**The Principle of Solidarity in Asylum and Migration within the Context of the European Union Accession Process**

Dr Neža Kogovšek Šalamon

Assist. prof. of international law, Senior Researcher, Director of the Peace Institute, Slovenia

neza.kogovsek@mirovni-institut.si

**Abstract**: The paper addresses the question of the principle of solidarity in the fields of asylum and migration within the context of accession negotiations between the European Union and the candidate countries for EU membership. When candidate countries fulfil the membership conditions, it is expected that they will share the values of solidarity, mutual assistance, and burden sharing in the fields of asylum and migration to the detriment of state sovereignty. The paper is based on the hypothesis that solidarity in the field of asylum and migration has not been discussed within the enlargement process, meaning that the new Member States were not aware of the concrete forms this principle could have taken in the future. This hypothesis was tested on three case studies by analysing the accession documents of one candidate country from each of the three enlargement processes (Slovenia, Bulgaria and Croatia). The paper concludes by showing that with agreeing to the EU treaties, its solidarity clause and the majority vote rules, either as Member States or candidates, the states undertook the duty to transpose obligations in the fields of asylum and migration even if they did not agree with them.

**Keywords**: asylum, solidarity, burden-sharing, EU accession, justiciability

Please cite the published version of the article as:

Kogovšek Šalamon, Neža: The principle of solidarity in asylum and migration within

the context of the European Union accession process, *Maastricht Journal of European and*

*Comparative Law*, First Published December 13, 2017.

DOI: 10.1177/1023263X17742814.

**1. Introduction**

The paper addresses the question of the principle of solidarity in the in the fields of asylum and migration wihin the context of accession negotiations between the European Union (EU) and the candidate countries for EU membership. The importance of the issue became evident in the context of increased numbers of arrivals of asylum seekers into the EU when the Member States started discussing how the principle of solidarity should be applied to achieve a fair distribution of the persons in need. In May 2015, the European Commission proposed relocation of people in clear need of international protection, who arrived through Greece and Italy, to other EU members. The measures were formally introduced in September 2015 with the adoption of two Council relocation decisions 2015/1523 and 2015/1601[[1]](#footnote-1) (which were criticised as insufficient),[[2]](#footnote-2) and quotas defined for each Member State.[[3]](#footnote-3) The responses to the proposed measures revealed differences in perceptions that various groups of Member States had about solidarity. A number of EU Member States, particularly those from the Višegrad group[[4]](#footnote-4) and some others, disagreed with the proposed decisions. Slovenia, for example, declared, that solidarity has to be ‘voluntary’ and the imposed quotas should take into account the capacities of the country and its limitations,[[5]](#footnote-5) but still decided to support the measures at the end. Romania, Hungary, Slovakia, and the Czech Republic that opposed the instruments until the end of the legislative procedure, were outvoted, as provided by the Treaty on the Functioning of the European Union (TFEU) which allows for certain decisions to be adopted without consensus. As a consequence, two of the outvoted Member States, Hungary and Slovakia, brought actions against the adopted decisions to the Court of Justice of the European Union (CJEU), as provided by Article 263 TFEU.[[6]](#footnote-6)

Negative attitudes towards relocation schemes have been noted with some of the ‘old’ EU Member States as well. For example, as of February 2017, Austria has still been refusing to participate in the relocation scheme.[[7]](#footnote-7) However, a large majority of the ‘old’ Member States have been performing better in the implementation than the new ones. There were also exceptions on the other side. The Bulgarian prime minister, for example, called upon the opposing states to participate in the burden sharing mechanism.[[8]](#footnote-8) Nevertheless, the pattern is notable. Among the Member States who are not participating in the relocation measures or are participating in a very limited way, are Hungary, Poland, Czech Republic, Bulgaria, Croatia and Slovakia. Further, among the top ten ‘relocators’ eight are ‘old’ member states, while among the last ten ‘relocators’ eight are from ‘new’ member states.[[9]](#footnote-9)

These developments raise important issues on the meaning of ‘solidarity’ and ‘fair sharing of responsibility’ within the EU, especially with regard to the differences in perceptions of solidarity between old EU Member States and those that acceded after 2004. The main source of the meaning of the principle of solidarity, which is also invoked as a legal basis for the two Council relocation decisions, is currently Article 80 TFEU. While it remains to be seen how the CJEU will decide in both cases, considering the specific relocation measures introduced and the quota system imposed there is no doubt that, based on Article 80 TFEU, the principle of solidarity is one of the main guidelines to be used when designing and applying measures in the field of asylum and migration, including and particularly in emergency and extraordinary situations, such as the one witnessed in the migration context in 2015/16. With the EU enlargement the scope for potential solidarity measures in the fields of asylum and migration has expanded, which means that the ‘old’ Member States being more attractive for asylum seekers might be more interested in such measures, while the ‘new’ Member States being less attractive might be less interested. This raises a question of whether resistance towards solidarity in the field of asylum has become, following the enlargement process, an inherent EU problem.

This question is aggravated by the fact that the provision of Article 80 is written in broad and undefined way, providing for a wide scope of interpretation. Hence, the operationalization of the principle of solidarity can result in many different forms of burden-sharing instruments. These could entail payments into joint funds and their distribution according to the needs of individual Member States[[10]](#footnote-10) and seconding staff to crisis locations in other members when needs arise, which has already been taking place on a regular basis.[[11]](#footnote-11) But it can also entail hosting asylum seekers, conducting asylum procedures irrespective of the Dublin rules, and redistribution of persons who have been granted international protection. As other authors have argued, due to the openness of the concept, the European legislature enjoys a wide margin of discretion as to which measures to introduce under the principle of solidarity, but it clearly demands for the measures to be fair with respect to the individual Member States.[[12]](#footnote-12)

