THE PRINCIPLE OF "MUTUAL TRUST" IN OPINION 2/13

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In its Opinion 2/13 of 18 December 2014, the Full Court of Justice of the European Union, quite surprisingly, rejected the draft accession agreement of the EU to the European Convention by stating that:

> "The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU[27] or with Protocol (N° 8)[28] relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

1. The Principle of "Mutual Trust"

The opinion states that one of the essential characteristics of the legal structure of the EU is "the principle of mutual trust between the Member States [that the] set of common values on which the EU is founded" will be recognised (points 167-168). According to the Court of

[27] "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties".

[28] "Article 1: The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty of the European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to : (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.
Article 2: The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.
Article 3: Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union".
Article 344 TFEU reads as follows: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided therein".

Justice, referring to its judgments *N.S.* and *M. E. and Others*[29] and *Melloni*,[30] that principle which allows "an area without internal borders to be created and maintained", requires, "particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Members States to be complying with EU Law and particularly with the fundamental rights recognised by EU law" (point 191).

As stated by the Court of Justice "save in exceptional circumstances, [the Member States] may not check whether [an] other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. [point 192] […] In so far the ECHR would […] require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law" (point 194).

Apparently, the Grand Chamber judgments of the European Court of Human Rights in the cases *M.S.S.* v. Belgium and Greece (21 January 2011)[31] and *Tarakhel* v. Switzerland (4 November 2014)[32] have prompted the Court of Justice to insist on the importance of the principle of mutual trust for the EU legal order:

- According to Steve Peers,[33] it can be inferred from the reiteration by the Court of Justice of the principle of mutual trust that it was seething about the *Tarakhel* judgment.
- Jean-Paul Jacqué,[34] who believes that the above mentioned considerations of the Court of Justice have maybe been inspired by the *Tarakhel* judgment, notes that, if

[29] See *infra*, *sub* 2, b.

[30] CJEU judgment of 26 February 2013 in the case C-399/11; see also LENAERTS, Koen, "Human Rights Protection through Judicial Dialogue between National Constitutional Courts and the European Court of Justice", *Liberae Cogitationes, op. cit.,* pp. 367-377.

[31] See BOSSUYT, Marc, "Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum Law", *European Human Rights Law Review,* 2011, pp. 582-597, and also "The Court of Strasbourg acting as an Asylum Court", *European Constitutional Law Review*, 2012, pp. 203-245, at pp. 216-218, 228-229 and 232-233.

[32] See BOSSUYT, Marc, "*Tarakhel c. Suisse* [4 November 2014]: La Cour de Strasbourg rend encore plus difficile une politique commune européenne d'asile", *Revue suisse de droit international et de droit européen,* 2015, pp. 3-6.

[33] "The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection", (http://eulawanalysis.blogspot.nl/2014/12/the-cjeu-and-eus-accession-to-echr.html), 18 December 2014.

[34] "Note à l'adhésion à la Convention européenne des droits de l'homme", www.droit-union-européenne.be, 23 December 2014.

each State must verify whether its own more protective rules are applicable in the State of entrance of an asylum seeker, the Dublin system would be paralysed.

- According to Walter Michl,[35] the Court's stand appears to be a reaction to the *M.S.S.* judgment.
- Also referring to the Dublin cases *M.S.S.* and *Tarakhel*, John Morijn[36] wonders whether the Strasbourg Court was aware that the Luxembourg Court had such a strong opinion on the sole relevance of the Union law in these cases.
- Fabrice Picod[37] notes that the appreciations by the Strasbourg Court in its *Tarakhel* judgment testify of the high requirements imposed by the Court, letting foresee excessive constraints on the European States which would put in danger the principle of mutual trust characterising the relations among the Member States and which would undermine systems elaborated within the EU.
- Daniel Halberstam[38] notes that the judgments *M.S.S.* and *Tarakhel* set up a clash between Strasbourg and Luxembourg on questions of mutual trust in asylum law.
- Henri Labayle and Frédéric Sudre[39] see in the mutual trust an episode of deaf rivalry opposing the two Courts on the Dublin Regulation and expect upcoming conflicts on that issue.
- According to Sarah Lambrecht[40] finally, the objection relating to the mutual trust is perhaps "a backlash against the *M.S.S.* and *Tarakhel* judgments", particularly since, following the *Tarakhel* judgment, the presumption of compliance with fundamental rights "should also be able to be rebutted if minimum accommodation conditions for families with children are not fulfilled in the transferral state".

