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The Interplay Between Solidarity and Agency in the New Pact on Migration and Asylum

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Abstract

This thesis explores the persistent state of permacrisis in the EU migration management, where the Union has repeatedly failed to adapt its policies to the ever-changing patterns of migration flows targeting the continent. It is argued that the ineffectiveness of the Common European Asylum Policy (CEAS) stems from the lack of agency recognition provisions in the operationalisation of the principle of solidarity and fair sharing of responsibilities.

The Dublin system is indeed plagued by systemic failures resulting from non-compliant attitudes by both Member States – who criticise the inherent imbalances in the system and the insufficient implementation of solidarity – and asylum seekers, who cannot choose the country where to seek and enjoy asylum once entered the EU. Both the EU legislators and the Court of Justice of the EU have introduced multiple measures to enhance the effectiveness of the CEAS. However, these approaches share a common flaw: they are rooted in a dogmatic view that frames solidarity and agency as mutually exclusive concepts.

The thesis challenges the perceived irreconcilability of interstate solidarity and the recognition of asylum seekers' agency. It advances the normative argument that EU asylum law should incorporate agency in the operationalisation of solidarity within the CEAS. It is claimed that agency positively influences the enforcement of the EU asylum policy, fostering the compliance of asylum seekers to the rules and enhancing the overall effectiveness of the EU asylum policy in achieving its objectives.

The case for agency recognition is grounded on the assessment of the weaknesses affecting the Dublin system and the inability of the New Pact on Migration and Asylum to properly address them. The reforms introduce new solidarity measures in both standard and emergency migration management: The Dublin system remains largely unchanged but is

counterbalanced by the introduction of a permanent solidarity mechanism and a mix of solidarity and derogation measures available to Member States in crisis situations. However, asylum seekers remain excluded from the decision-making governing the new system: any attempt at onward movement is forbidden and harshly sanctioned, and their involvement in all phases of the asylum process – from the authorisation to enter EU territory to the selection of the applicable asylum procedure and access to remedies – is significantly restricted.

The thesis maintains that the solutions identified under the New Pact are not the only way to operationalise solidarity, as demonstrated by the Ukrainian temporary protection scheme. Faced with the sudden arrival of millions of refugees escaping the Russian invasion, the EU activated the Temporary Protection Directive and equipped it with a free-choice responsibility-sharing approach: refugees' intra-EU movements are allowed and encouraged as a medium of inter-state solidarity. By choosing where to obtain protection, beneficiaries of temporary protection implement a redistribution model among Member States without relying on overly complicated – and oftentimes unsuccessful – relocation plans.

The Ukrainian temporary protection scheme has been successful in defusing the risk of a "migration crisis" through the active involvement of refugees in its governance. Nonetheless, the Union has opted for the codification of the instrumentalisation approach within its crisis control mechanism. This model empowers Member States to combat "hybrid threats," such as the inflow of asylum seekers facilitated by hostile actors, through derogations that exclude asylum seekers from both the legal and geographic territory of the Union. Despite the clear agency-denial direction taken by the EU in reforming its asylum policy, the thesis argues that the EU possesses the legislative and normative flexibility to operationalise solidarity through agency, making the CEAS more resilient and humane.

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Abbreviations

Art. – Article

Arts. – Articles

AFSJ – Area of Freedom, Security and Justice

AMMR – Regulation on Asylum and Migration Management

APR – Asylum Procedures Regulation

CEAS – Common European Asylum System

CFM Regulation – Crisis and Force Majeure Regulation

Charter – Charter of the fundamental rights of the EU

CJEU – Court of Justice of the EU

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EUAA – European Union Agency for Asylum

New Pact – New Pact on Migration and Asylum

STC – Safe Third Country

TEU – Treaty on the EU

TFEU – Treaty on the Functioning of the EU

TPD – Temporary Protection Directive

Introduction

The European Union (EU) asylum policy has undergone a great legislative evolution since its relatively late communitarisation under the Amsterdam Treaty. EU action in this field has captured scholarly attention to quite an unprecedented degree in the recent history of European integration. This heightened interest stems from the fact that the measures adopted under EU law touch upon a deeply sensitive policy area – asylum – which over the past decade has consistently ranked among the top priorities for national leaders and public opinion alike.[1] In May 2024, the latest wave of reforms to the EU asylum policy, the New Pact on Migration and Asylum, brought overarching changes affecting all components of the Common European Asylum System (CEAS).