This raises an interesting issue that is at the heart of this article. There seems to be a divide in how solidarity is perceived by the ‘new’ Member States (EU13) compared to the ‘old’ Member States (EU15). While before 2015 solidarity instruments such as relocation measures have not been extensively discussed, meaning that they represented a novelty even for the EU15, they have nonetheless been opposed predominantly by the new Member States, four of which also voted against their adoption. The question that poses itself is: have the members that joined the EU in the last three enlargement processes been aware of all the aspects that the solidarity principle could entail in the field of asylum and migration? For them to be aware of this, the issue would have had to be more or less clearly raised in the enlargement process, during the negotiation procedure and with respect of reforms that each candidate country had to undertake in the process. Was this the case with regard to the countries that acceded to the EU between 2004 and 2013? The answer to this question will be provided through three case studies, involving one country from each of the three accession cycles in 2004, 2007, and 2013.[[13]](#footnote-13) For this purpose, we selected the following countries – Slovenia for the 2004 enlargement cycle, Bulgaria for the 2007 cycle, and Croatia as the sole country that acceded in 2013. The results of the case studies will make it easier to understand how the candidate countries perceived the principle of solidarity and whether the principle of solidarity was under the discussion in the context of the chapters related to justice and home affairs. Last but not least, the findings will be beneficial for further enlargement processes and may serve as a guiding tool for discussions and preparations of the current candidate or prospective candidate countries for the future membership.

**2. The meaning of solidarity for enlargement process**

Before examining the case studies, a basic definition of the meaning of solidarity is needed in the context of the EU competence on asylum and migration, in order to verify if it has been taken into account in the enlargement process. I will not pursue a historical analysis of the notion of solidarity, nor will I elaborate extensively on the concept of solidarity from the legal point of view, as this has already been done by other authors.[[14]](#footnote-14) The analysis will be limited to the main concepts related to allocation of responsibility, the need for this sharing of responsibility to be fair and the relationship between responsibility sharing and enlargement.

The fact that the EU Member States have agreed on the joint Schengen border control policy and the Common European Asylum System (CEAS) is of immense importance in the discussions on solidarity and its meaning in the enlargement context. First, protection of external borders is by definition a more important concept in some Member States than in others. In the case of increased numbers of arrivals, it is by definition clear that some Member States will have more trouble coping than others. Therefore, any solidarity measures will clearly be needed in such cases. From among enlargement countries some could have become recipients of solidarity assistance while others could be taking over increased shares of responsibilities. Second, by establishing CEAS, the Member States agreed that asylum/international protection is an important civilizational achievement that has to be preserved and properly implemented, and that the coordinated EU action would be beneficial in this respect. If the system cannot be properly implemented in one of the states, for internal or external reasons, they should be assisted by the EU institutions and by the other Member States. This is inherent to the idea of CEAS and involvement in CEAS requires taking over certain additional responsibilities for the enlargement countries as well.

As it has already been argued by other authors,[[15]](#footnote-15) in the CEAS context the legislative document which, through its effects, adversely affects the concept of solidarity, is the Dublin III Regulation, aimed at determining the responsibility of the Member States to examine asylum applications. Have the discussions of the candidate countries’ involvement in the Dublin system contributed to the awareness on the potential prospective solidarity obligations in the field of asylum and migration? Not necessarily. Namely, the Dublin III Regulation contains a solidarity paradox – regardless of the Regulations’ declaratory reliance on solidarity, it has anti-solidarity effects. In this regulation, solidarity is mentioned in recital 8 in the context of solidarity measures provided by EASO. However, the Dublin system is primarily based on the geographical position of states as the implementing bodies predominantly use the first-entry rule to determine the responsibility for examining asylum applications, despite the existence of other rules. This already leads to imbalances among the Member States. No mechanisms exist to ensure the redistribution of responsibility for asylum applications if any of the states becomes overburdened due to Dublin procedures.[[16]](#footnote-16) Read together with Article 80 TFEU, it is clear that in the event of an unequal or asymmetric[[17]](#footnote-17) distribution of responsibility following the Dublin rules, the principle of solidarity requires some *additional* mechanisms to redress eventual imbalances among the Member States.[[18]](#footnote-18)

The discussion about the Dublin regulation is important since Dublin forms one of the cornerstones of CEAS, which is one of the central issues of negotiations within the justice and home affairs area of the EU competence. The system has been in place since 1990 when the predecessor of the Dublin regulations – the Dublin Convention – was signed. Therefore, it has become well known, and it has certainly been clear to the countries involved in the enlargement processes that a certain system of assigning responsibility was in place that was not necessarily based on solidarity. Also, it is worth remembering that the EU agenda for the new members was not so much about shared values as it was, as Grabbe points out, to build capacities of the countries to participate in the common market and implement similar policies.[[19]](#footnote-19) The question, therefore, is whether solidarity, along with other values, had any place in the EU enlargement processes whatsoever.

**3. Solidarity and the EU Accession**

To assess the degree of awareness on the principle of solidarity present among the then candidate countries involved in the enlargement processes, it is useful to review the primary sources of law valid at the time of accession, particularly the treaties defining the basic terms and conditions of the existence of the EU. While the Maastricht Treaty (1992) and the Treaty of Nice (2001) do not mention solidarity, the Amsterdam Treaty (1997) involves several references to this principle, however, not in the field of asylum and migration but in the field of common foreign and security policy.[[20]](#footnote-20) It was the 2009 Lisbon Treaty renaming the EU treaty into the Treaty on the Functioning of the European Union, with its 13 references to solidarity, including one in Article 80 that specifically relates to border control, asylum, and migration (hereinafter: BCAM). It was only this provision that permitted the principle of solidarity to become firmly embedded in the structures and procedures of the EU.

This is an important notion for the enlargement processes. The accession countries in 2004, 2007, and 2013 have been in somewhat different positions considering their expected awareness about the importance of the principle of solidarity in BCAM areas and the forms that it might take. While the 2004 accession countries could not predict that solidarity in BCAM areas might be expected from them in the future, they, on the other hand, after the accession, voted in favour of the Lisbon Treaty which explicitly introduced this principle into BCAM areas. There is also a counterargument indicating that perhaps the 2004 accession countries could have been aware of the solidarity principle in the field of asylum and migration. Namely, the wording of Article 80 TFEU originates from the process of drafting of the EU Constitutional Treaty which was negotiated between 2002 and 2004, i.e. before the accession process. In any case, since TFEU was adopted with the consensus, it is safe to conclude that all 2004 enlargement states that were members in 2009 specifically agreed to this. What is possible though is that they did not predict that concrete solidarity measures might include taking in of actual *people*, instead of sending out police officers to help other states, or paying into the EU budget while not necessarily benefiting from certain funds, such as SOLID and AMIF, to the same extent as the Member States in need. After all, at the same time, they could count on the fact that they will continue to be net recipients of EU funds. Similar conclusions could be drawn for both countries that became members in 2007. Namely, Romania and Bulgaria were full-fledged members when the Lisbon Treaty entered into force.

