articles 25 and 26 of the 2001 EU Temporary Directive obliges Member States to indicate reception capacities in the case of a mass influx of refugees on the basis of which Member States can formulate requests for a transfer of refugees to other Member States, with a possibility for the Council to “take appropriate action”. However, this solidarity mechanism can only be activated if—by virtue of Article 5—the Council has actually first decided by qualified majority that a situation of “mass influx of refugees” exists, which—in spite of situations of very significant refugee movements into some Member States—it has never done so far.

A slightly more positive assessment can be arrived at with regard to another operational solidarity instrument amongst Member States in the asylum field, the “European Asylum Support Teams”. Under Article 13 of the 2010 European Asylum Support Office (EASO) Regulation Member States subject to a particular pressure can request the EASO to deploy Asylum Support Teams (ASTs) consisting of national experts
assigned by the Member States to form part of an “Asylum Intervention Pool” to provide technical and operational assistance which may include the facilitation of the initial analysis of asylum applications, interpreting services and transfer of management and handling expertise. If the EASO agrees to the request the other Member States are expected to contribute the necessary number of experts for the deployment of the ASTs under an operating plan agreed with the requesting Member State. This still relatively new mechanism has already been used several times. A major example is the deployment in 2013 to Greece of over 40 experts nominated by 14 Member States in over 50 ASTs to help Greece tackling its huge asylum applications backlog, setting up a sustainable and efficient asylum and reception structure and guaranteeing the quality of the asylum and reception process. However, while the deployment of the ASTs appears to have been well managed and focused on Greece’s main challenges in the field it is evident that 40 experts from other Member States cannot make a fundamental difference to the huge task of clearing a backlog which in 2013 was close to 50,000 applications.

A similar mechanism to the ASTs—and actually pre-dating it—exists in the field of external border management. The equivalent to the ASTs in this field are the European Border Guard Teams (EBGTs). These are formed by the EU’s external borders management agency Frontex out of a pool of national border guards designated by the Member States to be deployed in “joint operations”, “pilot projects” or (more short-term) “rapid interventions” in response to specific control and surveillance challenges at EU external borders, especially in situations of “disproportionate pressures”. The deployment can be made at the request of Member States concerned, but also—in agreement with the Member States to be assisted—at the initiative of Frontex itself. The number of border guards designated by Member States for the EBGTs was increased during 2013 from 1,700 to 2,500, a figure of a
clearly entirely different order than that for the ASTs, reflecting the higher political priority given by Member States to border security and migration management challenges. Apart from being able to call on the EBG Ts joint operations organised by Frontex can also call upon Member States to make necessary equipment, such as aircrafts and ships, available to help particularly exposed Member States to tackle illegal immigration and other security challenges at external borders. During 2013 no less than 20 of such joint operations were organised at external EU air, land and sea borders. The largest of these operations, “Operation Poseidon Sea 2013”, provided sea border management assistance to Greece, lasted 275 days, involved personnel and equipment from 19 other Member States as well as one non-Member State, Albania, and benefitted from close to €5.8 million of EU funding. It was aimed at enhancing the control of irregular migration flows and other cross-border crime from the Turkish coast and Egypt towards Greece and Italy as well at contributing to the control of secondary migration movements from Greece towards the European Union. Not all of the EU external border joint operations, however, reach this scale, and the participation can vary considerably: The 2013 joint operation “EPN Hera”, for instance, aimed at implementing activities to control irregular migration flows and other cross-border crime from West African countries towards the Canary Islands, involved apart from the host country Spain only Luxembourg for a total duration of 92 days.

Frontex joint operations currently constitute the most substantial form of operational solidarity between the Member States, and at the time of the creation of the AFSJ nothing remotely similar existed. They can also generate substantial results: Operation “Poseidon Sea 2013”, for instance, led to the detection of 10,815 illegal immigrants, the arrest of 126 facilitators and 69 drug smugglers, the rescue of 2,716 migrants at sea and the confiscation of drugs worth over €10 million. Yet the instrument has also its limitations. Apart from the already indicated vari-
able participation the operations are always temporary and cannot permanently remedy capacity deficits of particularly exposed Member States. Greece, for instance, has thus called repeatedly upon joint operations assistance, putting considerable organisational strain on Frontex and the assisting Member States. The effectiveness of joint operations seems also to be affected by the complex interaction between a multiplicity of European and national actors, of diverging procedures and shifting priorities.