In its legal design and enforcement, the CEAS underscores a tension between solidarity and responsibility, unified under the Lisbon regime under a single guiding principle. Both solidarity and responsibility are framed solely from an inter-state perspective: when adopted, solidaristic measures are directed at Member States, which are simultaneously required to fulfil the responsibilities assigned to them under the CEAS. Under the Dublin system, establishing the framework to determine which Member State is responsible for examining an asylum application lodged within the EU, the relationship between solidarity and responsibility is profoundly asymmetrical: responsibility is allocated based on objective criteria rather than fairness, whereas no residual solidaristic measure have been identified to address the resulting imbalances. The recently adopted New Pact on Migration and Asylum introduced a permanent solidarity mechanism alongside an emergency governance framework specifically tailored to address crises in the field of asylum. However, such measures are

[1] Since 2015, the biannual Standard Eurobarometer reports have consistently identified migration as one of the top priority areas for EU action, ranking as the first or second main concern for EU citizens in 75% of these reports. The list of Standard Eurobarometer reports is available here: https://europa.eu/eurobarometer/surveys/browse/all/series/4961.

overshadowed by the EU's persistent focus on ensuring that each Member State upholds its processing responsibilities.

Against this backdrop, the question arises as to what role, if any, the final recipients of the EU asylum policy – asylum seekers and beneficiaries of international protection – play within the system. Which is their involvement in operationalising the mechanisms designed to balance responsibility and solidarity under the CEAS? The burden-sharing model established by the Dublin system and maintained under the New Pact is premised on the principle that asylum seekers cannot choose the Member State responsible for assessing their protection needs and granting them protection. Consequently, the denial of asylum seekers' agency is a dogmatic component of the CEAS, reiterated at every stage of asylum procedures.

The thesis argues that the exclusion of asylum seekers from decision-making regarding the selection of their country of asylum is one of the main – if not the central – reasons for the systemic failures of the CEAS in upholding the principle of solidarity and fair sharing of responsibility. These shortcomings were starkly exposed during the 2015 "migration crisis" and are not appropriately addressed under the New Pact framework.

Problem Overview, Definitions and Research Question

The thesis analyses the role and interrelation of solidarity and agency in the EU asylum policy, looking at the Dublin system, the related Court of Justice of the EU (CJEU) case law and the reforms introduced by the New Pact on Migration and Asylum. The two concepts have a very different legal status and role under EU asylum law.

The CEAS is one of the most developed "islands of solidarity" of the EU legal framework: solidarity is a codified legal principle underpinning the EU asylum policy, guiding its governance and justifying the adoption of

binding obligations for Member States to implement it.[2] Normatively, inter-state solidarity relies on burden-sharing mechanisms entailing the harmonisation of standards, allocation of funds, provision of operational support, and implementation of relocation schemes.

Agency, which the thesis defines as the ability of asylum seekers to seek and enjoy asylum in a country of their preference, is not a legal obligation mandated by either international or EU law. Under the Geneva Convention, States are bound to protect those in need, with no specifications on where protection can or must be enjoyed.[3] Consequently, the decision on whether to allow or deny protection seekers to choose where to have their asylum application processed is inherently normative.

The EU is the only legal order with a binding mechanism allocating the responsibility for assessing asylum claims lodged in its territory among its participating States. As such, it is the ideal forum to analyse the influence of agency denial or recognition on the redistribution of asylum seekers among States. From a legal perspective, the Dublin system functions independently of both solidarity and agency: the system allocates responsibility according to objective criteria which do not factor genuine solidarity or fairness in their implementation. Agency is not recognised, as it does not feature among the criteria to identify the responsible Member State. In its enforcement, however, the Dublin System carries significant implications for solidarity and agency. The responsibility-allocation mechanism places a disproportionate responsibility on a limited number of Member States, which are tasked with processing the majority of asylum

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[2] Arts. 67(2) and 80, Treaty on the Functioning of the EU. Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, para 252. Bruno De Witte and Evangelia Lilian Tsourdi, 'Confrontation on Relocation–The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic And' (2018) 55 Common market law review; Peter Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union' (2015) 34 Yearbook of European Law 257.

