



ARTICLES

EUROPEAN EXTERNAL MIGRATION FUNDS AND PUBLIC PROCUREMENT LAW

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ABSTRACT: Since 2014, the European Union has established three funds (for Africa, Syria, and refugees in Turkey) to implement its external migration policy. In this *Article*, we analyse whether these funds and their implementation are compatible with EU public procurement law. This leads to a mixed picture. The wholesale exemption of expenditure under the EU Trust Fund for Africa from public procurement is incompatible with EU law; the exemption is not motivated, and it is implausible that there is a crisis in all 26 African countries where the Trust Fund operates thorough the duration of the Trust Fund. However, some more limited exceptions may apply, allowing for exempting particular projects from public procurement. Whether or not public procurement has taken place is often not transparent. It is remarkable that the notion of emergency is used in a cursory manner. It is equally remarkable that European public procurement law is not well integrated in external migration policy.

KEYWORDS: public procurement law – migration law – EU Trust Fund for Africa – facility for refugees in Turkey – Trust Fund in response to the Syrian crisis – external migration policy.

I. INTRODUCTION

In 2014-2015, the European Union adopted three financial measures in order to cooperate with neighbouring countries in the field of migration policy. Under the three instruments, not only migration policy projects were funded, but also humanitarian and security related projects. By July 2019, the Trust Fund in response to the Syrian crisis,

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also called the Madad Fund, was worth a total of 1.8 billion euros;¹ the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa was worth 4.6 billion euros;² and the Refugee Facility for Turkey³ (later changed to Facility for Refugees in Turkey)⁴ 5.6 billion euros.⁵

For the projects implemented through these financial measures, there is often no open competition. Instead, potential implementing partners bring their projects to the attention of EU delegations in the country concerned and the European Commission.⁶ These carry out a first scrutiny of potential projects. Subsequently, an informal expert group carries out an examination of the project proposals. In the background, there is an on-going negotiation between the Commission, the EU Member States, the third

¹ Commission Decision C(2014) 9615 of 10 December 2014 on the establishment of a European Union Regional Trust Fund in response to the Syrian crisis, "the Madad Fund". For financial details compare Commission Implementing Decision C(2014) 9614 final of 10 December 2014 on the constitutive contribution to the European Union Regional Trust Fund in response to the Syrian crisis, "the Madad Fund", to be financed from the general budget of the European Union; Commission Implementing Decision C(2015) 7695 of 13 November 2015 adopting the special measure for the 2015 DCI contribution to the European Union Regional Trust Fund in response to the Syrian crisis to be financed from the general budget of the European Union; Commission Implementing Decision C(2016) 7898 of 8 December 2016 on the 1st special measure for the 2016 ENI contribution to the European Union Regional Trust Fund in response to the Syrian crisis, the "Madad Fund", to be financed from the general budget of the Union; Implementing Decision C(2017) 4290 final of 26 June 2017 on the first special measure for the 2017 ENI contribution to the European Union Regional Trust Fund in response to the Syrian crisis, the 'Madad Fund', to be financed from the general budget of the Union; Implementing Decision C(2017) 8187 final of 8 December 2017 on the second special measure for the 2017 ENI contribution to the European Union Regional Trust Fund in response to the Syrian crisis, the 'Madad Fund', to be financed from the general budget of the Union; Commission Implementing Decision C(2018) 7776 of 27 November 2018 on the financing of the special measure for the 2018 DCI contribution to the European Union Regional Trust Fund in response to the Syrian crisis. Commission, Financial state of play, July 2019.

² Commission Decision C(2015)7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa. Financial state of play, July 2019.

³ Commission Decision C(2015) 9500 of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey.

⁴ Commission Decision 2016/C 60/03 of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015.

⁵ Art. 4 of Decision C(2015) 9500, cit. Financial state of play, July 2019.

⁶ Annex I, para. 4, of the Constitutive Agreement of the Madad Fund (*infra*, Section III.2) provides that the Commission may call upon expertise from the field to identify actions. In an action fiche from the Madad Fund, it is explicitly mentioned that the proposed action builds on several concept notes submitted by different networks and partnerships. See the Action Document for EU Trust Fund to be used for the decisions of the Operational Board, 1 April 2016, ec.europa.eu, p. 11, where the term "applicant" is used for the beneficiary of the project. The project supports the Kenyan National Counter Terrorism Centre, which will be granted 5 million euros.

country involved and sometimes the potential implementing partner.⁷ In the words of the European Court of Auditors, the selection of projects is “not fully consistent and clear”.⁸ Others have called it “opaque”.⁹

In light of these concerns about the transparency of the way in which large amounts of public funds are spent, we will analyse how expenditure under the migration funds relates to European public procurement law. In order to do so, in a first paragraph we give a summary outline of European Union public procurement law (Section II). Subsequently, we will describe the three external migration funds, with particular attention for their financial management (Section III). In order to get an idea of the actual implementation, we then describe five individual projects, again with particular attention for their financial management (Section IV). In Section V, we draw some conclusions on the relation between public expenditure under the external migration funds and EU public procurement law.

II. EUROPEAN UNION PUBLIC PROCUREMENT LAW

The main features of European public procurement law, as applicable to the Member States of the European Union, are laid down in three directives concerning public procurement in general,¹⁰ on the award of concession contracts¹¹ and on procurement by entities operating in the water, energy, transport and postal services sectors.¹² For the current subject matter, we can limit ourselves to Directive 2014/24.

Public procurement law aims to bring the award of public contracts by or on behalf of the Member States in consonance with the principles of the TFEU, in particular with the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving thereof, such as equal treatment, non-

⁷ S. CARRERA, L. DEN HERTOOG, J. NÚÑEZ FERRER, R. MUSMECI, M. PILATI, L. VOSYLIUT, *Oversight and Management of the EU Trust Funds. Democratic Accountability Challenges and Promising Practices*, Brussels: European Parliament, February 2018, p. 28 *et seq.*

⁸ European Court of Auditors, *European Union Trust Fund for Africa: flexible but lacking focus*, 2018, pp. 17-25. The European Court of Auditors also issued a report on the Facility for Refugees in Turkey, which does not address procurement issues: European Court of Auditors, *The Facility for Refugees in Turkey: helpful support, but improvements needed to deliver more value for money*, Special Report no. 27/2018, eca.europa.eu.

⁹ S. CARRERA, L. DEN HERTOOG, J. NÚÑEZ FERRER, R. MUSMECI, M. PILATI, L. VOSYLIUT, *Oversight and Management of the EU Trust Funds*, *cit.*, pp. 29 and 75.

¹⁰ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

¹¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

¹² Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

discrimination, mutual recognition, proportionality and transparency.¹³ One may summarise the Directive's general aim as to open up markets for public contracts, stimulating competition and as a consequence the proper spending of public money.

The Directive is and, in light of Art. 288 TFEU, only can be addressed to the Member States. Regulation 966/2012 provides that public contracts awarded by the institutions of the European Union shall be subject to public procurement and sets down the rules for the procedures.¹⁴ The institutions of the Union are not directly bound by the Directives. However, since the Regulation follows from the same fundamental principles of the TFEU as the Directives, the institutions practically apply the provisions of the Regulation along the lines of the Directive. It comes as no surprise that the General Court applies these principles in the context of the Regulation in the same way as in the context of the Directive.¹⁵ So even though the institutions do have some liberty to diverge from the provisions of the Directive, and of course the Union legislator has the opportunity to deviate from the application of the directives in its own regulations, public procurement law applicable to the institutions of the Union has to be very much in consonance with the procurement law applicable to the Member States. This is not just a technicality; the Directive and the Regulation are implementations of the same fundamental principles.

In general, this means that the institutions of the EU and their subsidiaries as well as the Member States should apply the principles and procedures of the Directive. Public contracts should be awarded through pre-announced, transparent, open, non-discriminatory and objective procedures, which provide for a tender on the broadest possible basis, unless an exception to this principle applies. The tender (regardless whether it is issued by Member States or by EU institutions) must be published in the Official Journal of the European Union by the contracting authorities. The full procurement procedure (especially publication in the Official Journal) only has to be fulfilled above certain financial thresholds; Art. 118 of Regulation 966/2012 refers to Directive 2004/18, which has been replaced by Directive 2014/24. The thresholds vary from over 5 million euros for public works contracts to between 134.000 and 750.000 euros for public supply and services contracts.¹⁶

Arts 101 and 102 of Regulation 966/2012 provide that public contracts shall be subject to public procurement. A public contract is defined as a written contract for pecuniary interest between economic operators and contracting authorities, in order to obtain, for a price paid (in part) from the EU budget, the supply of movable or immovable assets, the execution of works or the provision of services. This includes building con-

¹³ Recital 1 of Directive 2014/24/EU, cit.

¹⁴ Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union.

¹⁵ General Court, judgment of 28 January 2009, case T-125/06, *Centro Studi Manieri v. Council*, paras 41, 81 and 86.