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[35] "Thou shalt have no other courts before me", http://www.verfassungsblog.de/en/thou-shalt-no-courts/#.VSeMQ5OUcd9, 23 December 2014.

[36] "After Opinion 2/13: how to move on in Strasbourg and Brussels?", http://eutopialaw.com/2015/01/05/after-opinion-213-how-to-move-on-in-strasbourg-and-brussels/, 5 January 2015.

[37] "La Cour de justice dit non à l'adhésion de l'Union européenne à la Convention EDH. – Le mieux est l'ennemi du bien, selon les sages du plateau de Kirchberg", *La Semaine juridique*, 9 February 2015, pp. 145 et ss.

[38] "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", University of Michigan Public Law Research Paper No 439. http://ssrn.com/abstract=2567591 or http://dx.doi.org/10.2139/ssrn.2567591, 20 February 2015, and "A Constitutional Defense of CJEU Opinion 2/13 on EU Accession to the ECHR (and the way forward)", http://free-group.eu/2015/03/13/a-constitutional-defense-of-cjeu-opinion-213-on-eu-accession-to-the-echr-and-the-way-forward/, 13 March 2015.

[39] "L'avis 2/13 de la Cour de justice sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: pavane pour une adhésion défunte", *Revue française de droit administratif*, 2015, n°s 32-37.

[40] "The sting is in the tail: CJEU Opinion 2/13 objects to draft agreement on accession of the EU to the European Convention on Human Rights", *European Human Rights Law Review*, 2015, pp. 185-198, at p. 187.

2. The European case-law concerning the EU asylum policy

The Dublin Regulation is a central piece of the Common European Asylum System[41] and the oldest European instrument on asylum. The present Dublin III Regulation[42] of 26 June 2013 replaces (from 1 January 2014 on) the Dublin II Regulation[43] of 18 February 2003 which itself had replaced the Dublin [I] Convention of 15 June 1990.[44] This instrument, that is based on the assumption that the EU-Member States respect the principle of *non-refoulement* and on the mutual trust given by those Member States to each other in matters of asylum, cannot function without their loyal cooperation based on reciprocity. It provides for a simplified procedure for determining the Member State responsible for the examination of an asylum application as to its merits. That procedure is not supposed to examine the human rights situation in the responsible State.

If for the determination of the responsible State a full-fledged jurisdictional remedy should be provided for, such a procedure would not make much sense. In that case, it would be more efficient to examine immediately the asylum application on its merits, because it is hardly more time consuming to examine the fear invoked by an asylum seeker vis-à-vis Afghanistan than vis-à-vis Greece. Requiring otherwise would reduce the Dublin Regulation, which aims at the simplification and not at the complication of the asylum procedure, to a meaningless tool. The Dublin Regulation is also closely linked to the Schengen system: if one participating State does not assume the consequences of the deficiencies in its surveillance of the common external borders, it is the whole system which becomes deficient. It is as like in a building with several external gates: when one of those gates stands open, it is the whole building that stands open.

a) ECHR, GC, *M.S.S.* v. Belgium and Greece, 21 January 2011

[41] Defined in the Tampere Programme of 16 October 1999 and The Hague Programme of 4 November 2004, see SIDORENKO, Olga, *The Common European Asylum System*, The Hague, Asser Press, 2007, 254 p.
[42] The [Dublin III] Regulation No 604/2013 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".
[43] Council [Dublin II] Regulation (EC) No 343/2003 "establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national"
[44] The [Dublin I] Convention "determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities".