[3] United Nations, Convention relating to the Status of Refugees [1951] and Protocol Relating to the Status of Refugees [1967].

applications lodged in the EU. This dynamic has led to calls for greater solidaristic support from other Member States. Asylum seekers subjected to Dublin procedures are transferred to the responsible Member State regardless of their preferred country of asylum, and any attempt to resist or challenge the responsibility-allocation is sanctioned.

The 2015 "migration crisis" escalated these implications.[4] The sudden surge in arrivals and asylum applications – exceeding one million for that year – paralysed the Dublin system and exposed its systemic failures.[5] In particular, it showed that both Member States and asylum seekers react with non-compliant attitudes when targeted by rules they perceive as unfair.

The migration crisis and its aftermath should have served as a wake-up call regarding the urgent need to fundamentally revisit the Dublin system. The CJEU case law intervened to support the necessity to systematically address its imbalances. The Court introduced an expanding set of exceptions to the absolute mutual trust governing the system.[6] These

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[4] Throughout the thesis, the term "migration crisis" refers to the migration-related events targeting the EU in 2015. It is acknowledged that the term oversimplifies the migratory events affecting (not only) Europe and has been contested in the literature. For this reason, the term will appear in quotes. See: Daniel Thym, 'The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 Common Market Law Review 1545.

[5] UNHCR; ' Over one million sea arrivals reach Europe in 2015' (30 December 2015), https://www.unhcr.org/news/stories/over-one-million-sea-arrivals-reach-europe-2015; Eurostat, 'Record number of over 1.2 million first time asylum seekers registered in 2015' (4 March 2016), https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6.

[6] Mutual trust is the "fundamental premiss […] that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded". Thanks to mutual trust, "each […] State, save in exceptional circumstances, […] consider[s] all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law". In the context of the Dublin system, mutual trust implies that all Member States are considered safe countries for third-country nationals, thereby subjecting transfers between them to limited scrutiny regarding compliance with fundamental rights. Opinion C-2/13, *Accession of the EU to the ECHR* [2014] ECLI:EU:C:2014:2454, paras 166-168 and 191. Eleanor Spaventa, 'A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 Maastricht Journal of European and Comparative Law 35; Chiara Favilli, 'Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'Unione Europea' (2015) 98 Rivista di Diritto Internazionale 701.

exceptions aim to protect asylum seekers from transfers that would subject them to degrading and inhumane treatments, while also providing relief to Member States with dysfunctional asylum systems.[7] Furthermore, the Court recognised the legislative obligation to involve asylum seekers in the decision-making process of the responsibility-allocation mechanism.[8] While not entitled to choose their country of asylum, applicants are nonetheless granted a set of procedural rights to ensure the correct enforcement of Dublin rules. While undeniably helpful in addressing the most significant protection and solidarity gaps in Dublin rules, the CJEU refrained from adopting a constitutional imagination capable of challenging the underlying mutual trust and burden-sharing premisses of the Dublin system.

EU institutions recognised the necessity of restructuring the Dublin system to better address the evolving migratory patterns affecting the EU. However, they struggled to implement robust and sustainable reforms. In 2016, the EU adopted two Relocation Decisions as emergency measures to alleviate migratory pressure on frontline Member States.[9] The measures were based on the view of solidarity and agency as irreconcilable concepts.[10] Nonetheless, they represented the EU's first attempt to address

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[7] Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865; Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218; Joined Cases C-297/17, C-318/17, C-319/17 C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, EU:C:2019:219; Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, M*inistero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934; Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127.

[8] Inter alia, Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409; Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410; Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, ECLI:EU:C:2017:587; Case C-201/16, *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl*, EU:C:2017:805.

[9] Council Decision 2015/1523/EU establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; Council Decision 2015/1601/EU establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80.

