

# The External Dimension of EU Migration Policy

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## Abstract

The policies relating to the management of migration - control of external borders, asylum and immigration have been, as is well known, sovereign prerogatives for excellence. The long-standing refuse of the EU Member States to provide them to a supranational government is a clear evidence of that. Determined to retain the exclusive control over the migrants, States have continued, to handle the situation.

This paper aims to reconstruct the foundations of the external dimension of EU migration policy, in order to highlight its complexity, resulting from the global scope of the problem and by its sensitive nature. If the global reach of migration invites the adoption of a coherent strategy that, gives substantial and structural interdependence between internal and external dimensions, allows to strengthen the Union's credibility on the international stage, the sensitive nature of migration policy confirms 'the opportunity to implement flexible solutions suitable to shape the criterion of added value.

Defining the conditions of consistency and flexibility to which the Union's external action can bring the management of migration - a management which will pursue all objectives of the EU's migration policy in accordance with the its principles, such as solidarity and the protection of fundamental rights - is the focus of this paper.

**Keywords:** external dimension; migration; solidarity; migration policy; human rights

## Introduction

The external dimension of the EU migration policy is based on values, is guided by principles and pursues goals<sup>1</sup>. However, it is given that, unlike other areas of EU action, the treaties do not provide for a specific discipline, values, principles and objectives of this dimension coincide with those characterizing the national policy, as well as with the general interests of the external action of the 'Union<sup>2</sup>. With regard to the discipline of the inner dimension, the TFEU states that the Union's action in that field is based

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<sup>1</sup> Cremona M., (2011), *Values in EU Foreign Policy*, in EVANS M., KOUTRAKOS P., *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World*, Oxford-Portland, p. 281

<sup>2</sup> Cremona M., Monar J., Poli S., *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Bruxelles, 2011, p. 79;

on the value of respect for fundamental rights (in particular the non-refoulement) and the value/principle of solidarity between Member States<sup>3</sup>.

As for the goals, however, after defining the Union's competence in terms of "common policy", the treaty identifies them on time in the three articles devoted to policies that make the migration issues<sup>4</sup>: the absence of any controls on persons at the time of ' crossing internal borders, checks on persons and monitoring and the gradual establishment of an integrated management of external borders (border control policy); recognition of an appropriate status to any third country that requires asylum, subsidiary or temporary protection (asylum); efficient management of migration flows, fair treatment of third country nationals legally residing and prevention and fight against illegal immigration and trafficking in human beings (immigration policy).

### **Analyses of the external dimension of EU migration policy**

As noted in the doctrine, "*are lined the essential components of the Union's action, which should contribute to defining a balanced approach to the matter,*"<sup>5</sup> and that the Global Approach to Migration and Mobility thus outlined, (also known as GAMM, English Global approach to Migration and Mobility), collects in four pillars, re-organized in order to launch a comprehensive strategy for the EU's external migration policy<sup>6</sup>.

With regard to the external discipline of the EU Treaty explicitly provides that the external dimension of migration policy, on one hand, must respect the principles that tally with their creation, development and enlargement of the Union, which inter alia

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<sup>3</sup> Art. 67, par. 1 and 2, TFEU: "*The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and different legal traditions of Member States. It ensures that there are no checks on persons at internal borders and a common policy on asylum, immigration and external border control, based on solidarity between Member States and fairness towards the citizens of third countries (...)*"; art. 78, par. 1, TFEU: "*[I] 'Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement (...)*"; art. 80 TFEU: "*[t]he Union policies referred to in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility between Member States (...)*".

<sup>4</sup> Artt. 77, par. 1, TFUE (for the border control policy), 78, par. 1, TFUE (for asylum policy), e 79, par. 1, TFUE (for migration policy).

<sup>5</sup> Gestri M., *La politica europea dell'immigrazione: solidarietà tra Stati membri e misure nazionali di regolarizzazione*, in Ligustro A., Sacerdoti G., *Problemi e tendenze del diritto internazionale dell'economia*, in *Liber Amicorum* in onore di Paolo Picone, Napoli, 2011, pp. 895-925.