¹⁶ Art. 4 of Regulation 966/2012, cit.

tracts, supply contracts, works contracts, and service contracts.¹⁷ Art. 104 of Regulation 966/2012 and Arts 27-30 of Directive 2014/24 prescribe the same procedures: the open procedure in which all candidates may apply for the contract under the conditions prescribed in the procurement documents; the restricted procedure with pre-selection of candidates, the contest, the negotiated procedure, and the competitive dialogue. The choice which procedure to use is not entirely up to the contracting authorities. The open and restricted procedures are favoured over the more limited procedures.

The Directive contains several specific exceptions to the duty to use the public procurement procedures. The most important are defence contracts¹⁸ and contracts in circumstance of emergency. Defence contracts are excluded insofar as they fall within the scope of the *lex specialis* of Directive 2009/81,¹⁹ or when public procurement would require disclosure of confidential information or other essential security interests. The Regulation does not contain a defence exception, presumably because at this moment the EU does not have a defence budget.

For emergency situations, Art. 32, para. 2, let. c), of Directive 2014/24 contains an exception by allowing the use of the negotiated procedure without publication, if this is necessary for reasons of extreme urgency brought about by unforeseeable events and the normal procedures cannot be applied. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority. Regulation 966/2012 does not explicitly contain this exception, but at Art. 190, para. 4, exempts civil protection operations and humanitarian operations in the field of external action.²⁰

Another exception to the obligation to apply the procedures of the Directive is in case the contracting authority is allowed to award a public service contract to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU (Art. 11 of Directive 2014/24). Those public contracts are only allowed if and when the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments, and more than 80 per cent of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority.²¹ No private participation in the controlled legal person is allowed. This exception had not been

¹⁷ *Ibid.*, Art. 101.

¹⁸ Arts 15-17 of Directive 2014/24, cit.

¹⁹ Directive 2009/81 of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

²⁰ The financing of external action is further regulated by Regulation 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action.

²¹ Art. 12 of Directive 2014/24, cit.

adopted in the Regulation, but since the historical development of the exception derives from case-law from the Court of Justice, to us it seems safe to assume that it may be applied by the EU institutions and their subsidiaries as well.²²

Another exception is embedded in Art. 32, para. 2, let. b), of Directive 2014/24. When the works, supplies or services can be supplied only by a particular economic operator for a restricted number of reasons, among others when competition is absent for technical reasons, it is not required to follow a public procurement procedure. This exception cannot be found in the Regulation, but it is reasonable to assume it is applied in the same vein for procedures within the scope of the Regulation.

In case of indirect management (*infra*, Section III.1), procurement procedures shall be laid down in the financing agreements between the Commission and the implementing entity.²³ The European Commission can adopt delegated acts on procurement in the field of external action.²⁴ The contents of these delegated acts have to conform to the basic principles of the TFEU and the purpose of the Regulation, which in conjunction with the Directive has to be interpreted functionally.²⁵ Regulation 1268/2012²⁶ contains a chapter on procurement, which contains rules that are equivalent to those in Regulation 966/2012 (Arts 121-172), and a chapter on grants (Arts 173-208). Regulation 1268/2012 specifies that, in case of indirect management, procurement rules equivalent to those applicable to the Commission have to apply.²⁷ Art. 154 of Regulation 1268/2012 reduces the applicable time limits to 10 or 15 calendar days for parties to respond to an invitation for tenders, in cases of “duly substantiated urgency”. On grants, the regulation specifies that they may be awarded without a call for proposals for the

²² *Centro Studi Manieri v. Council*, cit., para. 41.

²³ Art. 190, para. 3, in conjunction with Art. 189 of Regulation 966/2012, cit.

²⁴ *Ibid.*, Art. 190, para. 1.

²⁵ Court of Justice, judgment of 20 September 1988, case C-31/87, *Beentjes*.

²⁶ Commission Delegated Regulation 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union. Commission Delegated Regulation 1268/2012 has been replaced by Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012), see Commission Implementing Decision (EU) 2018/1614 of 25 October 2018 laying down specifications for the vehicle registers referred to in Article 47 of Directive (EU) 2016/797 of the European Parliament and of the Council and amending and repealing Commission Decision 2007/756/EC. This has not affected the content of the provisions relevant for this *Article*. As Commission Implementing Regulation 1268/2012 was in force at the time of the adoption of the measures under discussion here, we refer to this legal instrument.

²⁷ Art. 60 of Regulation 966/2012, cit., in conjunction with Art. 38, para. 1, of Regulation 1268/2012, cit.; Art. 40, let. f), of Regulation 1268/2012, cit. See in particular Arts 36 and 38 of Regulation 1268/2012, cit.

purposes of humanitarian aid and civil protection operations or for crisis management aid;²⁸ as well as in “exceptional and duly substantiated emergencies”.

From this short overview, it appears that contracts subjected to procurement law, must be awarded according to fairly strict, transparent procedures in which the contracting authority has little freedom to deviate from the prescribed procedures.

III. THE THREE FUNDS

The first level at which EU public procurement law is implemented in the current context is that of the migration funds. Two of these funds are EU Trust Funds (EUTFs), which are regulated in Regulation 966/2012 (Section III.1). After that, the two Trust Funds for Syria and Africa will be addressed (Section III.2). The crisis exception in the Trust Fund for Africa will be analysed in Section III.3, after which the *sui generis* instrument of the Facility for Refugees in Turkey will be discussed (Section III.4).²⁹

III.1. TRUST FUNDS

Art. 187, para. 1, of Regulation 966/2012 provides that the Commission may create trust funds under an agreement with other donors, for emergency, post-emergency or thematic actions. The Commission can adopt delegated acts on the management, reporting and governance of trust funds.³⁰ Regulation 2015/323 is the financial regulation applicable to the 11th European Development Fund (2014-2020).³¹ Art. 42 of Regulation 2015/323, on Union trust funds, stipulates that Art. 187 of Regulation 966/2012 shall apply. Trust funds shall be implemented directly by the Commission³² *i.e.* by its departments, including through delegation to Union delegations,³³ or to executive agencies.³⁴ Emergency or post-emergency trust funds may also be managed indirectly³⁵ by: third countries or the bodies they have designated;³⁶ international organisations and

²⁸ For the definition of crisis, see Art. 190, para. 1, let. a) and b), and para. 2, of Regulation 1268/2012, cit.

²⁹ See for a related discussion on the European Development Fund, V. DIMIER, *Eurafrica and Its Business: the European Development Fund Between the Member States, the European Commission and European Firms*, in *Journal of European Integration History*, 2017, p. 187 *et seq.*

³⁰ Art. 187, para. 9, of Regulation 966/2012, cit.

³¹ Regulation (EU) 2015/323 of the Council of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund.

³² Art. 187, para. 2, of Regulation 966/2012, cit.

³³ Compare Art. 56, para. 2, of Regulation 966/2012, cit.

³⁴ *Ibid.*, Art. 62.

³⁵ *Ibid.*, Art. 187.

³⁶ *Ibid.*, Art. 58, para. 1, let. c), sub-let. i).

their agencies;³⁷ public law bodies;³⁸ or bodies governed by private law with a public service mission.³⁹

Indirect management has to be in conformity with the general rules of Art. 60 of Regulation 966/2012, which requires sound management, transparency and non-discrimination. Indirect management will be supervised by the Commission and Union delegations.⁴⁰ A Board of each Trust Fund is established to ensure the representation of the donors, and of the non-contributing Member States as observers, and to decide upon the use of the funds.⁴¹

III.2. THE TRUST FUNDS FOR SYRIA AND AFRICA

The Trust Funds for Syria and Africa are established through Constitutive Agreements which are very similar.⁴² The Constitutive Agreements establish the funds as an emergency trust fund in the sense of Art. 187 of Regulation 966/2012.⁴³ The funds, which shall not have legal personality, are managed by the Commission, on behalf of the donors (in practice: the EU Member States) and the European Union.⁴⁴ The Constitutive Agreements set up a Trust Fund Board (consisting of the contributing Member States, the Commission, and as observers the non-contributing Member States and, for the Madad Fund, a representative of the Syria Recovery Trust Fund)⁴⁵ which establishes and reviews the overall strategy of the Trust Fund; and an Operational Committee (with a similar composition)⁴⁶ which decides about the allocation of funds to individual actions.⁴⁷ The Commission is the manager of the funds,⁴⁸ and is responsible for implementation of actions financed under the funds, directly or indirectly through imple-

³⁷ *Ibid.*, Art. 58, para. 1, let. c), sub-let. ii).

³⁸ *Ibid.*, Art. 58, para. 1, let. c), sub-let. v).

³⁹ *Ibid.*, Art. 58, para. 1, let. c), sub-let. vi).

⁴⁰ *Ibid.*, Art. 188.

⁴¹ *Ibid.*, Art. 187, para. 4.