The Grand Chamber judgment *M.S.S.* v. Belgium and Greece of 21 January 2011[45] is the first[46] concerning asylum seekers in which the Court found a State party (Belgium) indirectly responsible for returning an asylum seeker to another State party (Greece). The Court considered unacceptable the conditions of detention and the living conditions of that asylum seeker after his return to Greece. The Court found direct violations of Article 3 of the European Convention, and of Article 13, in conjunction with Article 3, of the Convention, by Greece. The Court also found indirect violations of Article 3 and a (direct) violation of article 13, in conjunction with Article 3, of the Convention, by Belgium for having applied the Dublin Regulation with respect to Greece. The Court condemned Greece, directly responsible for the violation of Article 3, to pay 1.000 euros to the applicant, while Belgium, which was indirectly responsible, had to pay 24.900 euros. In transforming the sovereignty clause and the humanitarian clause which allow a Member State to deal with an asylum application instead of another Member State, if he wishes to do so, into an obligation when the does not wish to do so, the Court has given to those clauses a meaning radically different from the one intended by its drafters. Other developments in this judgment raising concern are a) the continuously lowering of the threshold of Article 3,[47] b) the expansion with asylum seekers of the list of "particularly vulnerable groups",[48] and c) the extension of the applicability of Article 3 to the living conditions of asylum seekers.[49]

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[45] See BOSSUYT, "Belgium Condemned …", *op. cit.*, pp. 588-589 and 597.

[46] With the exception of an extradition case to Russia: *Shamayev and Others* v. Georgia and Russia (12 April 2005). In addition to the judgments mentioned in this contribution (besides *M.S.S.,* also *Sharifi and Others* and *Tarakhel,* see *infra, sub* 2, d-e*),* other judgments having found an indirect violation concerning an expulsion or extradition to a State party to the Convention (namely to Russia) are *I.K.* v. Austria (28 March 2013), *I.* v. Sweden (5 September 2013), *M.G.* v. Bulgaria (23 March 2014) and *M.V. and M.T.* v. France (4 September 2014).

[47] Not every ill-treatment amounts to torture, or even to inhuman or degrading treatment; a particular level of severity (the threshold) has to be attained. In the first judgments, finding that the conditions of retention of an asylum seeker violated Article 3, the conditions considered "unacceptable" lasted for several months (starting with 17 months in *Dougoz* v. Greece, 6 March 2001). However, in *M.S.S.* such conditions lasted only four days. This seems to be hardly compatible with the absolute character of the prohibition of torture which allows no exception, no restriction and no derogation "not even in time of war or other public emergency threatening the life of the nation".

[48] Contrary to the previous vulnerable groups identified by the Court, such as "mentally disabled" in *Oršuš and Others* v. Croatia (16 March 2010) and "Roma" in *Alajos Kiss* v. Hungary (20 May 2010), asylum seekers constitute a self-elected category, since every foreigner who decides to apply for asylum is an asylum seeker, regardless his personal condition or his motives for applying. In doing so, the Court is shifting from protecting civil rights of the universal human being towards protecting social rights of specific categories of persons having particular needs. According to the Court, persons belonging to one of those categories are entitled to an active intervention of the State beyond the level required for other persons with respect to civil rights and fundamental freedoms.

[49] As an obligation not to do something, the absolute prohibition of torture has to be and *can* be respected regardless the available resources. The Court, however, has transformed that civil right by excellence into an obligation to provide social benefits to asylum seekers which requires considerable expenditures. Less than six months after the *M.S.S.* judgment, a Chamber of the Court applied, in its judgment *Sufi and Elmi* v. the United Kingdom of 28 June 2011 (see BOSSUYT, Marc, "Strasbourg et les demandeurs d'asile (*M.S.S. c.* Belgique et