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility, 18 November 2011, COM (2011) 743 final., Pp. 7-8: "*the comprehensive approach should be based on four pillars of equal importance: (1) organizing and facilitating legal migration and mobility; (2) preventing and reducing irregular migration and trafficking in human beings; (3) promoting international protection and enhancing the external dimension of asylum policy; (4) increase in the incidence of migration and mobility on development*".

respect for human rights and solidarity<sup>7</sup>, and on the other, must advance its objectives, covered in a long and varied list, which sets out again the protection of the EU's values and the strengthening and support of the human rights<sup>8</sup>. Moreover, such a versatility of the concepts (at the same time values/principles<sup>9</sup> and objectives) TEU in terms of principles. To be noted also that before the entry into force of the Lisbon Treaty, the text of the Treaties was no less ambiguous, since it introduced a distinction not easy its external action, is reiterated in the EU Treaty on the general objectives, under which in international relations the Union must affirm both is to promote its values, thus contributing to their global spread<sup>10</sup>.

In light of this regulatory framework, in which obviously lacks a clear definition of the concepts, the precise identification of the values, principles and objectives of the external dimension of EU migration policy results difficulty. On one hand, the concepts that are internally classified as values externally are elevated to the guiding principles of Union action. On the other hand, the promotion and protection of one or the other (values and principles) are among the cross-cutting objectives of EU external action, the implementation of which is a preliminary to the pursuit of a set of additional multi-sectorial objectives.<sup>11</sup> Now, unless reading in this formulation of the Treaties the constituents desire to link the exercise to the internal action of the mere ethical convictions category (values) and, vice versa, to govern the external action from the legal requirements that marks the foundations and limitations (principles), such a difficulty should not be exaggerated<sup>12</sup>. Moreover, when switching from the internal dimension to the EU's external dimension, the need to translate the core values in law

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<sup>7</sup> Article 21, par. 1, paragraph 1, TEU provides: "*actions on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the principles of the UN Charter and international law*". Remember, also, that Article. 2 TEU provides that: "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women".

<sup>8</sup> Note that in this article the aforementioned versatility will be emphasized through the use of the term compound "values / principles".

<sup>9</sup> Art. 3, par. 5, TEU: "*in relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It contributes to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights, in particular rights of the child, and strict observance and the development of international law, including respect for the principles of the Charter of the United Nations*".

<sup>10</sup> To be remembered that the values and characteristics of civil society, set out in Article. 2 TEU, are defined.

<sup>11</sup> De Burca G., *The Road Not Taken: The EU as a Global Human Rights Actor*, cit.: "*the major emphasis of the EU's constitutional regime of human rights protection (...) is externally focused, setting up a distinct difference between external and internal policies*".

<sup>12</sup> Von Bogdandy A., *The fundamental principles of the European Union*, cit., P. 132, according to which the rules inscribed between the values (or principles) founding under Art. 6 TEU, and the common values referred to in Paragraph. 11 TUE. Art. 2 TEU, although it is defined as values, must be understood as fundamental principles, as they are subject to the procedure laid down in art. 48 TEU and having the legal effects of Articles. 7:49 TEU. For the view that is necessary to preserve the distinction between values / founding principles and general principles of EU law, as if the former can be used as a tool of interpretation, the seconds count as functional legal rules to the validity check, you see, inter alia, BERRAMDANE A. and J. ROUGE, *Droit de l'Union européenne: institutions et ordre juridique*, Paris, 2010, p. 529.

and impose the spread globally, intensifies: the promotion outward of the founding values of the Union legal system it is essential to create a climate of mutual trust, suitable to promote a lasting and fruitful collaboration relations<sup>13</sup>. The EU Treaty points out that multilateral and bilateral partnerships that ensure a satisfactory level of cooperation between the EU and third countries, will be implemented because the Union has previously been able to spread its values/principles at the international level.<sup>14</sup>

In this context, the choice of the constituents to confirm and strengthen the coherence of EU action as a fundamental principle should therefore be welcomed. In compliance with art. 21, par. 1, his guiding principle, in fact, the Union will have, on one hand, a commitment to give effect to the values / principles, placing them at the base of all actions (internal and external) adopted in order to regulate the migration issue and, on the other, will have to pursue some of its external action, giving priority to the one consisting in the promotion of its values / principles and concentrating efforts on targets that may be useful to the development of a flexible and effective migration policy<sup>15</sup>.

