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OUTSOURCING AND COOPERATION
WITH THIRD COUNTRIES:

DECONSTRUCTING THE FORMAL
AND THE INFORMAL IN MIGRATION
AND ASYLUM POLICIES

Edited by

ANA NIKODINOVSKA KRSTEVSKA

MARIA GAVOUNELI

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Editoriale Scientifica, 2022

Proprietà letteraria riservata

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Via San Biagio del Librai 39
Palazzo Marigliano
80138 Napoli

ISBN 979-12-5976-374-7

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Co-funded by the
Europe for Citizens Programme
of the European Union



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'STRUCTURED' SOLIDARITY OF THE EUROPEAN UNION TOWARDS ILLEGAL MIGRATION CHALLENGES IN NORTH MACEDONIA

OLGA KOŠEVALISKA¹
ANA NIKODINOVSKA KRSTEVSKA²
ELENA MAKSIMOVA³

1. The concept of solidarity in Asylum policy of EU

In the European Union (EU), an area of open borders and freedom of movement, countries share the same fundamental values and need to have a joint approach to guarantee high standards of protection for migrants. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse. This was one of the reasons for the establishing of the EU's Common European Asylum System (CEAS) that aimed to ensure that the rights of migrants under international law are protected in its member states. The migration crisis that caught the EU has put to the test not only the respecting of the laws from the member states but also has disturbed the respecting of the basic principles that are in the foundation of the EU, such as the principle of solidarity.

Migration had become a problem of the highest priority in the EU. Šabic, has made a good parallel of the goodwill for accepting migrants: *the will or ability to receive migrants had been steeply declining, almost on the same scale as the migration pressure was increasing.*⁴

European nations had come to fear migration. In the first decade of 2000, migration was seen as a normal phenomenon in light of globalization, world without borders concept, demands for economic develop-

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⁴ Šelo Šabic (2017), p.4.

ment, etc. However, during the last decade migration became gradually perceived as a threat to security, identity and the economic wellbeing of Europe. The anti-immigration agenda has become a dividing ideological line in political battles across nations.⁵

As stated in 2015 Working document of the European Parliament⁶ solidarity at EU level can be divided into two categories:

- *internal solidarity, which refers to the solidarity shown between Member States, between the European Union as a whole and its Member States, or between EU citizens and third-country nationals present in the EU, and*
- *external solidarity, which refers to solidarity by the EU towards people in third countries who are fleeing war, persecution, hunger, or violent conflicts in their country of origin, and solidarity with third countries that currently receive huge numbers of refugees fleeing war, persecution, and hunger in neighbouring countries.*⁷

Solidarity is one of the core values of the European Union and therefore it is represented as one of foundations of the Union.⁸

In article 67 of TFEU is implied that

“It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals”

Also, Article 80 of TFEU applies to all matters falling within the policy area of border checks, asylum, and immigration. For geographical and geopolitical reasons, migration does not affect European states in the same way, either as destinations or as transit countries.⁹ Migrants do not land in the middle of the EU territory, they first enter from the Member

⁵ Ibid.

⁶ Online document: Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration) available at https://www.europarl.europa.eu/doceo/document/LIBE-DT-564907_EN.pdf last accessed 10.07.2021.

⁷ Radjenovic, (2020), p.3,

⁸ Marin, Penasa, and Romeo, (2020) p.2; Biondi, Dagilytė, Küçük, (Eds) (2018); Moreno Lax, V. (2017) p. 744.

⁹ Marin, Penasa, and Romeo, (2020) p.3.

states or third countries (gatekeepers) that are on the external borders of the EU and therefore these Member States or third countries, are affected more severe than the others. That is why the solidarity approach must be assured and respected. States with high numbers of arrivals seek burden sharing for obvious financial, administrative, social, and political reasons and that is why the real sharing of responsibilities is the actual expression of this solidarity.¹⁰ One may ask, what is responsibility sharing actually? The main actors involved in this “sharing” practices, such as states, humanitarian organizations, and governmental agencies use different terms with similar concepts for expressing the means of Art.80 of the TFEU, such as ‘sincere cooperation’, ‘mutual trust’, ‘balance of effort’, ‘burden sharing’,¹¹ and ‘responsibility sharing’.¹² Thus, is in favor of the conceptual uncertainty that we already have additional to *the variety of legal regimes (international refugee law, international human rights law, European Union law) involved in the area of asylum, along with solidarity’s strong political, social and moral connotations that add a further level of complexity.*¹³ Moreover, in the Opinion of the Advocate General Bot in the case *Slovakia and Hungary v. Council*, he stressed that “*solidarity is among the cardinal values of the Union and is even among the foundations of the Union*”. According to Bot, “*solidarity is both a pillar and at the same time a guiding principle of the European Union’s policies on border checks, asylum and immigration*”.¹⁴