b) CJEU, GC, *N.S.* and *M. E. and Others,* 21 December 2011

In its Grand Chamber judgment of 21 December 2011 in the case *N.S.* v. Secretary of State for the Home Department, reference for a preliminary ruling by the Court of Appeal (England & Wales) (Civil Division) - United Kingdom (C-411/10), and in the case *M. E. and Others* v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, reference for a preliminary ruling by the High Court of Ireland – Ireland (C-493/10), the Court of Justice of the European Union recalled that the European Union is based on mutual trust and on a presumption of compliance, by other Member States, with EU law and particularly with the fundamental rights recognised by EU law. As far as the transfer from the United Kingdom and Ireland to Greece was concerned, the Court of Justice stated that:

> "Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' […] where they cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision" (emphasis added) (point 94).[50]

In doing so, the Court of Justice brings about the end of automaticity for the system of negative mutual recognition established by the Dublin Regulation. However, it is only in exceptional circumstances that the presumption is rebuttable: as stressed by Koen Lenaerts,[51] Vice-President of the Court of Justice, the notion of "systemic deficiencies" is to be

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Grèce, et *Sufi et Elmi* c. le Royaume-Uni)", VI *Ann. int. dr. h. 2011,* Athens, 2012, pp. 663-676, at pp. 668-676), the extension of the applicability of Article 3 to the living conditions in the country of origin of the applicants, two Somali sentenced several times in Britain on account of a variety of criminal offences, if they would run the risk of ending up in the "dire conditions" of a settlement in Somalia or in a refugee camp in Kenya.

[50] The new Dublin III Regulation of 26 June 2013 also provides in its Article 3.2, al. 2, that: "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are *systemic flaws* in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible" (emphasis added).

[51] "The Principle of Mutual Recognition in the Area of Freedom, Security and Justice", the Fourth Annual Sir Jeremy Lever Lecture at All Souls College, University of Oxford, 30 January 2015 (https://intranet.law.ox.ac.uk/ckfinder/userfiles/files/The%20Principle%20of%20Mutual%20Recognition%20in%20the%20Area%20of%20Freedom%2C%20Judge%20Lenaerts.pdf, p. 24).

distinguished from a mere "infringement of a fundamental right by the Member State responsible" (*N.S.* and *M.E. and Others, op. cit.,* point 82).

The question may be asked whether it is coherent that the Court of Justice has decided that the Dublin Regulation may not be applied with respect to a Member State such as Greece (and others to follow) without any consequence as to the free movement from the territory of such a Member State to other territories belonging to the Schengen area. It is obvious that persons residing legally in that area are allowed to move freely within that area. But why should all control at the borders be prohibited, extending the principle of freedom of movement to persons not residing legally in the Schengen area? The so-called "Schengen acquis" prohibits the Schengen States to control the internal borders of the Schengen area. But, as far as asylum seekers are concerned, the Dublin Regulation is the counterpart of the "Schengen acquis". If the Dublin Regulation cannot be applied with respect to some Schengen States, the mutual trust is lacking without which an area without internal borders cannot be maintained and, ultimately, the whole system is put in danger. This is particularly the case since the maritime external borders of all Member States of the Council of Europe are wide open for anyone applying for asylum as a consequence of the Grand Chamber judgment of 23 February 2012 of the Strasbourg Court in the case *Hirsi Jamaa and Others* v. Italy.[52]

c) CJEU, GC, *Shamso Abdullahi,* 11 December 2013

In its Grand Chamber judgment of 11 December 2013 in the case *Shamso Abdullahi* v. Bundesasylamt, request for a preliminary ruling under Article 267 TFEU from the Asylgerichtshof (Austria) (C-394/12), the Court of Justice of the European Union ruled that Article 19(2) of the Dublin Regulation II be interpreted as meaning that,

> "in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Article 10(1) of that regulation – namely, as the Member State of the first entry of the applicant for asylum into the European Union – the only way in which the applicant for asylum can call into