⁴² The Commission has concluded separate Constitutive Agreements with each Member State. The text of the Constitutive Agreement for the Trust Fund for Africa can be found at ec.europa.eu. The text of the Constitutive agreement for the Trust Fund for Syria can be found at ec.europa.eu. On the Trust Funds for Syria see A. KALICKA-MIKOŁAJCZYK, *The Madad Fund – the European Union Trust Fund in Response to the Syrian Crisis*, in *Silesian Journal of Legal Studies*, 2016, p. 121 *et seq.*

⁴³ Art. 1, para. 1, of both Constitutive Agreements, *cit.*

⁴⁴ *Ibid.*, Art. 1, para. 2.

⁴⁵ *Ibid.*, Art. 5, para. 1.

⁴⁶ *Ibid.*, Art. 6, para. 1.

⁴⁷ *Ibid.*, Art. 4, para. 1.

⁴⁸ *Ibid.*, Art. 7.

menting partners.⁴⁹ As such, the Commission has to exercise the same level of care as it exercises in managing the budgets under the Treaties.⁵⁰

Annex I to the Constitutive Agreement of the Madad Fund, para. 4.1,⁵¹ provides that actions can be implemented either directly by the European Commission through grants or procurement contracts, or delegated to host country governments, the national agencies of Member States or the agencies of other donors or international organisations.⁵² Furthermore, given the funds' objective in an emergency and post-emergency situation, flexible crisis procedures as authorised by applicable Commission rules and regulations. The Constitutive Agreements provides that implementation shall be done in accordance with the implementing modalities provided for in the applicable Commission rules and regulations.⁵³ The Constitutive Agreement of the EUTF Africa adds to this that, to prevent duplication, delegated cooperation with Member States is to be preferred, while delegated cooperation with other donors will also be considered.⁵⁴

The Commission Decision on the establishment of the EUTF Africa contains a hidden provision on procurement. Art. 3 of Decision C(2015) 7293 contains four unnumbered sentences:⁵⁵ one on internal delegation within the Commission; one on the applicable rules and procedures; one on overhead. And in between these a sentence providing that for the purpose of the implementation of the Trust Fund, the countries covered by the EUTF Africa "are considered to be in crisis in the sense of paragraph 2 of Art. 90 of the Rules of Application" for the duration of the Trust Fund. Art. 90 of the Rules of Application⁵⁶ concerns the recovery of fines or other penalties and does not refer to crisis. Most likely, the text intends to refer to Art. 190 of Regulation 1268/2012, which concerns exceptions to calls for grant proposals. Normally, grants are issued after a call for proposals.⁵⁷ Grants may be awarded without a call for proposals in case of, *i.a.*, humanitarian aid and civil protection operations or for crisis management; and in other excep-

⁴⁹ *Ibid.*, Arts 4, para. 1, and 7, para. 2, let. c). In principle, implementation contracts also fall under public procurement law. Exceptions may apply for emergencies, public right, etc. – *supra* Section II. We leave this issue aside for the moment.

⁵⁰ Art. 7, para. 4.1, of both Constitutive Agreements.

⁵¹ The Annexes form an integral part of the Constitutive Agreement pursuant to Art. 22 of the Constitutive Agreement.

⁵² Similar: Art. 2 of Commission Decision C(2014) 9615, cit.; Art. 2 of Commission Implementing Decision C(2015) 7695, cit.; Art. 2 of Commission Implementing Decision C(2016) 7898, cit.; Art. 2 of Decision C(2017) 4290, cit.; Art. 2 of Decision C(2017) 8187, cit.

⁵³ Art. 10 of both Constitutive Agreements, cit.

⁵⁴ Art. 10 of the Constitutive Agreement EUTF Africa, cit.

⁵⁵ Commission Decision C(2015) 7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa.

⁵⁶ Regulation 1268/2012, cit.

⁵⁷ *Ibid.*, Art. 189.

tional and duly substantiated emergencies.⁵⁸ Whether this general crisis exception for grants under the Trust Fund for Africa is compatible with European law will be addressed *infra*, Section III.3.

From this outline, it becomes clear that both funds are established as emergency trust funds. This has the dual effect of allowing for indirect management (for which a preference is made explicit for the EUTF Africa), while the existence of an emergency also allows for exceptions to normal public procurement law.

III.3. THE CRISIS EXCEPTION IN THE TRUST FUND FOR AFRICA

Art. 3 of Decision C(2015) 7293 declares a crisis in all countries covered by the EUTF Africa for the duration of the Trust Fund in the sense of Art. 190, para. 2, of Regulation 1268/2012. Art. 10 of the Constitutive Agreement establishing the EUTF Africa stipulates that “given the Trust Fund’s objective in a crisis and post-crisis situation, flexible procedures appropriate to the local environment will be used to ensure that the Fund is effective and responsive”.⁵⁹ Are these provisions compatible with European procurement law?

It is established case-law that exceptions to the law and main principles of the European Union must be interpreted restrictively and must comply with the principle of proportionality so as not to hinder the useful effect of European Union law. It follows that a legal measure restricting the application of European law is only allowed if and when it is necessary, as well as suitable with regard to its legitimate aim. This principle of proportionality fully applies to public procurement law. The result is that in procurement procedures contracting parties are supposed to adhere to the rules and principles of the Directives or the Regulation and refrain from demands that are not necessary for the public contract at hand. Case law also prevents Member States from adopting legislation restricting the procedures for public contracts, even though they intend to do so with a legitimate aim.⁶⁰ When regulating authorities in the Member States restrict the obligations of contracting parties or tenderers in public procurement law, this may be challenged in court and ultimately before the Court of Justice. An examination of the restriction against the principle of proportionality is then inevitable.⁶¹ This examination considers the proportionality of the restriction against the particular public contract awarded.

The application of the concept of crisis on the basis of Art. 190 of Regulation 1268/2012 has to comply with the proportionality principle. The crucial question is

⁵⁸ For the definition of crisis see *ibid.*, Art. 190, para. 1, let. a) and b), and Art. 190, para. 2.

⁵⁹ Art. 10 of the Constitutive Agreement establishing the Madad Fund contains the same provision. We accept the existence of a crisis in that context; in addition, projects funded through the Madad Fund are also covered by the humanitarian exception to public procurement. For that reason, we will not discuss the Madad Fund in this Section.

⁶⁰ Court of Justice: judgement of 3 April 2008, case C-346/06, *Rüffert*; judgement of 18 September 2014, case C-549/13, *Bundesdruckerei*.

⁶¹ Court of Justice, judgement of 17 November 2015, case C-115/14, *RegioPost*, para. 87.

whether in a third country there is a crisis which justifies non-application of procurement procedures, for example because immediate action is necessary in face of a natural disaster (an earthquake, a tsunami, a hurricane) or a conflict (for example a civil war). The term crisis is defined in Art. 190, para. 2, as follows:

“Crisis situations in third countries shall be understood as situations of immediate or imminent danger threatening to escalate into armed conflict or to destabilise the country. Crisis situations shall also be understood as situations caused by natural disasters, manmade crisis such as wars and other conflicts or extraordinary circumstances having comparable effects related inter alia to climate change, environmental degradation, privation of access to energy and natural resources or extreme poverty”.

The term crisis is thus defined as a situation which does not necessarily cover an entire country (“crisis situations *in* third countries”).

Art. 3 of Decision C(2015) 7293 fails to substantiate why there would be a crisis situation throughout the 26 countries covered by the Trust Fund. This alone is already sufficient reason to doubt the compatibility of this provision with Art. 90 of Regulation 1268/2012. It is conceivable that it could be substantiated that there is a crisis throughout a particular country, like South Sudan. Also, the presence of a UN Force in Mali could be grounds to argue there is, or was at a particular moment, a crisis situation in the north of Mali.⁶² In such situations, it is conceivable that the European Commission could establish that the situation is so urgent that public procurement would hinder an effective response to the situation. It is however far-fetched to claim that there is a crisis which makes procurement impossible in stable countries such as Ghana, Morocco or Kenya. Below, we will address two long-term projects in Mali (stimulating the cashew sector and improving civil registries). For both projects, it is implausible that it can be argued that procurement is not possible because of the security situation, because the projects are not direct responses to immediate security issues. They do not consist of actions such as sending troops, or humanitarian aid. These projects illustrate that the fact that there may conceivably be a crisis situation *in* a country does not imply that the crisis exception of Art. 190 of Regulation 1268/2012 can be applied to *all* projects in that country.

For these reasons, the provision of Art. 3 of Decision C(2015) 7293 is incompatible with European law for two reasons. First, no grounds are adduced to substantiate that there is a crisis in all 26 African countries for the entire duration of the Trust Fund. Second, the general nature of the exception makes the provision evidently overbroad. While it is conceivable that for particular projects it can be established that the situation

⁶² Security Council, Resolution 2100 of 25 April 2013, S/RES/2100 (2013), preamble and para. 16, let. a), sub-let. i).

is so urgent as to override the interests served with public procurement procedures,⁶³ the general exception is disproportional.