¹⁰ Vanheule, et al. (2011) p. 122.

¹¹ On burden-sharing see e.g., Noll, (2000); Noll, and Vested-Hansen, in Guild, and Harlow (eds), (2001) 195–224; Thielemann, (2003) p. 253.

¹² Alberto Miglio states that ‘it is interesting, however, to compare the relationship between responsibility and solidarity in this context and within the EMU. Whereas in the latter context solidarity operates as a countervailing principle to the dominant logic of individual responsibility of each Member State, Article 80 TFEU does not oppose responsibility and solidarity. On the contrary, since it indicates how responsibilities shall be allocated, the concept of fair sharing should be viewed as an element of solidarity or, to be more precise, as a criterion that helps define the content of the principle of solidarity in this particular policy area.’ See Miglio, (2018). in Kuzelewska, Weatherburn, Kloza (Eds.), pp. 23-50), and also see Gray, (2013) p. 175, 177, 182.

¹³ Karageorgiou, (2016), p.2.

¹⁴ Opinion of Advocate General Bot, 26 July 2017, Cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council of the European Union*, ECLI:EU:C:2017:618, *Slovak Republic and Hungary v. Council of the European Union*, Judgment of the

The fact that solidarity is referred to as a “principle” indicates that its nature differs from strict binary rules that prescribe or prohibit certain behavior (“do this – don’t do that”).¹⁵ Instead, solidarity and fair sharing as enshrined in Article 80 TFEU is to be realized to the highest degree that is actually and legally possible, depending on the circumstances at hand.¹⁶ Circumstances differ between Member states, we can acknowledge that fact, but what most differs between Member states is their real willingness to accept asylum seekers openhanded. Over the past decade, financial incentives of solidarity have been one of the most controversial issues of EU migration and asylum policies.¹⁷ There are contradictions in the EU regarding the policy that the Member States must follow. While countries of Western and Northern Europe are willing to accept migrants, those from Central and Eastern Europe are trying to keep them out. Extremely interesting is the position of the Visegrád Group Countries (The Czech Republic, Poland, Hungary, and Slovakia) on migrant issues differs from that of the leading countries in the EU.¹⁸ We also question the real solidarity between Member States in the light of the decisions for the relocation of refugees in the EU.¹⁹

And while the EU is struggling to respect the principle of solidarity in the inside, we question the real solidarity of the EU towards non-EU states that are the “gate-keepers” of the external borders of the EU. EU law fails to provide a definition and a clear indication of what solidarity entails, especially as for its external reach.²⁰

One of the purposes of this article is to explore the circumstances in the case of the solidarity of the EU towards North Macedonia

Court (Grand Chamber) of 6 September 2017, EU:C:2017:631 see <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf> last retrieved 30.07.2021.

¹⁵ For solidarity as principle see Ovádek, 2017.

¹⁶ Alexy, (2000) p, 294.

¹⁷ Online document Goldner Lang, Financial Implications of the New Pact on Migration and Asylum: Will the Next MFF Cover the Costs? in EU agencies, EU funds for migration and border management, New Pact on Migration and Asylum, Solidarity available at <https://eumigrationlawblog.eu/financial-implications-of-the-new-pact-on-migration-and-asylum-will-the-next-mff-cover-the-costs/> last retrieved at 20.07.2021.

¹⁸ See Ivanova, 2016.

¹⁹ Šelo Šabic (2017), p.1-11.

²⁰ Moreno-Lax, 2017.

in the coping with the ‘everlasting’ migrant crisis. We’ll try to give a short insight to the migrant crisis in North Macedonia to show the “tailor-made” solidarity of the EU towards North Macedonia.