It follows that the “borders” between internal and external dimension of EU migration policy are thin: the model that the EU intends to promote in international relations is in fact represented by the values/principles that are in its foundation, and that the institutions and Member States undertake to respect<sup>16</sup>. As well as internal growth and cohesion are essential conditions for the Union to influence the dynamics of the world economy, the existence of a solid tradition, founded on respect for values such as solidarity and protection of human rights, is essential for the EU to promote them effectively even in international relations. In other words, the Union is in the position to create the conditions to trigger a virtuous circle and is, therefore, invested with a big responsibility: to offer to the non-EU counterparts a credible model of migration management system, which can induce them to collaboration, if necessary in the agreed terms, and with conditionality clauses. If the intention is to pursue effectively, in the short as well as in the long-term, the objectives of its migration policy, this supranational organization must adopt a coherent action strategy: first, to promote

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<sup>13</sup> Cremona M., *Values in EU Foreign Policy*, cit., pp. 275-315 e Schieder S., *The Power of Solidarity in EU Esternal Relations*, in [http://euce.org/eusa/2011/papers/4c\\_schieder.pdf](http://euce.org/eusa/2011/papers/4c_schieder.pdf).

<sup>14</sup> Article. 21, par. 1, paragraph 2, TEU: “[I] 'Union shall seek to develop relations and partnerships with third countries and with international organizations, regional or global, which share the principles referred to in the first paragraph. It shall promote multilateral solutions to common problems, in particular in the United Nations. ”

<sup>15</sup> For example, it should be recalled here the objective of reducing world poverty, the pursuit of which is expressly provided for the Global Approach to migration. Note, that in accordance with Article. 208, par. 1, TFEU the Union's external action in the field of migration policy, will have to, as well as any policy that may have an impact on developing countries, taking due account of the objectives of development cooperation policy.

<sup>16</sup> Cremona M., *Values in EU Foreign Policy*, cit., p. 276: “it is unsurprising that as the Union develops a sense of its identity as being somehow defined in terms of its values, this should be reflected in its external projection of itself and in its external as well as internal policies”.

its values/principles internally and then to project the virtuous model in the external one<sup>17</sup>.

In addition, if this strategy works, very different companies would find themselves to share and to defend the same values and would be, therefore, more willing to cooperate in addressing common challenges, such as, *inter alia*, the phenomenon of international migration<sup>18</sup>. Within the words of the Commission: "*[it is] a general recognition that internal and external aspects of EU security are intrinsically linked. Societies based on common values such as good governance, democracy, the rule of law and respect for human rights will be more effective in preventing domestic threats to their safety, but will also be more able and willing to cooperate against international common threats*"<sup>19</sup>. *In the light of all the foregoing considerations, this paper aims to focus the attention on two fundamental concepts of the EU's migration policy, namely solidarity and respect for fundamental rights, in order to show how the interdependencies characterizing that policy are manifested both in the specific dynamics of these concepts and in their mutual interaction. Values and principles of the two dimensions (internal and external) of the EU's migration policy, the promotion of solidarity and the respect for fundamental rights are one the prerequisite and the complement of the other and, as a priority objective of outside the EU, their fortunes are likely to influence the development of the external dimension of EU migration policy.*

## Conclusions

If solidarity and protection of human rights are values / basic principles of internal and external dimensions of the EU migration policy, their promotion is also a priority of its external action. Intrinsically linked concepts, solidarity and protection of human rights constitute one precondition and complement of the other: if, on one hand, the solidarity actions interstate they can facilitate the promotion of the protection of migrants' rights, on the other hand, widespread deployment of a protective culture of human rights is a prerequisite for triggering the solidarity.

The circularity of this relationship is a point of contact in a third concept, the equitable sharing of responsibilities. In fact, the assumption of responsibility on the part of

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<sup>17</sup> Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A partnership for democracy and shared prosperity with the Southern Mediterranean, March 8, 2011, COM (2011) 200 final., p. 2: "the EU (...) must unreservedly support the aspiration of the peoples of neighboring countries to enjoy the same freedoms that we consider as a right."

<sup>18</sup> UE Council, *A Strategy for the External Action of JHA*, cit., p. 5.