An issue which merits separate attention is the covert nature of the crisis exception. Art. 3 of Decision C(2015) 7293 addresses four unrelated issues, which makes its contents intransparent. Furthermore, on the issue at stake here, it merely declares a crisis without specifying the consequences of this. And finally, the typo (Art. 90 instead of 190) makes the reference to Regulation 1268/2012 very hard to follow. One may ascribe this intransparent way of drafting a legal provision to the sloppiness which came with the haste of the Valletta summit, at which the EUTF Africa was set up. Another explanation could relate to the political tensions between the African Union and the European Union in the run-up to the Valletta summit.⁶⁴ It would not have been helpful if the Commission would have declared a general crisis in large parts of Africa, as this might conceivably have antagonised the African Union.

III.4. FACILITY FOR REFUGEES IN TURKEY

The Facility is not a financial instrument but a coordination mechanism, based directly on Arts 201, para. 2, and 214, para. 6, TFEU.⁶⁵ The Commission has established a coordination mechanism to assist Turkey in the immediate humanitarian and development needs of refugees, host communities, and national and local authorities.⁶⁶ The facility has been extended for 2018 and 2019.⁶⁷ The Facility aims at coordinating and streamlining actions financed from the EU budget and bilateral contributions from member States.

The legal setup of the facility has been changed substantially over time. In its original version, dating from November 2015, the Facility was to coordinate an amount of 3 billion euros, of which 500 million euros from the EU budget, and 2.5 billion euros from the Member States in accordance with a distribution key.⁶⁸ The Commission coordinated the actions by setting priorities and coordinating the allocation of resources.⁶⁹ The Commission retained the responsibility for the final decision on the set-

⁶³ Apparently unaware of the general exception, two action fiches on Nigeria do justify using a direct grant: see Linking Relief, Rehabilitation and Development and promoting the stability and safety of communities in displacement in North East Nigeria, no. T05-EUTF-SAH-NG-01, available at ec.europa.eu, p. 8, and Investing in the Safety and Integrity of Nigerian Girls (I-SING), no. T05-EUTF-SAH-NG-02, available at ec.europa.eu, p. 11.

⁶⁴ See T. BUNYAN, *EU-Africa: Fortress Europe's neo-colonial project*, in *Statewatch*, November 2015, www.statewatch.org, and the sources mentioned there.

⁶⁵ Opening sentence of the preamble of Decision C(2015) 9500, cit.

⁶⁶ *Ibid.*, Art. 1.

⁶⁷ Commission Decision 2018/C 106/05 of 14 March 2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 as regards the contribution to the Facility for Refugees in Turkey.

⁶⁸ Art. 4 of Decision C(2015) 9500, cit.

⁶⁹ *Ibid.*, Art. 3, para. 1.

ting of priorities, the identification of actions and on the allocation of funds.⁷⁰ It also selected and coordinated the implementation of actions.⁷¹ A steering committee, consisting of the Commission and Member States, was to provide strategic guidance and monitor the implementation of the Facility. Turkey was an advisory member of the steering committee.⁷² The 2.5 billion euros Member State contributions to the Facility were to be included into the EU budget as external revenue. Contributions from the EU budget were to be implemented in accordance with the financial rules and regulations of the respective funds. Member State contributions were to be implemented, directly or indirectly, by the Commission.⁷³

In February 2016, the original decision was amended via a decision⁷⁴ and a Common Understanding between the EU Member States and the Commission.⁷⁵ The main changes are the following:

a) the name is changed to Facility for Refugees in Turkey;⁷⁶

b) the express inclusion of conditionality; assistance is to be given on the condition that Turkey implements its commitments under the EU-Turkey Joint Action Plan;⁷⁷

c) the source of the contributions is changed to 1 billion euros from the EU budget and 2 billion euros from the Member States;⁷⁸

d) the provision stipulating that *the Commission* shall coordinate the actions is replaced by the provision that *the Facility* shall coordinate Union and Member States' actions by setting priorities and by indicating the instruments to be used for the implementation of actions;⁷⁹

e) the provision on the Commission's responsibility for final decisions is replaced by a provision indicating that the Commission shall chair the steering committee and have a leading role in coordinating its work; the Commission's competence is limited to the right to veto strategic guidance of the steering committee on the sole ground of legality;⁸⁰

⁷⁰ *Ibid.*, Art. 5, para. 2.

⁷¹ *Ibid.*, Art. 6, para. 1.

⁷² *Ibid.*, Art. 5.

⁷³ *Ibid.*, Art. 6, paras 3 and 4.

⁷⁴ Commission Decision C(2016) 855 of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015.

⁷⁵ See Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, available at www.statewatch.org.

⁷⁶ Art. 1 of Decision C(2015) 9500, cit., as amended by Decision C(2016) 855, cit., sole Art., para. 2, first and second indent.

⁷⁷ Decision C(2016) 855, cit., *passim*, and Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, cit., para. D.

⁷⁸ Sole Art., para. 2, fifth and sixth indent, of Decision C(2016) 855, cit.

⁷⁹ *Ibid.*, sole Art., para. 2, third indent.

⁸⁰ Art. 5, para. 2, of Decision C(2015) 9500, cit., as amended by Decision C(2016) 855, cit., sole Art., para. 2, eighth indent.

f) the provision that Member States' contributions are included into the EU budget as external revenue has been deleted in the Decision,⁸¹ and moved to the Common Understanding.⁸²

These changes turn the Facility from an EU entity into a potentially intergovernmental entity. The new institutional provisions suggest that it is now the steering committee (and not the Commission) that decides about the setting of priorities, the identification of actions and the allocation of funds. However, the amended provision on the competence of the steering committee is not clear about this. The amended system provides that the steering committee shall provide strategic guidance, which will consist in setting overall priorities, types of actions to be supported, the instruments to be used, and conditionality. It will also permanently monitor and assess the implementation of actions, including respect of the conditionality requirements. This means that an explicit provision on which entity decides about the adoption of actions is lacking.⁸³

The (unchanged) provision on implementation modalities provides that the Commission shall select and coordinate the implementation of relevant actions.⁸⁴ The Common Understanding adds that the Commission shall be responsible for managing the contributions.⁸⁵ The (unchanged) Art. 3, para. 3, of Decision C(2015) 9500 indicates a preference for grants, except if the nature of the project requires another form. The Commission has adopted a special measure approving spending 1.4 billion euros on education, health, municipal infrastructure and socio-economic support to refugees in Turkey in the financial Instrument for Pre-accession Assistance (IPA).⁸⁶ This Decision stipulates that "it is appropriate to authorise the award of grants without a call for proposals to the bodies identified in the Annex and for the reasons provided therein",⁸⁷ and in accordance with the conditions specified therein.⁸⁸ Implementation shall be direct or indirect; indirect management may be entrusted to the entities identified in the

⁸¹ Art. 6, para. 4, of Decision C(2015) 9500, cit., as amended by Decision C(2016) 855, cit., sole Art., para. 2, twelfth indent.

⁸² Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, cit., para. C.

⁸³ A press release of 19 July 2019 states that: "The European Commission today adopted a new set of assistance measures worth €1.41 billion". See Commission, Press Release IP/2019/4389 of 19 July 2019.

⁸⁴ Art. 6, para. 1, of Decision C(2015) 9500, cit.

⁸⁵ Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, cit., p. 2.

⁸⁶ Commission Implementing Decision C(2016) 4999 of 28 July 2016 adopting a Special Measure on education, health, municipal infrastructure and socio-economic support to refugees in Turkey, to be financed from the General Budget of the European Union for the years 2016 and 2017.

⁸⁷ *Ibid.*, recital 5. The justifications in the Annex concern the monopoly position of the Turkish Ministry of National Education, of the Turkish Ministry of Health, and the particular expertise and experience of the International Finance Corporation.

⁸⁸ Art. 4 of Decision C(2016) 4999, cit.

Annex.⁸⁹ The implementing partners are mentioned in the preamble (recital 6): the European Investment Bank, the Agence Française de Développement, the Council of Europe Development Bank, the World Bank Group, including the related International Finance Corporation, the European Bank for Reconstruction and Development, and the Kreditanstalt für Wiederaufbau.

The entities which implement actions through indirect management act as subsidiaries of the European Commission, both under Trust Funds and under the coordination mechanism that the Facility is. Therefore, they are in principle beholden to the rules of public procurement as laid down in the Regulation. In the next chapter we will review a number of projects subsidized by the abovementioned funds.