[52] In that judgment, the Court found a violation of Article 3 of the Convention by Italy and it awarded 15.000 euros in respect of non-pecuniary damage to 11 Eritreans and 13 Somalis each, who had tried to reach Lampedusa by boat, but were sent back to Libya by the Italian navy. It certainly will not discourage migrants to undertake such a perilous journey at the risk of their lives and it raises a number of intriguing questions relevant to the mission of Frontex (the EU agency managing European border control).

question the choice of that criterion is by pleading *systemic deficiencies* in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union" (emphasis added).

d) ECHR, *Sharifi and Others* v. Greece and Italy of 21 October 2014

In a Chamber judgment of 21 October 2014 in the case *Sharifi and Others* v. Greece and Italy, the Strasbourg Court found violations by Greece of Article 13, combined with Article 3, due to deficiencies in the asylum procedure in Greece, and by Italy of Article 3, Article 4 of Protocol N°. 4 and Article 13, combined with the previous mentioned Articles, for having exposed four Afghan asylum seekers to those deficiencies by sending them back by ferry boat to Greece without having analysed the individual situation of each of them. That during the proceedings before the Court several of the 35 applicants resided in Austria, France, Germany, Italy, Norway, Sweden and Switzerland shows how efficiently the Dublin Regulation has been undermined.[53]

e) ECHR, GC, *Tarakhel* v. Switzerland of 4 November 2014

In its judgment of 4 November 2014 in the case *Tarakhel* v. Switzerland, the Grand Chamber of the Strasbourg Court hold, by 14 votes to 3,[54] that there would be a violation of Article 3 of the Convention if an Afghan couple and their six children were

[53] See also DE BAERE, Geert, "The Court of Luxembourg acting as an Asylum Court", in André ALEN, Veronique JOOSTEN, Riet LEYSEN & Willem VERRIJDT, *Liberae Cogitationes: Liber amicorum Marc BOSSUYT*, Antwerp, Intersentia, 2013, pp. 107-124, at p. 117: "By adopting and endorsing the ECtHR's analysis, the ECJ profoundly unsettled the principle of mutual confidence that underlies the CEAS and, by extension, the entire edifice of European integration". The Dublin Regulation has even been further undermined by the Court's finding, by 4 votes against 3, of a violation of Article 13 combined with Article 3 of the Convention in its judgment *V.M. and Others* v. Belgium (7 July 2015). In that case, France was the first asylum country of a family of Serbs of Rom origin. As stated by Judge Jon Fridrik Kjølbro (Denmark) in his dissenting opinion in that case: "the Court's finding may have significant and negative consequences for the proper functioning of the cooperation between EU Member States regarding the processing of requests for asylum" (§ 23). As a former Vice-President of the Refugee Board in Denmark, Judge Kjølbro is particularly familiar with refugee issues.

[54] In their joint dissenting opinion, Judges Josep Casadevall (Andorra), Isabelle Berro-Lefèvre (Monaco) and Helena Jäderblom (Sweden) observed that "there is nothing to demonstrate that the applicant's future prospects if they were returned to Italy, whether taken from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3".

> "returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together".

The Court had observed that

> "although the situation [in Italy] is not comparable to the situation in Greece […], the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded" (§ 120).

When the conditions in a State party to the European Convention violate Article 3 of that Convention, the complaint should be examined with respect to that State Party (such as Greece and Italy) and not with respect to another State party (such as Belgium[55] and Switzerland[56]).[57]

Mutual trust does not imply that it should be ruled out that an EU-Member State would ever violate its obligations under the Convention but - at least among EU Member States - it is the State directly responsible for such a violation which should be held responsible for it and not (indirectly) another EU-Member State. Moreover, when the limited number of States in the world that respect their international obligations in the field of human rights and refugee protection, must welcome everyone preferring to live in those countries rather than in his own country of origin or in the country of his entrance into the EU, also those law abiding States will in the end not anymore be able to respect their obligations.