[10] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*,EU:C:2017:631, para 304.

the imbalances inherent in the Dublin system in a spirit of solidarity. Despite their potential, actual relocations were below expectations given the non-implementation attitudes from some Member States.[11] The poor performance of relocations significantly impacted the negotiations surrounding the reform of the Dublin system. The proposed Dublin IV Regulation failed to secure agreement in the Council, largely due to disagreements over its (limited) provisions for solidarity and agency recognition.[12]

In light of past failures, the 2020 New Pact on Migration and Asylum adopted a Realpolitik approach, seeking to reconcile the divergent demands of Member States under a common model: greater responsibility advocated by Central, Northern, and Eastern Member States, and increased solidarity requested by Southern Member States.[13] The reforms were presented as a "fresh start" in EU migration management, approaching migration with a "human and humane approach".[14] The New Pact adopted in May 2024 did not deliver on this promise. The Asylum and Migration Management Regulation (AMMR) establishes a permanent solidarity mechanism aimed at addressing the imbalances in migration pressures among Member States.[15] However, the AMMR responsibility-allocation mechanism mirrors the Dublin system and does not resolve the resulting inherent disparities.[16] The Crisis and Force Majeure Regulation (CFM Regulation) equalises solidarity

[11] European Court of Auditors, Special report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results [2019].
[12] Francesco Maiani, 'The Report of the European Parliament on the Reform of the Dublin System: Certainly Bold, but Pragmatic?' (EU Immigration and Asylum Law and Policy, 20 December 2017).
[13] Daniel Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy' (EU Immigration and Asylum Law and Policy, 28 September 2020).
[14] Communication on a New Pact on Migration and Asylum [2020] COM(2020) 609 final.
[15] Regulation 2024/1351/EU on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L, 2024/1351.
[16] Regulation 2024/1351/EU on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L, 2024/1351

measures and derogations from core EU asylum law provisions as tools to support Member States facing a crisis situation, challenging the idea of solidarity as a collaborative attitude.[17] Asylum seekers' agency is now explicitly excluded and further restricted at all phases of asylum procedures: their role within the responsibility-allocation mechanism is diminished, while any attempt at secondary movement is targeted with a punitive approach.[18]

Against this background, scholars have extensively analysed the expanded role of solidarity in the CEAS, both under the Dublin system and the New Pact framework.[19] Some authors acknowledged the role of the agency denial provisions over the inefficacies of the Dublin system and

[17] Regulation 2024/1359/EU of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L, 2024/1359.

[18] Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection [2024] OJ L, 2024/1346, Recital 14.

[19] See, inter alia: Harald Bauder and Lorelle Juffs, '"Solidarity" in the Migration and Refugee Literature: Analysis of a Concept' (2020) 46 Journal of Ethnic and Migration Studies 46; Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy Special Issue: Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24 Maastricht Journal of European and Comparative Law 740; Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law 667; Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23 Maastricht Journal of European and Comparative Law 965; MV Garlick, 'Solidarity Under Strain. Solidarity and Fair Sharing of the Responsibility for the International Protection of Refugees in the European Union'; Iris Goldner Lang, 'Is There Solidarity on Asylum and Migration in the EU?' (2013) 9 Croatian Yearbook of European Law and Policy; Harriet Gray, 'Surveying the Foundations: Article 80 TFEU and the Common European Asylum System' (2013) 34 Liverpool Law Review 175; Valsamis Mitsilegas, 'Solidarity and Trust in the Common European Asylum System' (2014) 2 Comparative Migration Studies 181; G Noll, 'Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field' (2003) 16 Journal of Refugee Studies 236; Giuseppe Morgese, La Solidarietà Tra Gli Stati Membri Dell'Unione Europea in Materia Di Immigrazione e Asilo (Cacucci editore 2018); Chiara Favilli, 'L'Unione Europea e La Difficile Attuazione Del Principio Di Solidarietà; Nella Gestione Dell'«emergenza» Immigrazione' [2015] Quaderni costituzionali; Juan Santos Vara, 'Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?' (2023) 2022 7 European Papers - A Journal on Law and Integration 1243; Eleni Karageorgiou, 'The New Pact on Migration and Asylum: Why Pragmatism Cannot Engender Solidarity' (2020) 3 Nordic Journal of European Law.

advocated for agency recognition.[20] However, the way the CEAS mechanisms influence asylum seekers' agency, as well as the way agency can be recognised at the judicial or legislative level, remain under-analysed.