IV. FIVE PROJECTS

Until July 2019 projects amounting to 12 billion euros have been funded under the three external migration funds.⁹⁰ Analysing all of them is beyond the scope of this *Article*. We have selected five projects covering all three funds. This selection is too small to be representative. Instead, we have selected the projects with an eye to diversity. The first project, on civil registries in Mali, is a typical good governance project in the field of a core state function: establishing the population of a state. The second one, on the cashew sector in Mali, is a traditional development project which is only marginally related to migration and focuses on private actors. The third one, repatriation from Libya, looks at a major humanitarian/migration project. In the fourth project, providing the Turkish Coast Guard with boats built by a private shipyard concerns a standard procurement situation in the field of migration management, with the peculiarity that it is implemented by the International Organization for Migration (IOM), an intergovernmental organisation with UN status. The final project is one of the massive financial transfers to allow international and national organisations to assist the 5.6 million Syrian refugees in Iraq, Jordan, Lebanon and Turkey. By including projects from different fields (good governance, development, humanitarian assistance, migration management), projects with direct (Section III.1) and indirect (Section III.2, III.4, III.5) as well as mixed (Section III.3) management, and projects implemented by UN organisations (repatriation, coast guard boats) as well as European development agencies (both projects in Mali, Syrian refugees) we aim to cover a selection of projects typical for the activities of the funds.⁹¹ Also, we have selected both projects which at first sight seemed to be cov-

⁸⁹ *Ibid.*, Art. 3; compare recital 6.

⁹⁰ Commission Decision C(2015)7293, cit.; Commission Decision C(2015) 9500, cit.; Constitutive Agreement of the Madad Fund, cit.

⁹¹ Together, these organisations implement 74 per cent of the migration management projects funded through the three migration funds. See T. SPIJKERBOER, *The Migration Management Cartel. Europe's Migration Funds as a Global Political Project*, on file with Authors.

ered by an exception to public procurement (humanitarian aid to Syrian refugees) as well as projects where at first sight that seems far-fetched (cashews), as well as projects in between. Therefore, we believe that the projects give an impression of the public procurement issues that are at stake in the European migration funds. There may be other issues that do not occur in the five projects discussed here; and we are unable to say anything about the frequency of the issues signalled here.

To determine whether a public contract should be procured according to the procedures mentioned in the Regulation, two aspects of the project will be reviewed.

Firstly, one should determine whether the contracting authority is an authority falling within the scope of Regulation 966/2012, *i.e.* whether the authority is one of the EU institutions or a subsidiary thereof.

Secondly, it should be decided whether the scope of the contract falls within the scope of the exceptions of the Regulation, and, if so, whether the applicable exception can be reasonably applied by the Commission as it is.

IV.1. CIVIL REGISTRIES IN MALI

A first project concerns civil registries in Mali, and was approved by the Operational Committee for the Sahel and Lake Chad window of the EUTF Africa on 14 December 2016.⁹² It is planned to run from 28 April 2017 until 28 March 2021.⁹³ The action fiche states that the project amounts to 25 million euros.⁹⁴ The EUTF website refers to a budget of 8 million euros, of which 13.250.000 euros are funded,⁹⁵ while it also refers to an identically names “sibling project” with a 17 million euros budget of which 11.750.00 euros has been funded.⁹⁶ If one adds both budgets, and both amounts of funding, all adds up to the 25 million euros in the action fiche. The project is implemented through direct management. The Commission was to sign a services contract with Civipol (the consulting and service company of the French Ministry of the Interior), which was to sign a sub-contract with Coopération Technique Belge (the Belgian development agency, which changed its name to Enabel in 2017).⁹⁷ They are to work in partnership with

⁹² Comité Opérationnel – Formation Sahel et lac Tchad, Orde du jour, 14 December 2016, p. 2, on file with Authors.

⁹³ Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08-01, ec.europa.eu.

⁹⁴ Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08, ec.europa.eu. A similar project was implemented in Senegal by the same partners: Programme d'appui au renforcement du système d'information de l'état civil et à la création d'un fichier national d'identité biométrique, no. T05-EUTF-SAH-SN-07, ec.europa.eu.

⁹⁵ Programme d'appui au fonctionnement de l'état civil au Mali, no. T05-EUTF-SAH-ML-08-01, cit.

⁹⁶ Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08-02, ec.europa.eu.

⁹⁷ *Ibid.*, p. 15.

the Sant'Egidio Community (a Christian community of lay people).⁹⁸ Confusingly, the EUTF website mentions as implementing partners (a term used for indirect management) Civipol for the 8 million euros version of the project,⁹⁹ and Enabel for the 17 million euros version of the project.¹⁰⁰ A European Commission webpage giving an overview of the EUTF in the Sahel and Lake Chad states that information about the contractual status of adopted actions can be accessed via a link,¹⁰¹ but this leads to a page for which permission is required.¹⁰²

The aim of the project is to provide Mali with a digitalised civil registry which is linked to a biometric database, so as to secure the identity of the population and to be accessible for other governmental users.¹⁰³ This new project follows an earlier project led by the United Nations Development Programme (UNDP) in 2013-2016. One of the aims of that project, of which 16.800.000 euros was contributed by the EU, was the "perennisation" of the civil registry, and the action fiche mentions that the earlier project "has financed the first year of the implementation of the perennisation of the civil registry".¹⁰⁴ One of the reasons why the Malian civil registry has weaknesses despite this earlier project is the "very important gap" between the financial efforts of donors and the "feeble level of political involvement for an institutional reform of the system".¹⁰⁵

The project has two concrete aims, namely the consolidation of the civil registry system, and to have a consolidated central civil registry database which is connected with other civil registry centres, including municipalities and consulates.¹⁰⁶ Concrete activities include assistance in revising the regulatory and management framework; capacity building; sensibilisation of the population as to the importance of declaring facts to the civil registry; and the creation of a national civil registry database linked to a biometric database and interconnected to municipalities and consulates abroad.¹⁰⁷ The most significant budget items are the following.

First, a 2 million euros budget item for support to the management of the civil registry and reinforcement of the interaction between the actors.¹⁰⁸ The concrete activities

⁹⁸ More information about the Sant'Egidio Community available at www.santegidio.org.

⁹⁹ Programme d'appui au fonctionnement de l'état civil au Mali, no. T05-EUTF-SAH-ML-08-01, cit.

¹⁰⁰ Programme d'appui au fonctionnement de l'état civil au Mali, no. T05-EUTF-SAH-ML-08-02, cit.

¹⁰¹ See https://ec.europa.eu/europeaid/regions/sahel-region-and-lake-chad-area-projects_en.

¹⁰² See https://ec.europa.eu/europeaid/overview-contractual-status-each-adopted-action-under-sahel-region-and-lake-chad-area-window_en.

¹⁰³ Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08, cit., p. 2.

¹⁰⁴ *Ibid.*, p. 4.

¹⁰⁵ *Ibid.*, pp. 4-5.

¹⁰⁶ *Ibid.*, p. 7.

¹⁰⁷ *Ibid.*, pp. 7-9.

¹⁰⁸ *Ibid.*, p. 16.

are support for finalising the national strategy of the civil registry; capacity building of the National Directorate of the Civil Registry; support regular meetings of the steering group; and facilitation and reinforcement of the interoperability between the “producer” sectors of the civil registry (national and decentralised state services and the civil registry processing centre) in the fields of health, justice, territorial administration and the ministry of Malians abroad.¹⁰⁹ The activity which can explain the size of the budget item is the reinforcement of interoperability, which most likely requires information technology (IT) services.

Second, a 5 million euros budget item for improving the service provision by the civil registry.¹¹⁰ The concrete activities for this are support, in the form of advice or technical assistance, to local civil registry actors; capacity building at the local level; support the creation and functioning of reporting centres (where people can report births, deaths and such¹¹¹); logistical support (means of transportation) for civil registry agents; and support in the form of equipment for civil registry centres.¹¹² This activity includes constructing and maintaining buildings (the reporting centres), acquiring motorbikes and cars (means of transportation), and acquiring IT equipment. Together, this can explain the size of the budget item.

Third, a 3 million euros budget item for support of archiving.¹¹³ This concretely consists of creating civil registry archives; rehabilitation and equipment of the archive rooms of civil registry centres; indexation and digitalisation of the registries, including the archives.¹¹⁴ This activity consists of acquiring IT equipment, and using it to digitalise the available civil registry data.

Forth, a 5,5 million euros budget item consists of updating the IT solution of the civil registry.¹¹⁵ Concretely, this consists of elaborating the specifications for updating the IT application for civil registry management; IT equipment (presumably: acquisition of this) for civil registry centres, including consulates; digitalising the National Directorate of the Civil Registry; progressive deployment of the IT solution throughout the territory; and maintenance of the database.¹¹⁶ This activity consists of acquiring IT equipment, and using it to keep civil registry data up to date.

Fifth, a 6 million euros budget item for upgrading the already existing biometric census civil registry database.¹¹⁷ This is to consist concretely of organising hearings and

¹⁰⁹ *Ibid.*, p. 8.

¹¹⁰ *Ibid.*, p. 16.

¹¹¹ *Ibid.*, p. 3.

¹¹² *Ibid.*, p. 9.

¹¹³ *Ibid.*, p. 16.

¹¹⁴ *Ibid.*, p. 9.

¹¹⁵ *Ibid.*, p. 16.

¹¹⁶ *Ibid.*, p. 9.

¹¹⁷ *Ibid.*, p. 16.

enrolment operations; and support for the establishment and use of the civil registry database in consular posts.¹¹⁸ The size of the budget item can be explained by acquiring and installing IT equipment at consular posts.