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[55] When M.S.S. was transferred to Greece in 2009, Belgium (with 20,15%) ranked 5th and Greece (with 14,15%) 8th in percentage of registered asylum seekers per million of habitants (*Migration magazine*, Summer 2010, 12-13).

[56] When the Tarakhel family had to be returned to Italy, Switzerland (with 19.440 applicants) ranked 4th and Austria (with 17.500) 6th on the list of asylum seekers registered in 2013 (in function of the number of inhabitants) while Italy (with 27.830) ranked 21th (UNHCR, Asylum Trends 2013, p. 22, http://ww.unhcr.org/5329b15a9.htlm).

[57] As stated by Judge Helen Keller (Switzerland) in her dissenting opinion in the case *V.M. and Others* (see supra note 53), the majority of the Court in that judgment seems to ignore that France is a State party to the Convention and that Belgium could presume that France respects its obligations under the Convention (§ 17). In his dissenting opinion in the same case, Judge András Sajó (Hungary) mentions that also Serbia is a Member State of the Council of Europe.

The question may be raised whether it will still be possible to save the Dublin Regulation. It is probably too late that the EU-Institutions and the EU-Member States became aware that the above mentioned judgments are not only threatening the Dublin Regulation but also the whole Common European Asylum System and even the Schengen acquis. The European Union should have reacted to the non-respect by some Member States of the EU-regulations and directives in matters of asylum before those judgments were rendered or at the latest immediately after the *M.S.S.* judgment. In the meanwhile, the crisis in the Mediterranean makes it even more urgent but also more complex. A new development is the proposal to proceed to a repartition of migrants asking for asylum in an equitable proportion over the different Member States, taking into account the number of asylum applications already submitted in those countries. This would derogate from the principles established by the Dublin Regulation and risks affecting the sense of responsibility of the Member States in controlling the external borders of the Union. One may wonder whether it would not be more appropriate to spread over the different Member States only those entitled to international protection. Would it not be very cumbersome to spread asylum seekers over the different Member States before it has been determined whether they are entitled to such a protection enabling them to stay in the country they would be sent to?

The freedom of movement within the European Union also will need a re-evaluation. The British and Swiss requests to review some elements of the application of that principle should also be seen in the light of the fight against abuses of the free movement of services and workers,[58] particularly in the field of construction and transport.[59] It is indeed appropriate to qualify as an "abuse" practices "which ostensibly come under the scope of legally permissible conduct but which, in fact, pursue improper purposes in general".[60] National measures taken to combat those abuses are too easily labelled as contrary to the free

[58] See also ROCCA, Marco, *Posting of Workers and Collective Labour Law: There and back again between Internal Market and Fundamental Rights*, Antwerp, Intersentia, 2015, 388 p.
[59] See also BOSSUYT, Marc, "Law and Politics", in Jan DE BRUYNE, Isabelle VAN HIEL & Michaël DE POTTER DE TEN BROECK (Eds.), *Policy within and through law (Report of the third ACCA Conference)*, Antwerp, Maklu, 2015, pp. 35-44, at pp. 38-41.
[60] See TRIDIMAS, Takis, "Abuse of Rights in EU Law: Some Reflections with Particular Reference to Financial Law", in Rita DE LA FERIA & Stefan VOGENAUER (Eds.), *Prohibition of Abuse of law: A New General Principle of EU Law,* Oxford, Hart Publ., 2011, pp. 169-191, at p. 189.

movement, while European measures are lacking or appear to be inefficient.[61] In the absence of rapid improvement in this matter and of an appropriate solution of the present asylum crisis in the Mediterranean, one may wonder how much longer the firm declarations of EU-leaders on the sacrosanct character of the principle of the freedom of movement will be shared by the citizens they are supposed to represent.

[61] Very recently, the ministers of Employment of Belgium, Denmark, France, Luxembourg, the Netherlands and Sweden have called upon the EU Commissioner for Employment, Social Affairs, Skills and Labour Management to adapt the directive concerning the posting of workers (*De Standaard*, 19 June 2015).