This thesis defines and contextualises the concept of asylum seekers' agency within EU asylum law. The purpose of this work is to challenge the perceived irreconcilability of interstate solidarity and the recognition of asylum seekers' agency. From a policy and normative perspective, the analysis seeks to explore and identify viable alternatives to the existing framework. The thesis performs a legislative review of the current framework, as modified by the New Pact on Migration and Asylum, and examines its agency implications in shaping solidarity within EU asylum law.

In addition, the research explores the complex interplay between solidarity and agency in the field of emergency migration management. In the past 15 years, the EU has relied extensively on integration through crisis in many fields,[21] and EU asylum law is no exception.[22] The resulting "crisification" of EU asylum law entailed the adoption of solidarity measures that inherently impact asylum seekers' agency.[23] The thesis focuses on two case studies and their opposite models of solidarity and agency interaction: the instrumentalisation approach – where solidarity is achieved through the exclusion of asylum seekers from decision-making – and the Ukrainian temporary protection – adopting an agency-compliant solidaristic approach.

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[20] Francesco Maiani, 'Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact' in Daniel Thym (ed), Reforming the Common European Asylum System (Nomos Verlagsgesellschaft mbH 2022); Valsamis Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24 Maastricht Journal of European and Comparative Law 721; Elspeth Guild and others, 'Enhancing the Common European Asylum System and Alternatives to Dublin' (LIBE Committee 2015) Study 83; Bernd Parusel, 'Solidarity and Fairness in the Common European Asylum System – Failure or Progress?' (2015) 12 Migration Letters 124.

[21] Erik Jones, R Daniel Kelemen and Sophie Meunier, 'Failing Forward? Crises and Patterns of European Integration' (2021) 28 Journal of European Public Policy 1519.

[22] Violeta Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border' (2023) 34 Queen Mary Law Research Paper; Marco Scipioni, 'Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis' (2018) 25 Journal of European Public Policy 1357.

[23] Moreno-Lax (n 22).

The relevance and originality of this research lie first in the novelty of the primary sources analysed: the New Pact on Migration and Asylum was officially adopted in May 2024 and most of its provisions will become fully applicable in mid-2026. Then and foremost, the thesis builds upon the existing framework and its interpretation by the CJEU to examine the new provisions from a dual perspective: their contribution to the operationalisation of the principle of solidarity and fair sharing of responsibilities, and their impact on the contraction or expansion of asylum seekers' agency under the CEAS. It is the overall claim of this thesis that the denial of agency in the operationalisation of the principle of solidarity is predominant in both the current and future EU asylum policy. However, the irreconcilability between solidarity and agency can be challenged with practical, legal and normative arguments. With sufficient political will and legal adaptability, the EU legal order can accommodate solidarity measures that incorporate asylum seekers' agency hence increasing its effectiveness.

Scope of the Research and Methodology

The thesis poses a normative research question, bridging legal analysis and socio-political studies. In its answer, it adopts both doctrinal and law in context approaches: the study draws on scholarly research and examines empirical manifestations of solidarity and agency within legislative texts, case law, and policies under the legal framework revised by the New Pact.

Even if not codified as a subjective right under international refugee law, asylum seekers' agency has been chosen as the fulcrum of the thesis given its key role in the enforcement of the EU asylum policy: regardless of its legal qualification, the control of asylum seekers' movements is crucial to the success of the CEAS. Such a control can be achieved by either restricting or allowing onward movements upon arrival in the EU, hence denying or enabling agency.

The thesis critically advances the normative argument that EU asylum law should incorporate agency in the operationalisation of solidarity under the CEAS. The call for agency recognition arises from the normative stance that agency positively influences the enforcement of the EU asylum policy. The involvement of asylum seekers in the decision-making processes underpinning the choice of the Member State where to seek and enjoy asylum is likely to foster compliant attitudes, thereby enhancing the overall effectiveness of the EU asylum policy in achieving its objectives. Such a stance is grounded on the literature in both legal and migration studies critically linking the systemic failures of the CEAS – and particularly the Dublin system – with the lack of involvement of asylum seekers in its responsibility-allocation mechanism. The practical effectiveness recently showcased by the Ukrainian temporary protection scheme and its "free-choice" model supports the claim.