Although it is not clear whether this project is implemented through direct (as stated in the action fiche) or indirect (as suggested on the EUTF website) management, the European Commission as well as the Member State agencies Civipol and Enabel fall in the scope of Regulations 966/2012 and 1268/2012, and are bound by their public procurement rules (in case of indirect implementation on the basis of Art. 60 of Regulation 966/2012 in conjunction with Art. 38, para. 1, of Regulation 1268/2012). Because the crisis-based blanket exclusion EUTF for Africa is not acceptable (*supra*, Section III.3), public procurement procedures have to be followed unless a specific exception applies. The project does not concern defence contracts in the sense of Arts 15-17 of Directive 2014/24 and of Directive 2009/81. Also, it is evident that there is no situation where an exception to normal procurement procedures is necessary for reasons of extreme urgency brought about by unforeseeable events (Art. 32, para. 2, let. c), of Directive 2014/24). Equally, the project does not fall under the exception for civil protection operations and humanitarian operations in the field of external action (Art. 190, para. 4, of Regulation 966/2012). Even if one were to apply, *mutatis mutandis*, the exception for grants from Art. 190 of Regulation 1268/2012, the project does not concern crisis management or another exceptional and duly substantiated emergency. One exception that does apply concerns the Malian public authorities involved in the project. They exercise an exclusive right which they enjoy pursuant to a law (Art. 11 of Directive 2014/24 as applied by the General Court in *Centro Studi Manieri v. Council*).¹¹⁹

If we assume that the project was implemented through direct management, as the action fiche specifies, then the Commission was held to apply public procurement procedures for the service contract with Civipol and its sub-contract with Enabel.¹²⁰ The relation with Sant'Egidio is more opaque, but the same applies. From the action fiche, it is clear that no form of public procurement procedure took place, and on the basis of available information this seems problematic. This is all the more compelling, as a partly overlapping project was implemented by UNDP in the years 2013-2016; UNDP and the entities it worked with would have been plausible implementing partners as well.

Both in case of direct and of indirect management, the contracts for the acquisition of IT equipment and the services contracts for the installation, maintenance and updating of IT systems (as shown above these probably covered the largest part of the budg-

¹¹⁸ *Ibid.*, p. 10.

¹¹⁹ *Centro Studi Manieri v. Council*, cit., paras 145-146.

¹²⁰ Action fiche, cit., p. 14. The exception of Art. 12 of Directive 2014/24/EU, cit., does not apply, as neither Civipol nor Enabel are controlled by the European Commission.

et) should have been subject to public procurement. No information is available as to whether public procurement took place.

IV.2. CASHEWS IN MALI

A project aiming at improvement of the cashew sector in Mali was approved by the Operational Committee for the Sahel and Lake Chad window of the EUTF Africa on 14 January 2016 during its first meeting.¹²¹ The project started on 8 October 2016, and the planned end date is 8 October 2020.¹²² The project amounts to 14 million euros, of which 13,5 million euros will be provided by the Trust Fund, and 500.000 euros by the implementing partner, the Spanish development agency Agencia Española de Cooperación Internacional para el Desarrollo (AECID).¹²³ The project is implemented through indirect management by AECID. Why this would be the most appropriate implementing partner is not established in the paragraph on implementation modalities in the action fiche.¹²⁴ AECID will conclude a sub-contract with the Malian Ministry of Rural Development.¹²⁵ AECID and the Ministry will sign partnership agreements with other partners, most notably with TRAGSA (Transformation Agraire SA, a Spanish public enterprise),¹²⁶ international non-governmental organizations (NGO) and their local partners, and other public and private institutions (such as APCAM, which presumably refers to the Assemblée Permanente des Chambres d'Agriculture du Mali, agricultural professional organisations, and cashew interprofessionnal – inter-branch – organisations).¹²⁷ The action fiche does not mention procurement for sub-contracting.

Since 2010, an entity referred to as Coopération Espagnole (which may well be identical to the implementing partner of this project, AECID) has supported the cashew sector in the Sikasso region in Mali in a 7 million euros project.¹²⁸ The new project's aim is to reduce the root causes of emigration by increasing economic and employment opportunities as well as food security, through improving the production, commercialisation and processing of cashew and its products. The project covers not only the Sikasso region, but also the Kayes and Koulikoro regions which, the action fiche states, are strongly affected by poverty, emigration and food insecurity. The project is seen as part

¹²¹ Comité Opérationnel – Formation Sahel et lac Tchad, cit. p. 1.

¹²² Projet d'Appui à la Filière de l'Anacarde au Mali (PAFAM), no. T05-EUTF-SAH-ML-02-01, ec.europa.eu.

¹²³ *Ibid.* The action fiche mentions 13.576.233 euros as the total estimated cost, all of which is to be funded from the Trust Fund.

¹²⁴ *Ibid.*, p. 12.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, pp. 11-12.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, pp. 1, 4.

of both regional and national development policies.¹²⁹ The main part of the budget (9,7 million euros) consists of activities to increase employment in growing, processing and selling cashews and cashew products. The main activities to this end are setting up 13 nurseries in the 13 geographical areas targeted by the project, so as to plant new cashew tree varieties; to train the women who grow and process cashews, and the men who sell cashew products; to build storage and processing installations (including two run by women); implementing a commercial strategy at the national, regional and international level; and to engage in literacy training and registering land ownership.¹³⁰ The two other substantive components are to implement a nutrition information campaign (budget just over 500.000 euros) and to promote the Malian cashew sector (budget just over 500.000 euros). The budget also contains a budget item of over 2 million euros for co-ordination, management, follow-up and communication.¹³¹

The project consists of several separate activities which contain services, supply activities, and works contracts. All the activities deal with the production, sale and processing of cashews. The activities are all in service of the improvement of the mostly female population and the improvement of the nutrition situation of the population. In principle, such contracts are subject to public procurement. Since the working territory is Mali, the project falls within the scope of the problematic general crisis exception for EUTF Africa (*supra* Section III.3). Even apart from our general observations about that exception, it has to be pointed out that the project's relation to EU migration policy is very thin.¹³² Also, the content of the program (including its embeddedness in long term and larger development policies) does not justify the exempting of the contracting authorities from their duty to award the contract according to the rules of Regulation 966/2012. The programme is supposed to last several years and does not seem to be bound to specific parameters which necessitate an urgent and rapid implementation.

However, since the Spanish development agency AECID is implementing the programme by indirect management, it can be argued that it can award contracts to TRAGSA without using the procurement rules. AECID is a Spanish State agency, and TRAGSA is a company controlled entirely by the Spanish state. The Court of Justice ruled

¹²⁹ *Ibid.*, pp. 3-4.

¹³⁰ *Ibid.*, pp. 7-8.

¹³¹ *Ibid.*, p. 13.

¹³² *Ibid.*, p. 2 mentions that in 2013 over 195.000 Malians emigrated. In a table, at p. 2, it refers to the high percentage of the population living outside their locality. In doing so, the action document conflates and problematizes domestic, regional, and Europe-oriented migration. Comparison with Eurostat data on immigration, asylum and irregular migration shows that Malian emigration was overwhelmingly to other African countries. In 2013, immigration to EU Member States concerned 2.907 Malians. 6.630 Malians asked for asylum in EU Member States. 415 Malians were refused entry at EU external borders. 4.145 Malians were found to be illegally present in EU Member States. In total, 93.792 (of whom two thirds in France) Malian nationals had a valid residence permit in an EU Member State on 31 December 2013 (source: Eurostat).

that TRAGSA is a public undertaking acting as an instrument and technical service of Spanish public authorities, over which the public authorities exercise a control similar to that which they exercise over their own departments, while TRAGSA also carries out the essential part of its activities with those same authorities. Therefore, TRAGSA could not be considered as a third party in its relation with the Spanish authorities, and consequently it could be awarded a contract without procurement procedure.¹³³

Furthermore, the sub-contract with the Malian Ministry of Rural Development may be subject to the exception of the exclusive right which the Ministry may enjoy pursuant to a Malian law (Art. 11 of Directive 2014/24). To the extent that the *Assemblée Permanente des Chambres d'Agriculture du Mali* exercises a public function, this exception may apply as well.

And finally, one might argue that, in light of the security situation in Mali,¹³⁴ the crisis exception applies. However, the cashew project is only remotely related to the security crisis in Mali, and is part of long standing and comprehensive development policies. Therefore, it seems artificial to apply this exception to this project.

Therefore, on the basis of the available information it seems likely that contracts can be granted by AECID to TRAGSA without procurement procedures, and this may apply to contracts with Malian public authorities as well. For other contracts (those with international NGOs and their local partners, professional organisations and other partners) normal public procurement law applies. Whether or not these have been followed in this project is not clear from the available information.