2. Migrants at the gates - The beginning of the migrant crisis in North Macedonia

North Macedonia since the disintegration of Yugoslavia has had specific relationship with the European Union and its Member States, characterized with many difficulties throughout the European Integration process,²¹ and during the years it has witness many migrations crisis on its soil. Starting from the crisis in Albania, when in 1991 the country received around 1,200 persons from the border regions with Albania, who sought protection and received protection by North Macedonia.²² In a following episode, in 1992, North Macedonia offered protection to 35,000 people fleeing from the war in Bosnia and Herzegovina.²³ In aftermath of the Kosovo crisis in 1999, North Macedonia was as protagonist in the Kosovo refugee crisis, hosting around 360,000 people Kosovars on national territory.²⁴ Furthermore, during the internal conflict in 2001, the country produced around 90,000 internally displaced persons.

Lastly, in 2015 North Macedonia was stroke by the unprecedented influx of migrants and refugees which transited through the country in order to reach their destinations in Northern Europe.²⁵ The migration/

²¹ After resolving the “name dispute” with Greece and the signing of the Prespa Agreement, a new challenge form another neighbor has aroused – the “language dispute” with Bulgaria. For more see Online document Folker Pabst, Locked-up in the waiting room for EU, last retrieved 25.07.2021.

²² See Online resource New Protests in Albania; Crisis Mounts, by David Binder, Special To the New York Times, (02/1991), Section A, Page 3, New York Times available at <https://www.nytimes.com/1991/02/22/world/new-protests-in-albania-crisis-mounts.html> last accessed at 10.07.2021.

²³ Kosevaliska, Nikodinovska Krstevska (2020) p.110-111.

²⁴ Online article Markovski, Evropskata begalska kriza — predizvik od globalni razmeri [European refugee crisis — a challenge with global proportion], available at <http://respublica.edu.mk/blog/2016-02-25-10-02-17> last accessed 11.07.2021.

²⁵ Legis, 2015.

refugee crisis that was happening alongside in Europe aggravated the already fragile political relations in the country and it highly affected upon the socio-economic and institutional stability of the State. Not only did North Macedonia found itself to be in the middle of the Balkan migration route, as a transit country, but at the same time it became a gate keeper of “Fortress Europe” with a clear role to defend and protect the external borders of the Union from an unwanted migrant influx.

In fact, until September 2016 more than 800,000 transited through North Macedonia (which is half of the country’s population²⁶). Even though their final destination was not North Macedonia, as it is acknowledged from the low number of asylum seekers or temporary protection requests in the country,²⁷ however the massive migration caused severe consequences upon the political, economic, institutional system of the country and also other countries from the Balkan route.²⁸ The short period in which the big migration wave was registered did not leave time for national authorities to prepare and respond with adequate measures to manage the influx of migrants and refugees. Actually, legal legislation was way behind, registration of migrants was inadequate or not made at all, improper measures were taken towards migrants that contained administrative limitations which were often subject to variation and changes and sometimes accompanied by unproportioned repression.²⁹ North Macedonia had even made it on the headlines of world newspapers when it detained 1003 refugees and migrants at Gazi Baba Reception Center from 1 January until 15 June 2015.³⁰

The legislation concerning asylum policy was amended at the very same time when the number of migrants reached its very peak, and the given solutions at that time was not the most appropriate one but bearing in mind that the government should had come to a solution faster

²⁶ The total population of the country according to the last census from 2001 amounts in 2.022.547 citizens (State Statistical Office 2019).

²⁷ Amet, 2018, p.140.

²⁸ Weber, 2016.

²⁹ Koshevaliska, Nikodinovska Krstevska, 2020, p.113.

³⁰ See Veigel, et all. (2016) p. 103-119.

than ever, it solved the problem temporary by introducing the 72 hours rule to transit throughout the territory of North Macedonia.³¹

North Macedonia has steadily strengthened its asylum system over the years. The legislative framework has been improvement and is today largely in line with international standards. But significant weaknesses persist in the asylum system in practice. The country has not been able to ensure that asylum-seekers have access to a fair and efficient asylum procedure, and this is reflected, amongst other, by the fact that North Macedonia has not yet put in place protection sensitive screening mechanisms at the border to identify those who may be in need of protection and to refer the individuals concerned to appropriate procedures.