It should also be noted that there is no operational solidarity mechanism similar to the Frontex joint external border operations in the internal security field, although Member States—as indicated above—also face asymmetric challenges as regards terrorism and organised crime. The political sensitivity of national law enforcement issues and the reluctance of most Member States to accept the potential deployment of law enforcement officers with executive powers from other Member States remain major obstacles in this field.

Our brief survey of operational solidarity instruments within the AFSJ would not be complete, however, without considering the contribution made by AFSJ agencies. Apart from the role given to EASO and Frontex in the planning and deployment of personnel and equipment resources for the assistance of Member States exposed to particular pressures the agencies provide in fact a host of services to national authorities which can be regarded as having a solidarity dimension as these give Member States access to shared expertise and intelligence which many, especially the smaller ones, might normally not be able to access or to afford. This is, true, in particular, for the country of origin information and training provided by EASO, the external border risk analyses, research and training provided by Frontex, and the strategic and operational analysis work, the support for operational coordination and the sharing of criminal intelligence via its “Secure Information Exchange Network Application” (SIENA) and the “Europol Information
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System” (EIS) as well as the specialised and forensic expertise which Europol provides to Member States’ police forces in the fight against cross border crime. The EU’s judicial cooperation unit Eurojust can also be regarded as an operational solidarity instrument because of the coordination and expertise support it provides to cross-border prosecution cases as well as the organisational and financial support it lends to Member States’ cross-border “Joint Investigation Teams”. In a more technical sense this also applies even to European Agency for the operational management of large-scale IT systems in the AFSJ (EU-LISA) which is in charge of managing the second generation border control and internal security relevant Schengen Information System (SIS II), the EU’s Visa Information System (VIS) and the EURODAC system for the electronic comparison of fingerprints of asylum seekers: Each of those systems allow national authorities to use on a significant scale migration and/or internal security management related data made available by other Member States. It should be added that the assistance provided by AFSJ agencies has obviously also a financial dimension, and —although the precise amount to come under the heading of ‘solidarity’ as such is difficult to calculate—a large part of, for instance, the €89 million annual budget of Frontex (2014) and the €84 million annual budget of Europol (2014) could technically be added to the financial solidarity within the AFSJ.

7. Conclusions

With major asymmetric pressures on Member States in key policy fields the AFSJ can serve as good indicator for the progress and the persisting limitations of solidarity between Member States within the EU:

On the one hand one can clearly conclude on a significant growth of solidarity instruments and mechanisms in the fields of asylum, migration
and external border management. The financial and operational solidarity mechanisms also serve at least to some extent the purpose of providing assistance to the Member States which are subject most to asymmetric pressures, and the overall increase in volume of the financial solidarity instruments under the 2014–2020 MFF at a time of austerity indicates a higher political priority for solidarity in the justice and home affairs domain. It is worth underling also that operational solidarity through the making available of national capabilities (in the context of joint operations) and the sharing of joint capabilities (through the AFSJ agencies) have not only become a very substantial dimension of solidarity within the AFSJ but arguably also its most sophisticated and—compared to traditional financial assistance instruments—most original form.

On the other hand, however, the limitations of solidarity within the AFSJ remain significant: Although the legal framework has been strengthened by the Lisbon Treaty reforms of 2009—including for solidarity through financial instruments—there is still no formal duty to assist or right to be assisted, and the content of the principle remains largely undefined. The overall financial volume remains rather modest in comparison with the extent of the asymmetric challenges some Member States are facing, and it allows primarily only for ‘reactive’ short-term emergency and pilot scheme support—which makes it difficult to address more fundamental asymmetric challenges and structural capacity deficits of Member States. A further problem is the comparatively weaker development of solidarity instruments in the fields of police and judicial cooperation in criminal matters relative, although major risk and capability imbalances also exist in the internal security field.