A slightly different was a situation for Croatia that joined the EU as the last one in 2013. This state had to agree with TFEU as it was, without having a chance to influence it. But at the same time, by becoming the member, Croatia undertook all the rights and obligations stemming from the treaty, but likely without being fully aware of what kind of forms the EU solidarity measures in BCAM fields might take place, similarly as the existing Member States.

The first conclusion could, therefore, be that all of the countries undergoing the accession process since 2004 should have been aware that solidarity mechanism aiming at ‘fair sharing of responsibilities’ in BCAM areas could potentially require them to receive refugees or asylum seekers. The fact that they might not necessarily agree with this but would be under the obligation to do it nevertheless was also clear from the new qualified majority voting rules, as provided by TFEU.

Arguably, the real problem for all of the EU Member States, regardless of the accession time, might have been that, at the time when the solidarity principle was introduced in Article 80 TFEU, most of them were probably not aware what concrete forms this principle could take in the future. To check whether the countries acceding between 2004 and 2013 could have expected the solidarity forms such as the relocation mechanism involving actual people, it is necessary to undertake case studies and examine, based on concrete examples, whether potential solidarity measures that could have been expected from the states, have ever been a subject of debates in negotiations in the accession processes concerning individual states.

The hypothesis of this article is that this has not taken place since the concepts of solidarity or burden sharing in the field of asylum and migration are not mentioned among the accession conditions, including those defined in the Copenhagen Criteria of 1993.[[21]](#footnote-21) According to the latter, for the candidate countries to be accepted into EU membership they must show: i) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criteria); ii) a functioning market economy and the ability to cope with competitive pressure and market forces within the EU (economic criteria); and iii) ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the *'acquis'*), and adherence to the aims of political, economic and monetary union.[[22]](#footnote-22)

As is evident from these conditions, there are several possible references relevant for the concept of solidarity as it has been imposed in the field of asylum and migration, especially in the context of ‘human rights’ guarantees and ‘ability to take on the obligations of membership’, i.e. implement the EU *acquis*. On the general level, these are the two criteria which the obligations stemming from Article 80 TFEU could be compared to. Also, the quotas imposed on the EU Member States under the auspices of ‘solidarity’ could fall under these two criteria. None of the EU accession conditions, however, are sufficiently detailed to conclude that a country had to be able and willing to exercise solidarity in the field of asylum and migration to be accepted into EU membership. Consequently, for the purposes of this paper, the substantive intersections between Article 80 TFEU and the two criteria were identified and analysed in order to verify whether the enlargement countries could argue that solidarity measures in the field of asylum and migration could not have been foreseen and were outside EU competence, and therefore cannot be binding for the recent EU Member States.

**4. Case Studies**

The main research question of this analysis has been tested on three case studies, involving one country from each of the three most recent enlargement processes – Slovenia that became a member in 2004, Bulgaria that became a member in 2007, and Croatia that became the sole new member in 2013. In each of the three case studies six most recent progress reports issued by the European Commission (Commission) before the state became a member were reviewed, first using keywords: ‘solidarity’ and ‘fair sharing of responsibility’. Further, the six progress reports’ sections on justice and home affairs, as well as borders, asylum and migration, were studied for control purposes, to assess whether the readiness of the candidate countries to respect the concept of solidarity in migration and asylum issues was discussed in any other way, using different terminology, but serving the same final purpose – a fair burden-sharing policy.

*4.1 Slovenia – An Example of the First Enlargement Cycle in the Eastern Bloc*

Slovenia began its negotiations for EU membership in 1995. On 30 March 1998, the accession process was formally launched at a meeting of the Ministers for Foreign Affairs of the fifteen existing EU Member States and eleven applicant states from the former Eastern bloc together with Cyprus and Malta, including Slovenia.[[23]](#footnote-23) This was the largest enlargement exercise ever undertaken by the EU. The progress of the candidate countries has been measured by a yearly reporting on measures taken by the states to harmonize their legislation and structures with the EU standards.

The first finding from these processes is that the terms ‘solidarity’ or ‘fair sharing of responsibility’ do not appear in any of the last six progress reports issued between 1998 and 2003 by the European Commission on Slovenia. In the 1998 progress report, which was also among the first reports on the progress made by candidate countries from Central and Eastern Europe, the membership conditions are clearly spelled out. In addition to the Copenhagen Criteria, the report also stresses the importance of conditions added by the Madrid European Council which emphasize the need for a guarantee of the ‘harmonious implementation of Community policies *after* membership’ (emphasis added).[[24]](#footnote-24)

Hence, two of the three elements of the Copenhagen Criteria were relevant for studying the approach of the Commission towards BCAM areas, namely the political criteria and the ability to take on the obligations of membership. Within the civil and political rights section, the European Commission paid significant attention to the situation of persons without regulated status (commonly known as the ‘erased’ people),[[25]](#footnote-25) refugees from Bosnia and Herzegovina, as well as the legislation concerning their status.[[26]](#footnote-26) Within the justice and home affairs chapter, the Commission stressed the need for new legislation concerning foreign national and border controls, to secure the border with Croatia which would become an external EU border after Slovenia’s accession.[[27]](#footnote-27) It expressed concerns over the fact that the state became transit territory for irregular migration and urged it to improve its return policies.[[28]](#footnote-28) In the field of asylum, it emphasized the urgent need to adopt the asylum law and train staff on asylum issues, despite the low number of asylum requests.[[29]](#footnote-29) These issues were also listed among deficiencies within administrative structures and capacity needed for the implementation of the *acquis*.[[30]](#footnote-30)