The doctrinal analysis confronts the vast scope and complexity of the CEAS. With the adoption of the New Pact on Migration and Asylum, the EU asylum policy has undergone three cycles of reforms: the post communitarisation in 2000-2005, the repeal phase in 2008-2013, and the 2024 reforms.[24] In parallel, the number of cases addressing the Area of Freedom, Security, and Justice in the CJEU's case law has grown significantly over the past decade, with particular focus on the right to asylum.[25]

[24] For an overview of the policy design of the CEAS, see: Daniel Thym, 'Common European Asylum System' in Daniel Thym (ed), European Migration Law (Oxford University Press 2023).

[25] Between 2019 and 2023, the Area of Freedom, Security and Justice was consistently the main subject matter of the questions referred to the Court for a preliminary ruling, spanning from 82 to 107 judgments per year. CJEU, 'Annual Report 2023 Statistics concerning the judicial activity of the Court of Justice' (2023). For a bird-eye overview of the latest cases addressing asylum, see: Steve Peers, 'Recent Asylum Case Law of the CJEU: Distinction, Integration or Extension from "Mainstream" EU Law?' (EU Law Analysis, 18 June 2024); Daniel Thym, 'A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases' (2019) 21 European Journal of Migration and Law 166.

The thesis analyses the legal evolution of secondary law forming the CEAS in order to understand the way solidarity and agency interact in shaping EU action in both standard and crisis asylum management.[26] The research performs a systemic evaluation of the impact of solidarity and agency over all the provisions governing access to and the handling of asylum procedures. The study is also instrumental for contextualising the case law of the CJEU: in its judgments, the Court has aligned its interpretation with the changes introduced through legislation.

Under the pre-New Pact framework, the analysis focuses on the Dublin system and its responsibility-allocation mechanism. The study draws on the extensive scholarly and judicial scrutiny of the system to examine the impact of Dublin transfers (and their suspension) on the operationalisation of the principle of solidarity and fair sharing of responsibility. It further investigates the standard denial of agency inherent in Dublin rules, alongside its limited agency-compliant exceptions recognised by the CJEU and (partly) codified under the Dublin III Regulation.

In examining the New Pact on Migration and Asylum, the thesis provides an overview not only of the AMMR, which repeals the Dublin system, but also of the new Screening Regulation and CFM Regulation, as well as the changes to special asylum procedures introduced by the APR.[27] The analysis of this legislative corpus is necessary given the interrelations among the legal texts and their contributions to the operationalisation of solidarity and agency.

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[26] This research focuses on secondary legislation, given its pivotal role in shaping the development of the common policy on asylum, subsidiary protection, and temporary protection as mandated by primary law, particularly under Art. 78 of the Treaty on the Functioning of the European Union.

[27] Regulation 2024/1356/EU of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2024] OJ L, 2024/1356; Regulation 2024/1348/EU stablishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L, 2024/1348.

There is no existing scholarship and case law offering a comprehensive overview of the new provisions. Consequently, this thesis contributes to the literature by offering the first systematic attempt to analyse the core texts of the New Pact on Migration and Asylum. Given the novelty, magnitude and complexity of the legal texts composing the CEAS as modified by the New Pact, the analysis entails some degree of simplification and generalisation.[28] Consequently, an in-depth analysis of the compatibility of the new framework with the Charter falls outside the scope of this study. The chapters addressing the New Pact reforms focus on the objectives, functions, and procedures embedded in each legal text to reveal the broader legal and normative concerns associated with each instrument.

The law in context approach explores the interactions between law and politics and the political assumptions underlying EU actions in the field of asylum.[29] Such an approach is essential to understanding the role of solidarity and agency combined under the CEAS. The research performs an empirical study that examines the practical implementation of Union measures in the instrumentalisation and temporary protection case studies: both models have been implemented for around three years, with tangible results in terms of the number of people stopped or hosted, as well as the public and political reception of the measures implemented. Furthermore, key elements of both models have been either introduced or retained in the New Pact framework. Consequently, the study of the case studies is instrumental in anticipating the likely impact of the reforms on the future shape of solidarity and agency under the reformed CEAS.