Overall solidarity in the EU justice and home affairs domain can today clearly be regarded as a reality, which it was not yet in any substantive sense a decade ago, but also as a still fragile and incomplete one. Its progress seems to depend more on pressures reaching the
stage where they can put the sustainability of the AFSJ and hence the interests of most or all Member States at risk—as this was the case during the 2011 “Schengen” crisis—rather than a permanent strong commitment to help Member States affected by serious pressures and capability deficits. For solidarity in the EU more generally this means that in a policy domain where there are clearly identifiable solidarity needs an essentially functional rationale prevails: Solidarity instruments are primarily considered useful and necessary only to avert systemic risks, and they are consequently mostly designed to address situations in which such risks can become acute. This does not only privilege short-term ‘reactive’ responses over more long-term ‘proactive’ policies but also shows that solidarity in the EU is still more of an instrument to address certain functional challenges rather than a community value and constitutional principle.

2) Art. 3(3) TEU.
3) Because of the Schengen “opt-outs” of Ireland the United Kingdom this common “area” is subject to a considerable degree of differentiation. As the implications of this differentiation—which varies from AFSJ field to field and from instrument to instrument—would require a chapter of its own it will not be elaborated on in this contribution.
5) Swedish Immigration Minister Tobias Billström, for instance, accused in March 2014 most other Member States to “just sitting on the ring side” and declared the current system as “unsustainable” (Reuters: Sweden demands EU shares out asylum seekers burden, 25 March 2014.
7) Ibid., 33.
9) For a fairly recent survey of those relating to organised crime see Europol: EU Se-
10) Own calculations based on statistics in Europol: TE-SAT 2014. European Union Terror-
11) OJ L 212 of 7 August 2001. We will come back to this instrument in section 6 below.
12) See on these developments Jörg Monar: Justice and Home Affairs, in: Journal of
13) Given the explicit reference to “policies of the European Union” and their implemen-
    tation at the beginning of Art. 80 TFEU and taking into account that the EU budget
    is a primary instrument of this implementation we regard “financial implications” as
    referring primarily to the EU budgetary framework rather than to any horizontal
    transfers between Member States as asserted in Matthias Rossi, in: Christian Callies/
    Matthias Ruffert (eds.): EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit
17) Figures taken from Council of the European Union: Council adopts the multiannual
    financial framework 2014-2020, Council document 15259/1/13 of 2 December 2013
    (based on Council Regulation (EU, EURATOM) 1311/2013 of 2 December 2013, OJ L
18) Based on Council documents 17794/13 of 16 December 2013 (financing programmes
    in the area of justice and fundamental rights 2014-2020) and 8916/14 of 14 April 2014
    (financing programmes in the area of home affairs).
20) As—rather curiously—no figures are available on the length of EU external border
    on the website of the EU’s external border agency the author had to take this figure
21) Ministry of Interior of the Republic of Slovenia: Formal Handover of Schengen Hel-
    icopter, 19 October 2007 (http://www.policija.si/eng/index.php/component/content/
    article/13-news/332-sporo33). Unfortunately no newer figure could be found.
22) European Parliamentary Research Service: EU Funds for asylum, migration and bor-
23) The European Commission had indeed proposed an even higher increase of the
    AMIF and ISF funding when it made its initial proposals for the MF 0 on 29 June
    2011, making full use of the solidarity argument. See European Commission: A Budget
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26) All figures from European Asylum Support Office (EASO): Annual Report Situation
    of Asylum in the European Union 2013, Malta (EASO) 2104, 73-74 and 111.
    temporary protection in the event of a mass influx of displaced persons and on measures
    promoting a balance of efforts between Member States in receiving such persons and
    Union 2013, Malta (EASO) 2104, 57.
    of Operational Cooperation at the External Borders of the Member States of the European
32) Ibid., 51–53.
    ations/archive-of-operations/8HPfg).
    ations/archive-of-operations/94RdDv).
36) See the critical evaluation of Frontex joint operations in the Greek-Turkish border
    regions in FDIH/Migreup/EMHRN: Frontex between Greece and Turkey: At the
    border of denial, 2014 (http://www.frontexit.org/en/docs/49-frontexbetween-greece-and-
    turkey-the-border-of-denial/file).
41) See, as an example, EU-LISA: Annual report on the 2013 activities of the Central
    Unit of Eurodac pursuant to Article 24(1) of Regulation (EC) No 2725/2000, Tallinn
    (EU-LISA) 2014.
43) Europol: Final Budget and Staff Establishment Plan 2014. The Hague (Europol) 2013
    (https://www.europol.europa.eu/sites/default/files/publications/uvropol_budget_and_staff_ 
    establishment_plan_2014_0.pdf).

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