In the next reports of 1999, the Commission stressed the same issues in the fields relevant to this paper, and recognized important steps that have been made, such as adoption of the Asylum Law and Law on Foreigners,[[31]](#footnote-31) as well as the creation of new structures in the fields of asylum and immigration, training and new reception capacities.[[32]](#footnote-32) Further, the 1999 report is the first to describe twinning projects implemented in cooperation with Germany and Austria, in the field of migration.[[33]](#footnote-33) The projects are examples of processes in which candidate countries benefit from the knowledge of counterparts from the other EU Member States in designing their own legal and policy responses to migration and asylum.[[34]](#footnote-34) Therefore, sharing (not of burden, but of knowledge, experience, strategies, policies) had been taking place intensively before the EU accession, but sharing without the involvement of burden and the underlying principle is not solidarity. Namely, all these projects were supported by the EU funds and both twinning partners benefited from them. What has been happening in fact, however, is that the candidate countries, by passing relevant legislation and engaging in twinning projects, were in the process of preparation to become capable of undertaking their share of responsibility in the fields such as migration and asylum.[[35]](#footnote-35) Namely, the number of asylum applications was relatively low in the times of accession negotiations, however, it was by all means possible to predict that their number would increase after accession to the EU, which necessarily meant that new members, being on the external EU border, would by definition start to undertake their share of responsibility, also due to the Dublin system they would become part of.

In the reports for 2000–2003, the issues of asylum and migration are still quite extensively discussed and, similarly as in the previous reports, some gaps were identified from the perspective of international and the EU law standards.[[36]](#footnote-36) The findings of the reports were limited to the description of the situation concerning legislation, institutions, training, and capacity building. While Slovenia has been taking measures in the fields of migration and asylum, these have been insufficient for the EU, where the numbers of migrants and asylum applications has been much larger in both absolute and relative terms. The fact that, during negotiations, so much attention was given to BCAM issues, it must have been quite clear to the candidate countries that these issues play a significant role in the EU policy making. For countries that did not have even basic asylum legislation in place before the negotiations began, this was a meaningful sign. However, while it was clear that within the preparations for EU membership BCAM areas would have to move higher on the policy priority list in Slovenia, during the negotiations, there was no discussion about the possible solidarity measures in these fields in the future. Despite the fact that the 2001 EU Directive on Temporary Protection of Displaced Persons,[[37]](#footnote-37) adopted after the Kosovo crisis, was in power at the time, aiming at fair sharing of responsibility in cases of mass influx.

*4.2 Bulgaria – An Overly Rushed Enlargement*

The accession process for Bulgaria also started in 1998,[[38]](#footnote-38) however, due to the lack of preparedness in 2004, Bulgaria, together with Romania, acceded to the EU three years later, which some regarded as still too soon.[[39]](#footnote-39) For this analysis, six progress reports issued by the Commission were analysed, i.e. from 2001 to 2006. Between 2004 and 2007, the methodology of the examination of the state’s preparedness did not change significantly, as it is also evident from the first reviewed report released in 2001.[[40]](#footnote-40) In the field of justice and home affairs, Bulgaria benefited importantly from pre-accession funds supporting projects, among others, for strengthening refugee agencies,[[41]](#footnote-41) as well as twinning projects on justice and home affairs.[[42]](#footnote-42) What is different than in the case of progress reports related to the 2004 enlargement, refugees and migrants are not mentioned in the section on political criteria. The issues of BCAM are addressed only under the third criterion – capacity to take on the obligations of membership, i.e. implementation of the *acquis*. In the relevant section, the 2001 report focuses on the adoption of appropriate laws, institution building, and training of personnel, which is similar as in accession processes leading to the 2004 enlargement.[[43]](#footnote-43) The report also extensively addressed gaps in the legislation comparing to the EU *acquis* and the European Convention on Human Rights, insufficient reception capacity, and lack of integration policies which were explicitly underlined among the problems.[[44]](#footnote-44)

Notably, all of the reports on Bulgaria (2001–2006) included extensive analysis of important human rights problems, such as police violence, treatment of Roma or conditions in child care institutions. In light of these important problems, asylum and migration did not stand out as the most important issues. Consequently, progress in the field of asylum and migration was mentioned under political criteria only in reports for 2002–2004,[[45]](#footnote-45) but not in the last two reports. Progress in these fields was commended also under the third set of criteria related to the capacity to take on obligations from membership,[[46]](#footnote-46) where it was underlined that more would have to be done to improve the asylum procedures, increase reception capacity, and improve conditions for integration.[[47]](#footnote-47)

The reports for 2002 and 2004 underlined that there is a need to ensure the functioning of Dublin and Eurodac procedures[[48]](#footnote-48) and this was addressed in the following year.[[49]](#footnote-49) With these notifications, Bulgaria received a clear sign that it would have to participate in burden sharing related in particular to those asylum seekers who will enter the EU through its territory. This was also an indication that EU membership involves participation in CEAS where certain burden sharing measures are already in place. However, while the rules of the Dublin system diminish the burden for the Western and the Northern Member States and not for those on the Eastern and Southern border, it cannot be concluded that this element of the negotiations sent a clear message to the country that solidarity towards the external border countries would someday be at stake.

The last 2006 report was extremely modest in terms of addressing the remaining needs in the field of BCAM issues, as it only mentioned each of these issues once in the whole report. It established that the administrative capacity in the field of asylum and refugees was adequately strengthened.[[50]](#footnote-50) Further, it found that the risks of irregular migration remained high,[[51]](#footnote-51) indicating that there were remaining border control issues. In none of the reviewed progress reports for Bulgaria, solidarity or burden sharing were mentioned. As in the case of Slovenia, this is not surprising, since the concept of solidarity entered the EU law through the Lisbon Treaty three years after the last progress report, in 2009.