IV.3. LIBYA

A project to support the protection and humanitarian repatriation of vulnerable migrants in Libya was approved by the Operational Committee of the North Africa Window on 16 December 2016.¹³⁵ Its starting date is 16 December 2016 (the same date as the adoption of the project), while no end date is given.¹³⁶ The project amounts to 20 million euros according to the action fiche, and 19,8 million euros according to the web-

¹³³ Court of Justice, judgement of 19 April 2007, case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo)*.

¹³⁴ On 25 April 2013, the UN Security Council established the United Nations Multidimensional Integrated Stabilization Mission in Mali in light of the security situation, Resolution 2100(2013); compare Security Council: Resolution 2164 of 25 June 2014, UN Doc. S/RES/2164 (2014); Resolution 2227 of 29 June 2015, UN Doc. S/RES/2227(2015); Resolution 2295 of 29 June 2016, UN Doc. S/RES/2295(2016); Resolution 2364 of 29 June 2017, UN Doc. S/RES/2364(2017); Resolution 2391 of 8 December 2017, UN Doc. S/RES/2391(2017); and Resolution 2423 of 28 June 2018, UN Doc. S/RES/2423(2018).

¹³⁵ Operational Committee – North Africa Window, Agenda, 16 December 2016, p. 1, on file with Authors.

¹³⁶ Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya, no. T05-EUTF-NOA-LY-02, ec.europa.eu.

site.¹³⁷ The project is to be implemented by indirect management by IOM for a 16,8 million euros component, and by direct management in the form of grants to civil society organisations for a 3 million euros protection fund.¹³⁸ IOM is argued to be well placed to implement the project, and for the repatriation component it is said to be the only organisation able to perform this kind of interventions in Libya at that moment.¹³⁹ For the grants to be awarded for the protection fund, the action fiche sets out eligibility criteria, essential selection and award criteria, and argues that pursuant to Art. 192 of Regulation 966/2012, EU financing may amount to 100 per cent instead of the usual 80 per cent because full funding is essential for the action to be carried out; this will be justified in the grant award decision. The action fiche refers to the general crisis exception in the EUTF Africa to argue that “flexible procedures” are applicable.¹⁴⁰ It does not explicitly refer to procurement, but from the context it is evident that this is what is meant.

The IOM component of the project consists of four concrete activities. The first is to equip the Libyan Coast Guard and Port Security officials with infrastructure at disembarkation and reception facilities, as well as life-saving equipment (to be identified with the Libyan authorities). Whether this may include the acquisition of coast guard boats is not clear from the document. This will include training to use the equipment, as well as human rights training.¹⁴¹ The second activity consists of improving the management capacity and the living standards in Libya migrant detention centres.¹⁴² Both of these activities are highly controversial. They are criticised as forms of aid and assistance to human rights violations by the Libyan Coast Guard both during interceptions at sea and by other Libyan state agents in the detention centres to which intercepted migrants are returned. In this perspective, these activities are outsourced forms of European border control. The EU and IOM respond to this criticism by arguing that the projects with the Libyan Coast Guard and in Libyan detention centres are making a bad situation slightly better.¹⁴³ A third activity is the repatriation of detained migrants, which involves interviews with migrants, getting their paperwork in order, doing medical checks, assisting them during their trip, and facilitating onward travel to their final destination, as well as

¹³⁷ The difference might be explained if we assume that for some reason the budget on the website does not include a 200.000 euros budget item for evaluation and monitoring which is in the budget, Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya, no. T05-EUTF-NOA-LY-02, cit., p. 18.

¹³⁸ *Ibid.*, pp. 16 and 18.

¹³⁹ *Ibid.*, p. 16.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, p. 10.

¹⁴² *Ibid.*

¹⁴³ *I.a.* Human Rights Watch, *No Escape from Hell. EU Policies Contribute to Abuse of Migrants in Libya*, 21 January 2019, www.hrw.org; IOM, *Protecting Migrants in Libya Must Be Our Primary Focus*, 2 April 2019, www.iom.int.

reintegration assistance in the country of origin.¹⁴⁴ A fourth activity is the collection, reporting and dissemination of data on migrants in Libya.¹⁴⁵

The protection fund serves to cover urgent needs of migrants inside and outside detention centres. These include assistance to victims of grave human rights violations (including gender-based violence), access to critical health services, to basic sanitation and hygiene facilities, and food and water.¹⁴⁶

This project consists of a combination of services and works contracts. Apart from the crisis-exception for the whole of EUTF Africa, whether the more specific crisis exceptions apply to the first two activities (the Coast Guard and the detention centres) is intertwined with the evaluation of the criticism of these activities. If one agrees that they are humanitarian activities, then they are thereby urgent (because people are dying at sea, and are exposed to inhuman conditions at disembarkation, reception and detention centres). If one agrees with the critique holding that these activities aid and assist inhuman treatment and are forms of externalised European border control, then they cannot benefit from the humanitarian exception to procurement (because the activities are not humanitarian but, quite the opposite, participate in human rights violations); and the activities cannot benefit from the crisis exception either because activities that should not be undertaken at all (because they constitute violations of international law) do not have to be undertaken urgently either.

For the repatriation activities, if we accept the factual claim that currently only IOM can carry out this project, then the exception which is contained in Art. 32, para. 2, let. b), of Directive 2024/14 could be applicable and procurement procedures are not required. Also, the crisis exception of Art. 190 of Regulation 1268/2012 may be applied because the conditions to which migrants are exposed by Libyan authorities are so dire that getting people out of the country is urgent. For the data collection activities, it seems very hard to argue that no public procurement is required, as no exception seems applicable. An obvious approach would seem to split the contract and use a public procurement procedure for the data collection activities.

The protection fund consists of grants. No exceptions to public procurement seem to be applicable, although there may be reasons to apply shortened procedures. The Commission intends to issue grants to civil society organisations, more specifically “experienced organisations active in the field of protection and migration in Libya, with a particular focus on vulnerable and most-at-risk migrant populations,” and refers to a lead applicant.¹⁴⁷ Earlier, the action fiche refers to “local [civil society organisations, CSOs] and NGOs, such as Ayadi Al Khair Society (AKS), Multakana Centre, Shaik Tahir Al

¹⁴⁴ Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya, no. T05-EUTF-NOA-LY-02, cit., p. 11.

¹⁴⁵ *Ibid.*, pp. 11-12.

¹⁴⁶ *Ibid.*, p. 12.

¹⁴⁷ *Ibid.*, p. 16.

Zawi Charity Organisation (STACO), Psychosocial Support Team/Psychosocial Network (PSS), IDPs Union, the Libyan Red Crescent and International Organisation for Cooperation and Emergency Aid (IOCEA)".¹⁴⁸ The action fiche mentions eligibility criteria and essential selection and award criteria,¹⁴⁹ which suggests that a form of competition for grants has taken place.

Concluding: for the repatriation activities, if the claim that IOM is the only organisation capable of carrying that out is correct, public procurement is not required. For data collection, no public procurement procedures have been followed while this seems not justified under any exception. For the grants in the framework of the protection fund, the action fiche suggests that some form of competition has taken place, and that seems appropriate.

IV.4. TURKISH COAST GUARD BOATS

A fourth project aims to enhance the capacity of the Turkish Coast Guard to carry out search and rescue operations. It has a budget of 20 million euros, and is categorised as non-humanitarian assistance.¹⁵⁰ The project implements the Instrument contributing to Stability and Peace. It is based on application of Art. 3, para. 1, let. a), of Regulation 230/2014,¹⁵¹ which creates a legal basis for technical and financial assistance in a situation of urgency, crisis or emergent crisis. The Commission decision adopting the project emphasises that there is a crisis, for which it refers both to Turkey's "migration management challenge" as well as to the "tragic incidents" in which migrants lost their lives.¹⁵² The project is to be implemented through indirect management.¹⁵³ The Annex to the decision argues that IOM is the appropriate implementing partner, on account of its expertise and experience with the situation in Turkey.¹⁵⁴

The project is to consist of three components. First, the Turkish Coast Guard will receive at least five search and rescue boats as well as lifesaving equipment. Second, the Turkish Coast Guard will receive training in the fields of responding to changing migration flows, preventing irregular migration and safeguarding the human rights of migrants. Finally, a mobile team will provide psychological support to Turkish Coast Guard

¹⁴⁸ *Ibid.*, p. 15.

¹⁴⁹ *Ibid.*, p. 16.

¹⁵⁰ European Union, EU Facility for Refugees in Turkey: projects committed/decided, contracted, disbursed – Status on 16/1/2019, 30 September 2019, ec.europa.eu, p. 7.

¹⁵¹ Regulation 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace.

¹⁵² Recitals 1-2 of Commission Implementing Decision C(2016) 3103 of 23 May 2016 on the exceptional assistance measure in favour of Turkey – Enhancing the capacity of the Turkish Coast Guards to carry out search and rescue operations.

¹⁵³ *Ibid.*, Art. 3.

¹⁵⁴ *Ibid.*, Annex, p. 7.

staff to prevent potential burnout.¹⁵⁵ Although no budget is given in the Annex, it is obvious that the acquisition of the coast guard boats will have been the main expense.