The combination of a socio-political perspective, which complements the doctrinal analysis of agency and solidarity under the New Pact, and the

[28] The New Pact reforms span across 10 legal texts with sensibly increased length compared to the previous framework. The links to the adopted texts are grouped here: https://eur-lex.europa.eu/oj/daily-view/L-series/default.html?&ojDate=22052024.
[29] Stephen Bottomley and Simon Bronitt (eds), Law in Context (Federation Press 2006).

law in context approach enables a comprehensive assessment of the post-New Pact CEAS. In conclusion, the thesis adopts a pure EU-law perspective in its analysis, which preserves an important limitation: without looking at national implementation, it is hard to grasp how EU norms are applied once in the hands of national administrative and judicial authorities.[30]

Structure of the Thesis

The thesis is structured in three parts: the first part defines and contextualises solidarity and agency in the current EU asylum law framework, looking at the Dublin system and related CJEU case law. The second part addresses the recently adopted New Pact on Migration and Asylum, exploring its main solidarity and agency implications. The third part focuses on the instrumentalisation approach and the Ukrainian Temporary Protection Scheme as case studies exemplifying the opposite sides of the spectrum of solidarity and agency interactions under crisis situations.

Part I - Conceptual Framework & Status Quo

The first chapter deals with the research question in theoretical terms, providing the basic tools to understand the legal and normative value of solidarity under the CEAS. Solidarity is defined as a cooperative attitude among a defined group that, accepting its heterogeneity and building reciprocal relationships, decides to evenly share advantages and disadvantages. Building on this definition, the chapter tracks the evolution and application of the concept of solidarity throughout the process of EU integration. The chapter then focuses on the role of solidarity under EU asylum policy as a legal principle functioning as both the base and guidance of Union actions. In its enforcement, solidarity has a purely intestate dimension which can serve preventive, rebalancing or emergency purposes via a burden-sharing model.

[30] It should be noted that the New Pact reforms are currently pending national implementation, with the implementation and enforcement period scheduled to end by mid-2026.

The second chapter presents the concept of agency, defined as the ability of asylum seekers to choose and enjoy asylum in a country of their preference. It acknowledges the lack of explicit agency provision in international refugee law. Asylum seekers possess the subjective right to seek and enjoy asylum, while States are obliged to ensure their protection. However, international treaties and primary law are silent on where asylum seekers should or could seek and enjoy asylum. Leveraging on this ambiguity, States developed "protection elsewhere" disentangling the right to seek and to enjoy asylum: asylum seekers can seek protection anywhere, but it is up to the receiving State to assess whether they are responsible for analysing the claim and granting protection or not.

The second half of the chapter outlines the main features of the Dublin system, the "protection elsewhere" policy designed by the EU to manage the allocation of responsibilities among Member States. The system is built on rapid and automatic procedures based on a safety presumption covering all Member States and enforced by the principle of mutual trust. Asylum seekers are not involved in the responsibility-allocation procedure: the Dublin system is deeply rooted in coercion, tempered by the promise of fair treatment in the analysis of asylum claims regardless of where they are lodged. However, it fails to deliver: the system is plagued by systemic failures that jeopardise the principle of mutual trust and result in significantly varying levels of protection for asylum seekers across the EU.