*4.3 Croatia – A Slow-down Approach to Enlargement*

After the impression that Bulgaria’s and Romania’s accessions were too rapid, the EU took a more careful approach with Croatia,[[52]](#footnote-52) while at the same time, by granting Croatia the status of a candidate, giving a positive sign and incentive to all of the other countries in the Western Balkans region.[[53]](#footnote-53) The reports for Croatia, as for all other countries of the Western Balkans region, have been issued by the Commission since 2002, and Croatia was granted candidate status in 2004.[[54]](#footnote-54) However, for this study, only six most recent reports, i.e. from 2007 to 2012, were reviewed. The reports contain the same structure and even the same wording as in the case of Slovenia and Bulgaria, indicating that issue-wise the negotiation processes and the themes discussed did not evolve significantly in ten years of enlargement span, apart from the fact that it was more thorough. Different than in the case of the other two states which acceded to the EU before entry into force of the 2009 Lisbon Treaty, Croatia was admitted after that, meaning that it should have been aware of the Article 80 solidarity clause in the BCAM field of the EU competence. However, the question remains whether it was ever discussed in the course of the accession negotiations and if yes, was the meaning of the possible solidarity measures that could have been adopted under this close clear to the participating countries.

As in the previous two case studies, neither solidarity nor burden sharing are mentioned in the progress reports. In the field of refugees and BCAM, the Commission focused first on the refugees from the post-war situation[[55]](#footnote-55) and second, on capacity building with an aim to strengthen asylum institutions, procedures, knowledge, and facilities for new asylum seekers from third countries.[[56]](#footnote-56) Preparations for Croatia to become part of the DublinNet, Eurodac, Schengen Information System (SIS II) and Western Balkans Risk Analysis Network (WB RAN) were thoroughly noted,[[57]](#footnote-57) as well as the preparation of the Integrated Border Management (IBM) and Schengen Action Plan, which had been prerequisites for accession to the EU.[[58]](#footnote-58) Border security was of immense importance of in the country’s accession process as Croatia has the longest EU external border.[[59]](#footnote-59) The issues were discussed very briefly in the 2007 report, and evolved to more comprehensive assessments in further reports, but in all cases the Commission’s conclusions focused on the capacity building for the state to be able to control the EU external border and deal with migrants and asylum seekers under its jurisdiction, in line with the EU *acquis*.[[60]](#footnote-60) In the reports, particular attention was given to the procedural guarantees, access to legal remedies for asylum seekers and overcrowding of the detention camp for irregular migrants.[[61]](#footnote-61) Solidarity and burden sharing, apart from the discussions about the participation in the Dublin system, were not mentioned.

**5. Justiciability**

Pre-accession conditioning would imply that solidarity as a principle should have post-accession legal effects. Otherwise it would make no sense to include it among the membership conditions. But does it mean that if solidarity was not considered in the accession process, is it also not judiciable but should rather be dealt with as a political question? Justiciability refers to the types of matters that the competent courts can adjudicate. If a case is ‘nonjusticiable’, a certain court cannot hear it. For the case to be justiciable, the court must not be offering an advisory opinion but a binding decision or judgment, the plaintiff must have the standing to pursue the case, and the issues must be ripe but neither moot nor should they violate the political question doctrine.[[62]](#footnote-62) How justiciable is the solidarity clause? To what extent could the courts interfere with the inactivity of the states or their inability to reach an agreement required by solidarity?

From the analysis of the three case studies, it clearly stems that solidarity was not on the accession agenda, not even in the case of Croatia, despite the fact that the concept was introduced into the Lisbon Treaty and hence into the TFEU in 2009, and despite the existence of the Temporary Protection Directive adopted with the purposes of burden-sharing. While none of the progress reports mentions solidarity or any other differently named concept with the same meaning, this principle is relevant for all three groups of states – for those that acceded in 2004 and 2007 because they were already full-fledged members who participated in the adoption of the Lisbon Treaty, and for Croatia acceding after that because it had to be familiar with the wording of the Lisbon Treaty and the TFEU, and hence also with Article 80 solidarity clause. Therefore, despite the fact that solidarity was not included among the accession conditions, being a part of the main source of the primary law prevails. Hence, solidarity clause is unequivocally part of the legal document that is binding for all the three groups of states, regardless of the year of accession.

But is the solidarity principle also justiciable? May the Commission, under Article 258(1) TFEU, issue a reasoned opinion if it finds that the Member State does not comply with the principle of solidarity, and the EU measures adopted on the basis of this principle? If yes, then the Commission may also bring the matter to the CJEU in line with Article 258(2) TFEU. The Commission may do if it ‘considers that a Member State has failed to fulfil an *obligation* under the *Treaties*’[[63]](#footnote-63) (emphasis added by the author). Is the solidarity clause imposing a new obligation under the TFEU? Or is it only valid on the level of principle that is not justiciable but only helps in the interpretation of primary and secondary law provisions?

Article 80 TFEU reads as:

The *policies* of the Union set out in this Chapter [Policies on Border Checks, Asylum and Immigration] 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 (emphasis added by author).

From the wording of the provision, it is clear that it does not impose concrete and practical legal obligations on the EU institutions and the Member States, but rather defines a binding guiding principle for policy making and policy implementation and it also introduces solidarity as an interpretation tool for the CJEU.[[64]](#footnote-64) The obligations deriving from the two relocation Decisions indicate that the Member States are, inter alia, required to take a number of relevant practical measures to ensure the implementation of the decisions, such as appointing a national contact point, establishing a direct cooperation and an exchange of information between the competent authorities; indicating the number of applicants who can be relocated; participating in identification of persons to be relocated and participating in relocation which has to be as swift as possible.[[65]](#footnote-65) The Decisions also include quotas (i.e. numbers of persons that each Member State has to receive through relocation) which are also binding.

These obligations are mandatory for all Member States, regardless of whether they supported the decisions or were outvoted, whether they are old or the new Member States, or whether they have been informed in the negotiation processes that solidarity measures might be taking place in the future or not. The obligations remain legally binding unless the CJEU takes a different decision following actions initiated by Hungary and Slovakia.[[66]](#footnote-66) Possible arguments[[67]](#footnote-67) of the Member States that during the accession process they were not made aware that such measures could have been introduced and obligations of such character be imposed on them will have little value. By agreeing to the Lisbon treaty, its solidarity clause or the majority vote rules, either as Member States or candidates, they also undertook the duty to transpose obligations they did not necessarily agree with. While perhaps ‘solidarity cannot be imposed’, as the president of the European Commission J. C. Juncker said in a ‘State of the Union Speech’ in 2016,[[68]](#footnote-68) *binding* legislative measures adopted in the spirit of solidarity are enforceable, at least as much as the EU law in general is enforceable.