<sup>19</sup> Commission Communication, A strategy on the external dimension of the area of freedom, security and justice, 12 October 2005, COM (2005) 491 final, p. 5. In the same terms, see also the working paper submitted by the Committee on Civil Liberties, Justice and Home Affairs (Rapporteur Bogdan Klich), on a strategy on the external dimension of the area of freedom, security and justice, June 19 2006 DT \ 615150IT.doc: "the broad framework for regulating the area of freedom, security and justice within its borders and the EU's experience and success on fronts such as border management, migration control (...) can serve as an inspiration for third countries. "

everyone involved by migration facilitates, the creation of a spirit of mutual trust, such as to encourage both the Union's commitment to solidarity and the commitment of third countries in the field of protection the rights of migrants. In other words, the sharing of responsibilities is an essential element of the EU's migration policy, which should be further promoted to ensure the adoption of solutions that are equal to the global dimension of the phenomenon. As promoters of cooperation, however, the Union and the Member States must bear the primary responsibility. Forced to the level of the Treaties to respect the principle of consistency<sup>20</sup>, those must first promote the values / principles of solidarity and respect for fundamental rights internally. The establishment and consolidation of a European culture of solidarity and respect for the rights of the migrants is essential to encourage third countries to cooperate with the EU on migration issues. As pointed out by the doctrine, "*c'est bien d'un modèle qu'il est question et de rien d'autre. Là se trouve la limite principale de l'action extérieure de l'Union telle qu'elle est entreprise aujourd'hui*"<sup>21</sup>.

In other words, if the EU and its Member States aim to achieve the goal of promoting the values/principles of the EU in external relations, they are called upon to make a crucial choice of consistency<sup>22</sup>: first, it must develop a credible and virtuous model internally and only then, they can project it externally. The price to pay in case of failure is indeed undoubtedly high: the EU's international credibility is compromised, while third countries are inclined to emulate the flawed model<sup>23</sup>. Now, if the message to be drawn from the text of the Treaties is not precise as regards its form, this cannot be said to be contradictory with regard to the substance: "*the Union policies referred to in this paper and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility between Member States*" (art. 80 TFEU); "*the Union recognizes the rights, the freedoms and the principles enshrined in the Charter of Fundamental Rights (...) which has the same legal value as the Treaties*" (Art. 6, par. 1, TEU); "*the Union shall ensure consistency between its policies and activities*" (art. 7 TFEU).

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<sup>20</sup> Art. 21, par. 3, TEU and 7 TFEU, cited. In general on the principle of coherence in EU external action, see: A. Mignolli, *the European Union's external action and the principle of consistency*, Naples, 2013; Bosse-Platière I., *L'article 3 du traité EU: recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne*, Brussels, 2014..

<sup>21</sup> Labayle H., *The European Union's external policy on justice and home affairs: a chimera or a reality*, in *The dynamics of European law at the beginning of the century: studies in honor of Jean-Claude Gautron*, Paris, 2014, p. 691.

<sup>22</sup> Duke S., *The European External Action Service: Antidote against Incoherence?*, in *EFAR*, vol. 17, 2012, pp. 45-68, s p. 49: "*the use of the emphatic 'shall' implies that 'consistency' (as per the English version of the treaty) is an obligation. The treaty therefore establishes a clear obligation regarding horizontal coherence but also extends this to the vertical aspects by [way of the statement] in Article 4(3) TEU (...)*".

<sup>23</sup> Perrin D., *The impact of European migration policies on migration-related legislative activity in Maghreb countries: an overview of recent reforms*, in Gortazar C., Parra M.-C., Segaert B., Timmerman C., *European Migration and Asylum Policies: Coherence or Contradiction. An Interdisciplinary Evaluation of the EU Program of Tampere (1999), The Hague (2004), Stockholm (2009)*, Bruxelles, 2012, pp. 255: "*EU normative power may show through Maghreb countries' new regulations governing migration, as far as repression, but also protection, is concerned. Yet, the implementation of both kinds of regulation is not equal. So far, sanctions have been more easily applied than hypothetical procedural or substantial rights that seem to have been added to laws as a matter of show*".

Today the EU is formally committed, both internally and externally, to promote its values/principles of solidarity and respect for human rights, avoiding all the contradictions. Substantial coherence that must guarantee, pledging also to facilitate the stable coordination of the actions of all parties involved in the migration phenomenon, the EU's institutions, offices and agencies, Member States, third countries of origin and transit and International, governmental and non-governmental organizations.<sup>24</sup>

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<sup>24</sup> Raport C., Partnerships between the European Union and European third countries: study of the European Union's contribution to the legal structuring of the European area, Brussels, 2014 p. 440 ss.

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