3. Modus operandi – how is North Macedonia managing the influx of migrants

Even though North Macedonia is not a frontline country to the Schengen zone, still its geographical position being on the crossroad on the Balkan, puts it in a very controversial situation in the migration crisis context. To cope with the overwhelming number of illegal migrant's form 2015, the country declared the state of emergency on both the south and north border, which is still in force. The state of emergency triggered several consequences: firstly, the Crisis Management Center was activated and was given the coordinative role in the refugee crisis, i.e., it participated in the formation and completely took over the coordination procedure of the transit camps. Secondly, the Army of North Macedonia was engaged along the borders as necessary for the management of the illegal migration and the other safety risks

³¹ See Amendments to the Law on Asylum and Temporary Protection, published in the Official Gazette of the Republic of Macedonia No. 49/2003, 66/2007, 142/2008, 146/2009, 166/2012, 101/2015, 152/2015, 55/2016 and 71/2016. After these changes in the legislation, it was more than obvious that a new Law for asylum and for foreigners should see the daylight. In the first quarter of 2018 the new Law for international and temporary protections came into force (Law for international and temporary protection, Official Gazette No.64 from 11.04.2018), replacing the law for asylum, and in June a new Law for foreigners replaced the old one.

arising from the process. And lastly foreign police forces from several EU Member States (mostly Visegrád countries) were deployed on the Macedonian-Greek border and still are patrolling alongside the border in mixed teams with the Macedonian police.³²

The posting of border officers from Czech Republic, Poland, Slovakia, Slovenia, Austria, Hungary, and Croatia, together with Serbia as a non-EU country in 2016, later greatly contributed to the halt in migratory flow through the Western Balkan corridor.³³ Currently, based on this *modus operandi*, there is still a contingent deployed on the Greek-Macedonian and two contingents at the Serbian-Bulgarian border and Serbian-Macedonian border. Since then, the barriers and additional security measures and procedures have not, however, managed to prevent the irregular flows from reoccurring.

Enhanced cooperation with the Western Balkan partners led to a decrease in the migratory flows by late 2016, but further work is needed today, as we are witnessing an increase in the migratory flows from 2019 until now.³⁴

4. How does solidarity really look like?

The state of emergency triggered several consequences that put a heavy financial burden on the already empty state budget. The human and financial resources that the country allocates for border management are significant and having in mind that irregular migration continues to flow, it is assumed that the financial burden imposed upon the country exceeds its capacities. Acting as a so called ‘gate keeper to the Fortress Europe’ North Macedonia alarmed the EU and still makes efforts to raise the awareness

³² See Nikodinovska Krstevska, Kosevaliska, (2021).

³³ The cooperation furthermore includes mutual training, exchange of information and coordination. At the beginning of this cooperation a total of 166 foreign police and in 2019 this number was 1550. Data from free access to public information No. 16.12-386/1 from 11.03.2020 – Sector for Public relations of the Ministry for internal affairs.

³⁴ See Online document Publication: State of art of the asylum in North Macedonia in 2018-2019 available at <https://myla.org.mk/wp-content/uploads/2020/11/Sostojba-so-azil-RSM-2018-2019.pdf> also see field reports of the Macedonian Young Lawyer Association, available at <https://myla.org.mk/wp-content/uploads/2021/01/Q4-Field-Report-October-November-December-2020.pdf> last accessed on 28.07.2021.

regarding its capability-expectations gap, outlining that the crisis is exceeding its national capacities – in financial and human resources, and that it urgently needs material and logistical support to effectively deal with irregular migration as well as humanitarian assistance to refugees and migrants. Therefore, it is necessary to reflect upon EU’s effective solidarity towards the country in the migration context, starting from financial help, technical and logistic assistance, and of course well-organized and efficient police cooperation as well as access to relevant data basis, which are deemed crucial towards coping with challenges that arise from illegal migration and consequences upon human rights issues.