Hence, since the obligations are legally valid, the lack of their implementation can also lead to infringement procedures under the TFEU, as in all other cases of the lack of implementation of the EU primary and secondary legislation. Therefore, the duties that are clearly spelled out it in the two decisions, which have a nature of legally binding sources of secondary EU law, are justiciable.

**6. Conclusions**

The case studies demonstrate that during the last three EU enlargement processes, the importance of the solidarity principle did not reach a level where it would have to be discussed in the accession negotiations, including the last enlargement in which the new Article 80 was already in force. This indicates that an opportunity in which the preparedness of the candidate country to undertake the obligations of EU membership in line with the principle of solidarity was missed. It is worth pointing out that if at the last EU enlargement the solidarity principle in BCAM issues had been invoked more clearly, Croatia as the last country to have acceded to the EU would have been subjected to a stricter scrutiny. However, from the legal point of view, that would have been acceptable, as the candidate country would have been required to prepare for the implementation of the same rule that has already been binding for the existing members.

At the same time, as the reports in the three case studies reveal, the candidate countries have benefited extensively from the accession process in terms of capacity building. The accession process provided for social learning and persuasion which led to a durable compliance of the new members with the EU law, often even more rigorously than in the case of the old members.[[69]](#footnote-69) Extensive resources, mentoring, increase of expertise, and capacity-building in BCAM fields were invested into then prospective EU members. While certainly the candidates’ obligations to pass legislation and set up structures were constantly emphasized, the candidates were admitted to the EU in the spirit of a robust one-way EU support in their development path. The obligations that were stressed in this process were related to the transposition of and respect for the *acquis* and the cooperation with the EU institutions and the other EU Member States, primarily for their own (candidate countries’) benefit. Note that in the negotiations there was some emphasis on the respect of fundamental rights of the candidate countries’ citizens, including those belonging to national minorities. But outside of the *acquis*, structures, procedures, institutions, and capacity building in the field of asylum and migration, there was very little discussion, if at all, on fundamental rights of migrants and refugees.

That is why for the candidate countries the EU accession should also be understood as a somewhat ‘selfish’ process, focused primarily on the progress of the candidate countries themselves and despite the fact that they had to deliver extensively, it was ultimately predominantly about *them* – their prospects, their wellbeing, and their progress. By aspiring to EU membership, the candidate countries focused on how they could have benefited most and not how they could have contributed to the EU and the other Member States. Note that solidarity is all about the latter. This does not mean that the EU and the other Member States have not benefited from the enlargement process – they did, in many aspects. But from the perspective of the accession process as such, how the candidate countries perceived it and whether they understood from negotiations that they will ever have to engage in any burden-sharing operation (especially in the field of asylum and migration), the answer is negative. This is also evident today when most of the countries that opposed relocation quotas were far more ready to participate in the border management operations by seconding their staff and sharing other resources with the countries in migration routes, than receiving actual people seeking protection.

One of the key criteria examined during the accession process was related to the capacity to adopt the obligations of membership, i.e. the *acquis*, even after the EU accession. Based on this, it should have been clear for all candidate countries that by becoming the EU members they would at times have to compromise in order to reach an agreement on a certain issue. Since not only opportunities but also obligations were thoroughly discussed during the negotiations, the candidate countries should have come to terms that EU membership would not only bring them benefits but also additional responsibilities that they might not have should they remained non-EU states. In that sense, EU membership resembles marriage – once the country is in, it is expected to stay in for better or worse. While divorce is possible (e.g. Brexit), the time of membership brings not only opportunities but also responsibilities. It is possible that the countries had not been aware of the scope of obligations they would be required to undertake, but the solidarity measures imposed have certainly not been surprising, taking all the asylum and migration legislation adopted on the EU level, previous distribution measures (such as the Dublin Regulation), as well as the increasing numbers of arrivals in the recent years. The solidarity clause was not introduced in the EU legislation while the refugee crisis evolved, but eight years ago. Its operationalization should not have come as a surprise.

A recommendation that offers itself from the described analysis is that in the future enlargement processes the EU institutions should ensure that the solidarity, its meaning, including in migration and asylum, are clear in the pre-accession context as well. The acceding countries should be aware of the fact that acceding to the EU invokes rights and duties. The Member States should not only profit from the membership and participate only in possibilities which are beneficial to them (e.g. Erasmus, structural funds, loans from the ECB), but also in less popular developments that affect the whole of the EU. However, in reality, it can also be expected that in the possible future accession negotiations the principle of solidarity in the field of migration will probably not be emphasized. EU enlargement is by definition meant to be mutually beneficial: while with the enlargement the EU’s internal market is increasing, the new members usually remain net recipients of the EU funds for years. Therefore, it is questionable whether potential crisis scenarios will ever be intensively debated in the accession negotiations. It is likely that the negotiations will continue to address legislation and structures needed for a potential situation in which solidarity and burden sharing will be needed, but not the actual solidarity scenarios. This issue will probably remain a taboo. The question is whether this is wise.

1. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, [2015] OJ L 239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L 248/80. [↑](#footnote-ref-1)
2. A. J. M., The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration, 22 *European Law Journal* (2016), p. 399. [↑](#footnote-ref-2)
3. Apart from UK that did not opt-in and Denmark that does not have the possibility to opt-in. [↑](#footnote-ref-3)
4. EU Observer, Refugee quotas 'unacceptable' for Visegrad states, 4 September 2015, [https://euobserver.com/migration/130122 (25](https://euobserver.com/migration/130122%20%2825) April 2017). [↑](#footnote-ref-4)
5. The Slovenia Times, Slovenia Opposed to Binding Refugee Quotas in EU, 16 June 2015, [http://www.sloveniatimes.com/slovenia-opposed-to-binding-refugee-quotas-in-eu (25](http://www.sloveniatimes.com/slovenia-opposed-to-binding-refugee-quotas-in-eu%20%2825) April 2017). [↑](#footnote-ref-5)
6. Case C-647/15 *Hungary v. Council*; Case C-643/15 *Slovakia v. Council*. [↑](#footnote-ref-6)
7. European Commission, Commission calls for renewed efforts in implementing solidarity measures under the European Agenda on Migration, Press Release, 2 March 2017, [http://europa.eu/rapid/press-release\_IP-17-348\_en.htm (25](http://europa.eu/rapid/press-release_IP-17-348_en.htm%20%2825) April 2017). [↑](#footnote-ref-7)
8. Novinite.com, Bulgaria's PM Calls for EU Solidarity on Refugee Relocation Quotas, 5 May 2016, [http://www.novinite.com/articles/174342/Bulgaria%27s+PM+Calls+for+EU+Solidarity+on+Refugee+Relocation+Quotas](http://www.novinite.com/articles/174342/Bulgaria%27s%2BPM%2BCalls%2Bfor%2BEU%2BSolidarity%2Bon%2BRefugee%2BRelocation%2BQuotas) (25 April 2017). [↑](#footnote-ref-8)
9. E. Guild, C. Costello, V. Moreno-Lax, Implementation of the 2015 Council Decisions establishing provisional