Neither the Decision nor the Annex claim or establish that the crisis situation is of such nature that no public procurement is possible. Although the acquisition of the boats is labelled as a mixed migration control/humanitarian project, it is labelled as non-humanitarian in the contract status overview, and as complementary to humanitarian aid in recital 8 of the Commission Decision. Therefore, the humanitarian aid exception has not been applied. It seems logical that the civil protection exception (which in this case could be applicable if saving lives were the main aim) is also not invoked in the decision. The defense exception is not invoked either, and this seems correct as the coast guard is a police organization, not a military one.¹⁵⁶ As the Commission decision does not invoke any of the exceptions, it seems to consider itself bound by the rules of public procurement. In substance, this seems appropriate: the situation does not seem to have been so urgent that the (if necessary: shortened) public procurement procedures could not have been followed.¹⁵⁷

IOM has made public that, indeed, six boats were given to the Turkish Coast Guard, of which IOM emphasises the life-saving capacities while the Turkish rear admiral emphasises the fight against irregular migration.¹⁵⁸ Commissioner Hahn has informed a member of the European Parliament that the boats have been built by Damen Antalya.¹⁵⁹

IOM Ankara has stated that it was IOM that “sent a proposal with the project and we were chosen to implement the project”.¹⁶⁰ IOM has applied its normal procurement procedures:¹⁶¹ “There were I think 6 companies who responded in this case, we looked at pricing and the products proposed. We did so in constant contact with the Turkish Coast Guard to see what they wanted. Damen was chosen because they have a shipyard in Antalya, in the country, which is great. The Turkish Coast Guard and IOM are

¹⁵⁵ *Ibid.*, p. 6.

¹⁵⁶ This is clear from a video of the delivery of the first tow boats on 15 June 2016 on YouTube (Aysun Hoche, *Damen Shipyards Antalya Coast Guard Boats Delivery. 15.06.2017*, www.youtube.com). There are no guns on the boat, which is of a civilian nature.

¹⁵⁷ In this context, the Commission Implementing Decision C(2016) 3103, cit., mentions that the Turkish Coast Guard also received five inflatable boats and four thermal cameras (budget: about 1,7 million euros) under the Instrument for Pre-Accession Assistance in 2007, and ten patrol boats in 2008. See also Commission Decision of 2007 adopting a national programme for Turkey under the IPA-Transition Assistance and Institution Building Component for 2007, on file with Authors, and Commission Decision of 2007 adopting a national programme for Turkey under the IPA-Transition Assistance and Institution Building Component for 2008, on file with Authors. These texts refer to “tendering procedures” for these contracts.

¹⁵⁸ IOM, *EUR 20 Million EU Project in Support of Turkish Coast Guard Seeks to Save More Migrant Lives*, 16 June 2017, www.iom.int.

¹⁵⁹ European Parliament, *Answer given by Mr Hahn on behalf of the Commission*, 21 June 2018, www.europarl.europa.eu.

¹⁶⁰ Telephone interview with Lanna Walsh, IOM Ankara, 4 October 2018, on file with Authors.

¹⁶¹ We have not been able to identify the rules and procedures which IOM applies to its procurement.

nearby which may have reduced costs. In any case it was more convenient and it made sense. Damen is very sophisticated, this boat can right itself when capsized and it can operate in very stormy weather”.¹⁶² Our written request to be shown the call for tenders for the boats remained without response.

In this case, the available information suggests that the normal public procurement rules applied. It also seems that the Commission considered itself bound by it. From the statements of IOM Ankara, it appears that IOM considered itself bound by public procurement rules, and applied them, or at least introduced some form of competition to award the contract.

IV.5. SYRIAN REFUGEES

The contract status for the Turst Fund for Syria mentions a project, funded through the Instrument Contributing to Stability and Peace, entitled “Improving school conditions, access to economic opportunities, local administration, social cohesion and dialogue facilitation for refugee, IDP and host communities”, targeting Iraq, Lebanon, Jordan and Turkey. As starting date 15 June 2016 is mentioned, and it will run for 36 months. The budget amounts to 74,6 million euros, of which in October 2018 49,7 million euros had been disbursed. The main project partner is GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit, the German development agency), in partnership with Expertise France (the French public international cooperation agency) and AECID.¹⁶³ The project has been approved as part of a multi-project action fiche “Regional resilience and local development programme for Syrian refugees and host communities” with a total budget of 128 million euros.¹⁶⁴ In the multi-project action fiche the project mentioned on the contract status is not mentioned or otherwise visible. The action fiche embeds the funding decision in much larger multilateral funding programmes for the four countries involved.¹⁶⁵ Likewise, the objectives and activities are described in general terms. The multi-project action fiche allows for direct management in the form of grants, but the contract status shows that in this case implementation takes place through indirect management, with GIZ as the principal implementing partner, in cooperation with Expertise France and AECID. The other potential partners mentioned in the multi-project action fiche are the Italian Cooperation (presumably the Italian Agency for Development Cooperation, AICS), AfD (which probably is not meant to refer to the extreme right German political party but to the Agence Française de Développement), IOM and the Unit-

¹⁶² Telephone interview with Lanna Walsh, cit.

¹⁶³ EU Regional Trust Fund in Response to the Syrian Crisis, the “Madad Fund”. Projects contracted – Status on 25 October 2018, ec.europa.eu, p. 1.

¹⁶⁴ *Action Document for EU Trust Fund to be used for the decisions of the Operational Board*, cit. We base our assumption that this multi-project action fiche is the basis for this contract on an email from the EU Regional Trust Fund in Response to the Syrian Crisis of 3 September 2018, on file with Authors.

¹⁶⁵ *Ibid.*, pp. 2-5.

ed Nations programme UN-HABITAT.¹⁶⁶ However, these other potential partners do not figure in the contract status for the project under discussion here.

The GIZ website gives some more information about the project.¹⁶⁷ The project consists of improving basic social services for internally displaced persons (in Iraq), refugees and local populations. There is an emphasis on education, including acquiring school buses. An important characteristic is assisting refugees and local communities together, and to facilitate their integration through, *i.a.*, community centres offering training, advice and counselling.

Evidently, this project is exempted from public procurement on the basis of Art. 190, para. 4, of Regulation 966/2012 – the exception for humanitarian operations in the field of external action. We have no information on whether public procurement procedures were used. A supply contract concerning providing school buses, or a services contract for trainings, could result in better outcomes as well as in transparency. In all situations it remains to be seen whether the value of the individual contracts would necessitate public procurement.

V. CONCLUSION

The European external migration funds are subject to the ordinary public procurement rules to which both the Member States and EU institutions themselves are subject. Regulation 966/2012 and Regulation 1268/2012 prescribe open, transparent and objective procedures so as to open up markets for public contracts, stimulating competition and therefore quality of contractors and the proper spending of public money.

When we look at the compatibility of expenditure under the three funds with public procurement law, a mixed picture emerges. The wholesale exemption of expenditure under the EUTF for Africa from public procurement law via Art. 3 of Decision C(2015) 7293 is incompatible with EU law, both because no grounds are given for declaring a crisis in the 26 African countries involved, and because for most of these countries this is far-fetched (*supra* Section III.3). On the other hand, humanitarian aid projects funded via the Madad Fund and the Facility for Refugees in Turkey are exempted from public procurement law (*supra* Section IV.5). Furthermore, the more specific exceptions for public undertakings (*supra* Section IV.1, IV.2), for exclusive rights (*supra* Section IV.1, IV.2) and for organisations with unique capacities (*supra* Section IV.3) seem to apply in some cases. Whether public procurement has taken place, and if so how is not always transparent (*supra* Section IV.3).

From a migration law perspective, the cursory reliance of the notion of emergency fits with a more general tendency in the field to consider ordinary rules, standards and

¹⁶⁶ *Ibid.*, p. 14.

¹⁶⁷ Supporting refugees and host communities in the countries bordering Syria, available at www.giz.de.

procedures inapplicable because of an assumed emergency. Other examples are the continued internal border controls¹⁶⁸ and the prohibition of inhuman treatment in migration detention cases.¹⁶⁹ From a public procurement law perspective, it is remarkable that European public procurement law is not well integrated into external migration policy. This leads to a situation where the expenditure of billions of euros is vulnerable to political challenges, as well as to legal challenges from parties whose interests may have been harmed by the failure to apply public procurement procedures.

¹⁶⁸ E. KARAGEORGIU, T. SPIJKERBOER, *Solidarity With/Out Borders*, in *RLI Blog on Refugee Law and Forced Migration*, 13 June 2019, rli.blogs.sas.ac.uk.

¹⁶⁹ European Court of Human Rights: judgment of 15 December 2016, no. 16483/12, *Khlaifia et al. v. Italy*, paras 179-185; judgment of 25 January 2018, no. 22696/16, *J.R. et al. v. Greece*, paras 138 and 143.