In terms of financial help, the Minister of internal affairs, Mr. Spasovski stated on more occasions³⁵ that the legal amendments and changes in the relevant laws in asylum policy led to additional engagement of human resources of employees from the Ministry of internal affairs, the Ministry of labor and social policy, Ministry of health, the Army, and other relevant institutions. These additional human and material-technical resources of all competent institutions are additional burden to the budget and North Macedonia is not capable to bear this financial burden. Financial help was given on several occasions’ through the Instrument of Pre-Accession, I, II and now III,³⁶ also from IOM,³⁷ UN-

³⁵ See Online Statement of Mr. Olivier Spasovski Minister of internal affairs available at <https://mvr.gov.mk/vest/1109>, last accessed on 30.07.2021. Ministry of the Interior, Minister Spasovski at the Conference “Irregular Migration as One of the Challenges of Macedonia Today” (21 September 2016) <https://mvr.gov.mk/vest/2607> accessed 30.07.2021. Also see the statement of the Chief of the Bureau for Public Security, Mr. Saso Tasevski who stated that financial help and international cooperation are more than necessary for coping with the migrant crisis, available at <https://nkeu.mk/2019/12/21/second-cycle-first-session-of-working-group-4-chapter-24-waiting-on-frontex-the-border-security-through-the-prism-of-the-mixed-migration-flows/> last retrieved on 25.07.2021.

³⁶ For the Instruments of Pre-Accession (IPA I and II) visit the relevant links on https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/north-macedonia_en and also European Commission: Cross Border Cooperation, Program 2021-2027, Republic of North Macedonia and Albania, available at https://ipacbc-mk-al.eu/assets/files/IPA%20III%20CBC%20MK-AL%20First%20draft%20final_07.12.2020.pdf last accessed on 25.07.2021.

³⁷ Online document: Assistance to North Macedonia in addressing the 2015 - 2019 refugee crisis, available at <https://coebank.org/en/donors-and-trust-funds/beneficiaries-donor-funds/migrants-and-refugees-north-macedonia/> last retrieved on 25.07.2021.

HCR and donations from several Member States.³⁸ In addition, there were several generous donations from the Check Republic, Germany, and EC in equipment basically vehicles, offroad vehicles, thermal cameras and other equipment that helped the Macedonian police to patrol the southern border with Greece. However, this equipment is still not sufficient, as the country still copes with a high number of illegal migrants trying to enter its borders with Greece and Serbia.

Strong police cooperation between certain EU Member countries in particular the Visegrad countries (Poland, Czech Republic, Slovakia and Hungary) with North Macedonia and other transit countries has been found essential for preventing and ending migrant smuggling as well as other interlinked types of crime, which exploit migratory flows. Therefore, on these grounds the country had established strong and fruitful cooperation with the other countries and with FRONTEX, whereby it has deployed ‘guest police officers’ on the southern border with Greece, who execute mixed patrols with the Macedonian police performing duties for prevention of illegal migration and fight against smuggling of migrants. Other than that the country has established cooperation with FRONTEX, IOM and UNCHR.

The level of regional cooperation and progress achieved so far in dealing with migratory flows and organized crime are in no way to be underestimated, but still when looking at the statistics – it comes out that this is not enough. From interviews, reports, and relevant research,³⁹ border police officers estimate that their capacities to deal with irregular migrations on the borders, without the assistance of foreign police officers, would be reduced 5 times lower than if they collaborated with the foreign border police officers. As a matter of fact, this type of cooperation proved to have solid results, despite the fact that the Macedonian segment of the Balkan route is the most expensive ones. Namely, the cost for smuggling from Turkey to Germany is around 5000 euros/per person. The part cut off for smuggling throughout the territory of North Macedonia is between 1200-1500 euros (almost 30% of the total sum).⁴⁰ Hence, the cooperation has been performed based

³⁸ For more see Kamberi (2020).

³⁹ Nikodinovska Krstevska, Kosevaliska, (2021).

⁴⁰ See Nikodinovska Krstevska, Kosevaliska, (2021).

on the already existing know-how and the available regional legal bases but needs further development.