measures in the area of international protection for the benefit of Italy and of Greece, study done for LIBE Committee, European Parliament, 2017. [↑](#footnote-ref-9)
10. This is the usual way of how solidarity functions in the EU, with the funds usually going from West to East. [↑](#footnote-ref-10)
11. During the refugee and migrant crisis, a number of the EU Member States (e.g. Hungary and Czech Republic) deployed border police officers to assist in border control on the Western Balkans migration route. See, for example: Government of the Republic of Slovenia, *Police Reinforcements from EU Countries*, press release, 30 October 2015, http://www.vlada.si/en/media\_room/newsletter/slovenia\_weekly/news/article/police\_reinforcements\_from\_eu\_countries\_56793/ (14 April 2017). [↑](#footnote-ref-11)
12. E. Küçük: The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?, 22 *European Law Journal* (2016), p. 455. [↑](#footnote-ref-12)
13. For lessons learned from the enlargement processes see H. Grabbe: Six Lessons of Enlargement Ten Years On: The EU’s Transformative Power in Retrospect and Prospect, 52 *JCMS* (2014), Annual Review, p. 40-56. [↑](#footnote-ref-13)
14. See A. Raspotnik et al., The issue of solidarity in the European Union, Tepsa Brief, 8 August 2012, http://www.tepsa.eu/tepsa-brief-the-issue-of-solidarity-in-the-european-union/ (13 April 2017). See also papers in this journal. [↑](#footnote-ref-14)
15. E. Küçük: The Principle of Solidarity and Fairness in Sharing Responsibility, p. 455. [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. A. J. Menéndez, The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration, 22 *European Law Journal* (2016), p. 393. [↑](#footnote-ref-17)
18. E. Küçük: The Principle of Solidarity and Fairness in Sharing Responsibility, p. 451. [↑](#footnote-ref-18)
19. Grabbe, H., Six Lessons of Enlargement Ten Years On: The EU’s Transformative Power in Retrospect and Prospect, 52 *JCMS* (2014), Annual Review, p. 41. [↑](#footnote-ref-19)
20. See Title V of the Amsterdam Treaty. [↑](#footnote-ref-20)
21. Copenhagen Criteria are criteria that any country wishing to become an EU member state must meet. They were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. See European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, Section 7 (Relations with the Countries of Central and Eastern Europe), point iii), p. 13. The legal basis for the definition of the accession conditions was Article 49 of the then Treaty of the European Union. The legal basis has not changed and remains the same also in the current TFEU. [↑](#footnote-ref-21)
22. European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, Section 7 (Relations with the Countries of Central and Eastern Europe), point iii), p. 13. [↑](#footnote-ref-22)
23. EC, Progress report on Slovenia, 1998, p. 6. [↑](#footnote-ref-23)
24. Ibid., p. 5. [↑](#footnote-ref-24)
25. I have written extensively about this issue elsewhere, see N. K. Šalamon, *Erased: Citizenship, Residence Rights and the Constitution*, Peter Lang, 2016. See also J. Dedić et al.: *The Erased: Organized Innocence and the Politics of Exclusion*, Peace Institute, 2001. [↑](#footnote-ref-25)
26. EC, Progress report on Slovenia, 1998, p. 11. [↑](#footnote-ref-26)
27. Ibid., p. 36. See also Geddes, A., and Taylor, A., In the shadow of fortress Europe? Impacts of European migration governance on Slovenia, Croatia and Macedonia, *Journal of Ethnic and Migration Studies* (2015), p. 10. [↑](#footnote-ref-27)
28. EC, Progress report on Slovenia, 1998, p. 36. [↑](#footnote-ref-28)
29. Ibid., p. 36. [↑](#footnote-ref-29)
30. Ibid., 1998, p. 41. [↑](#footnote-ref-30)
31. EC, Progress report on Slovenia, 1999, p. 16, 34. [↑](#footnote-ref-31)
32. Ibid., 1999, p. 52-53. [↑](#footnote-ref-32)
33. Ibid., p. 10. [↑](#footnote-ref-33)
34. The wording migration and immigration demonstrates that the authors of the report differentiated between these two terms, which shows that migration could also include asylum and also irregular migration. [↑](#footnote-ref-34)
35. For more information on the functions of the twinning projects see Trauner, F., The Europeanisation of the Western Balkans: deconstructing the EU’s routes of influence in justice and home affairs, Paper presented to the ECPR Fourth Pan-European Conference on EU Politics, Riga, September, 25-27, 2008, p. 11. [↑](#footnote-ref-35)
36. EC, Progress report on Slovenia, 2000, p. 17, 69-71, 85; EC, Progress report on Slovenia, 2001, p. 19, 78, 90, 93, 97; EC, Progress report on Slovenia, 2002, p. 25, 45, 100, 102, 104, 116, 129; EC, Progress report on Slovenia, 2003, p. 42, 44. [↑](#footnote-ref-36)
37. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving 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 bearing the consequences thereof, [2001] OJ L 212/12. [↑](#footnote-ref-37)
38. EC, Progress report on Bulgaria, 2001, p. 6. [↑](#footnote-ref-38)
39. H. Grabbe, Six Lessons of Enlargement Ten Years On: The EU’s Transformative Power in Retrospect and Prospect, 52 *JCMS* (2014), Annual Review, p. 42. [↑](#footnote-ref-39)
40. EC, The first progress report for Bulgaria was issued in 1998, as for the ten states that acceded to the EU in 2004. However, in line with the methodology of this study, I reviewed the last six reports before the accession, meaning that for Bulgaria the first report that was taken into account was the one issued in 2001. [↑](#footnote-ref-40)
41. EC, Progress report on Bulgaria, 2001, p. 10. [↑](#footnote-ref-41)
42. Ibid., p. 12. [↑](#footnote-ref-42)
43. Ibid., p. 80-81. [↑](#footnote-ref-43)
44. Ibid., p. 83, 102. [↑](#footnote-ref-44)
45. EC, Progress report on Bulgaria, 2002, p. 28, 30, 34; EC, Progress report on Bulgaria, 2003, p. 22, 27; EC, Progress report on Bulgaria, 2004, p. 22. [↑](#footnote-ref-45)
46. EC, Progress report on Bulgaria, 2002, p. 108, 110, 139; EC, Progress report on Bulgaria, 2003, p. 100, 104-105; EC, Progress report on Bulgaria, 2004, p. 116; EC, Progress report on Bulgaria, 2005, p. 65; EC, Progress report on Bulgaria, 2006, p. 27. [↑](#footnote-ref-46)
47. EC, Progress report on Bulgaria, 2002, p. 108, 110, 139; EC, Progress report on Bulgaria, 2003, p. 100, 104-105; EC, Progress report on Bulgaria, 2004, p. 116; EC, Progress report on Bulgaria, 2005, p. 65. [↑](#footnote-ref-47)
48. EC, Progress report on Bulgaria, 2002, p. 110; EC, Progress report on Bulgaria, 2004, p. 120. [↑](#footnote-ref-48)
49. EC, Progress report on Bulgaria, 2005, p. 65. [↑](#footnote-ref-49)
50. EC, Progress report on Bulgaria, 2005, p. 27. [↑](#footnote-ref-50)
51. Ibid., p. 52. [↑](#footnote-ref-51)
52. H. Grabbe, Six Lessons of Enlargement Ten Years On, p. 43. [↑](#footnote-ref-52)
53. Trauner, F., The Europeanisation of the Western Balkans: deconstructing the EU’s routes of influence in justice and home affairs, p. 8. [↑](#footnote-ref-53)
54. EC, Progress report on Croatia, 2007, p. 5. [↑](#footnote-ref-54)
55. Ibid., p. 13, 14, 53. [↑](#footnote-ref-55)
56. EC, Progress report on Croatia, 2007, p. 54, 55; EC, Progress report on Croatia, 2008, p. 56, 57; EC, Progress report on Croatia, 2009, p. 57; EC, Progress report on Croatia, 2010, p. 54; EC, Progress report on Croatia, 2011, p. 53, 54; EC, Progress report on Croatia, 2012, p. 37-39. See also Feijen, L., Facing the Asylum-Enlargement Nexus: the Establishment of Asylum Systems in the Western Balkans”, 20 *International Journal of Refugee Law* (2008), p. 505; Geddes, A., and Taylor, A., In the shadow of fortress Europe? Impacts of European migration governance on Slovenia, Croatia and Macedonia, p. 13. [↑](#footnote-ref-56)
57. EC, Progress report on Croatia, 2007, p. 55; EC, Progress report on Croatia, 2009, p. 57; EC, Progress report on Croatia 2010, p. 55. [↑](#footnote-ref-57)
58. Celador, G. C. and Juncos, A. E., The EU and Border Management in the Western Balkans: Preparing for European Integration or Safeguarding EU External Borders?”, 12 *Southeast European and Black Sea Studies* (2012), p. 204. [↑](#footnote-ref-58)
59. Geddes, A. and Taylor, A., In the shadow of fortress Europe? Impacts of European migration governance on Slovenia, Croatia and Macedonia, p. 11. [↑](#footnote-ref-59)
60. EC, Progress report on Croatia, 2008, p. 59. [↑](#footnote-ref-60)
61. EC, Progress report on Croatia, 2007, p. 54, 55; EC, Progress report on Croatia, 2008, p. 56, 57; EC, Progress report on Croatia, 2009, p. 57; EC, Progress report on Croatia, 2010, p. 54; EC, Progress report on Croatia, 2011, p. 53, 54, 56. [↑](#footnote-ref-61)
62. See Wex Legal Dictionary, Cornell Law School, https://www.law.cornell.edu/wex/ (12 April 2017). [↑](#footnote-ref-62)
63. Article 258(1) TFEU. [↑](#footnote-ref-63)
64. E. Küçük, The Principle of Solidarity and Fairness in Sharing Responsibility, p. 463. [↑](#footnote-ref-64)
65. Article 5 of Council Decision 2015/1523 and Council Decision 2015/1601. [↑](#footnote-ref-65)
66. For the analysis of the claims of Slovakia and Hungary see E. Küçük, The Principle of Solidarity and Fairness in Sharing Responsibility, p. 466. [↑](#footnote-ref-66)
67. The arguments that Hungary used in the action against the Council did not focus solely on solidarity, but also involved questions of procedure, in particular the relationship between the consensus principle in the European Council and the majority rule in the Council under Articles 15-16 TEU. [↑](#footnote-ref-67)
68. J. C. Juncker, ‘State of the Union Speech’, 14 September 2016, http://europa.eu/rapid/press-release\_SPEECH-16-3043\_en.htm (13 April 2017). [↑](#footnote-ref-68)
69. H. Grabbe, Six Lessons of Enlargement Ten Years On, p. 44. [↑](#footnote-ref-69)