In July 2018, European Commissioner Dimitris Avramopoulos and Macedonian Interior Minister Oliver Spasovski agreed on a status agreement that enables teams from the European Border and Coast Guard Agency to be deployed in North Macedonia. The Agreement allows the Agency to conduct joint operations in the country in case of urgent or sudden migratory challenges. The draft version of the Agreement foresees that a Member State team from the Agency would perform tasks and execute the Agency mandate on the territory of North Macedonia under instructions from and in the presence of national border guards or other relevant staff.⁴¹ There are new trends, new routes, new modus operandi and in this manner, this seeks for new ways to answer.

⁴¹ The new agreements will allow Frontex and EU border officials to carry out all executive powers necessary for border control in a third country. This will no longer be a competence reserved for border authorities of the host third country. These agreements are part of EU's contingency plan to avoid a duplication of the events of late 2015 and early 2016. It will provide Frontex border guards with executive powers to conduct different types of operations in this south-eastern European region. In essence, status agreements will allow Frontex to duplicate what it is doing inside the EU also in the Western Balkan region. A status agreement defines the procedures, scope, civil and criminal liability, tasks, and powers of the actions to be taken, which can be a joint operation, a rapid border intervention or a return operation. The Commission developed a model status agreement in November 2016. With the adoption of the Decision on 8 March 2017 to agree on status agreements, the Council smooth the way for the Commission to open negotiations with Serbia and North Macedonia. It is not a coincidence that these are the two countries with which an agreement like this was aimed to be signed first. Belgrade and Skopje cooperated closely with member states when the latter embarked on the objective of reducing the number of migrants on the so-called 'Balkan route'. These countries already have a working arrangement with the Agency. In October of the same year, the Commission also launched talks with Albania, Bosnia and Herzegovina and Montenegro. However, on 1 May 2019, Albania became the first country from the region with a fully operational status agreement. 20 days later, the Agency launched its first fully fledged joint operation outside the EU to support Albania in controlling its external borders and fighting cross-border crime. Three Status agreements have already been initialized with North Macedonia (July IDSCS Policy Brief No.6/2019 - July 2019), Serbia (September 2018), Bosnia and Herzegovina (January 2019) and Montenegro (February 2019). They are currently pending finalization. The status agreement with North Macedonia is postponed until resolving the language dispute with Bulgaria.

5. Conclusion

During these past years since migration become an issue in EU asylum and migrations policy, North Macedonia has witness in its asylum and migration policy, the intersection of two different policy approaches. One – that of the EU through the external solidaristic approach, and the other one from the EU member states, exemplifying in a pure security approach to migration and asylum. Concerning the first, North Macedonia has been engaged in the process of EU integration, and within it, the country has made serious efforts to harmonize its legal system with the EU *acquis* in asylum and migration. The whole process in terms of legislative changes and amendments, strengthening capacities in border management, trainings, etc. was and still is generally put through with the financial help of the European Union, meaning the EU IPA fund. Until now these approaches have been characterized as humanitarian approaches to migration and asylum, since they were addressed to solving the pressure of the migrant influx in North Macedonia, not only towards the country but above all towards migrants and refugees. On the other hand, the bilateral police cooperation between EU member states and North has strengthened the security dimension of asylum and migration, focusing on prevention of illegal migration and fight against smuggling of migrants, and proved to be a very successful policy tool, giving visible results concerning prevention of irregular migration, but at the same time raising concerns about the humanitarian dimension of these practices. These two approaches have put North Macedonia in the middle, being not only on the crossroads on the Balkan route but also on the crossroad of the different policy approaches to solidarity that depict a quite conflicting image of the European Union. Therefore, the tailor-made solidarity approach to migration and asylum depends on who is the main actor in EU migration and asylum policy, how does migration influx impact upon EU Member states and on the coherency of internal solidarity within the EU. To conclude, North Macedonia is not in condition to create its own policy regarding asylum and migration, having in mind that the country is in the process of European Integration, so it is dependent upon EU's legislative rules and of course EU's economic benefits using the carrot and sticks instrument to enlargement policy. While, on the other hand the

country has established solid border police cooperation with EU Member states that give the country a crucial role in the border management of the external borders of the Union. So basically, these two different approaches collide into a tailor – made approach to solidarity in North Macedonia in the field of asylum and migration while looking at the challenges of illegal migration. Therefore, it is still yet to see which of these approaches will prevail in the future.

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