Against this background, the third chapter examines the limits of the statutory interpretation of the CJEU in critical judgments related to the Dublin case law.[31] The chapter offers a taxonomy of the Court's efforts to balance mutual trust with the protection of asylum seekers' fundamental

[31] Statutory interpretation is understood as a Court's approach driven by an "administrative mindset", with arguments focused on the wording, general scheme, objectives and context of secondary law, rather than on a "constitutional imagination". See more: Daniel Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) 44 European law review 138.

rights in the Dublin system. It aims to identify the avenues of agency recognition explored in the jurisprudence and assess their limitations. With the "systemic deficiencies" doctrine, the Court introduced a judicial form of solidarity and de facto recognition of agency: by halting transfers to Member States affected by systemic flaws, the CJEU alleviates the burden caused by the application of the Dublin rules. At the same time, it retrospectively legitimises the movements of asylum seekers away from Member States where they might face inhumane or degrading treatment. Similarly, the CJEU acknowledges the special case of vulnerable applicants by establishing high thresholds for their transfer, thereby enhancing their chances of remaining in the country of their choice. Furthermore, asylum seekers' procedural rights have been progressively expanded, signalling the CJEU's recognition of their involvement in the decision-making process. The Court gradually moved away from the "systemic deficiencies" doctrine to align with the European Court of Human Rights case law blocking the execution of all transfers resulting in inhumane and degrading treatments, regardless of the source. However, in a recent shift in approach, the CJEU emphasised that only exceptionally rare circumstances can shield asylum seekers from Dublin transfers: the system's mutual trust-driven automatism remains the core prerogative of the responsibility-allocation mechanism.

The chapter ends by presenting the protection-driven approach of the Court as symptomatic of a statutory interpretation approach in cases tackling the Dublin system. Guided by an administrative mindset rather than developing a constitutional imagination, the Court is deferential to the direction set by the legislators through secondary law. This makes its case law neither constant nor definitive: subsequent legislative reforms, such as the recently adopted New Pact on Migration and Asylum, will eventually lead to a change in case law which could depart from the protection-driven approach adopted so far.

The main finding of the first part of the thesis is that the Dublin system fails to operationalise the interstate dimension of solidarity and is based on

the systematic denial of agency. Interpreting the responsibility-allocation mechanism, the CJEU embraced an agency-enhancing perspective only insofar as it was deemed necessary for the well-functioning of the system. Given the Court's statutory interpretation, it falls to the EU legislators to amend the legal framework to align more closely with the guiding principle of solidarity and fair sharing of responsibility.

Part II – The New Pact on Migration and Asylum

The second part of the thesis focuses on the New Pact on Migration and Asylum, the comprehensive body of CEAS reforms tabled in September 2020 and officially adopted in May 2024. The reforms strived to introduce a "durable European framework" where "all Member States should contribute to solidarity on a constant basis" and asylum seekers are provided with "certainty, clarity and decent conditions".[32] The New Pact profoundly changes the legal framework governing the EU asylum policy. However, the thesis argues that the reforms only partly (and inefficiently) operationalise the principle of solidarity and fair sharing of responsibility and reinforce the agency denial features of the CEAS.

The fourth chapter outlines the genesis and negotiation process of the New Pact reforms. It then offers the reader an overview of the AMMR, focusing on its dual rationale: ensuring that each Member State fulfils its obligations as determined by the responsibility-allocation mechanism mirroring the Dublin system, and addressing the mechanism's disparities through a permanent solidarity framework coupled with a more robust approach to combating secondary movements. Differently from the Dublin system, the AMMR incorporates solidarity as a tool to govern responsibility-sharing among Member States. The analysis praises the novelty of the solidarity mechanism while outlining its main design flows concerning the

[32] Communication on a New Pact on Migration and Asylum [2020] COM/2020/609.

emergency-driven logic, the simultaneously mandatory and flexible nature, and the hyper-complexity.

The second half of the chapter looks at the position of asylum seekers under the AMMR: agency is still absent from the criteria governing the responsibility-allocation mechanism. Furthermore, the AMMR places great emphasis on combating onward movements: frontline Member States are tasked with increased responsibilities to police asylum seekers' movements, while applicants are targeted by punitive sanctions for non-compliant behaviours and limited procedural rights to challenge transfer decisions. Simultaneously, the AMMR partly codifies the protection-driven CJEU case law and recognises meaningful links as a useful criterion to govern asylum seekers' transfers in both the responsibility-allocation and solidarity mechanisms. The AMMR navigates a delicate balance between preserving the Dublin rules and introducing mitigation measures to address their inherent disparities. Its success ultimately hinges on the effective implementation and the willingness of Member States to engage with its mechanisms in a spirit of solidarity.

The fifth chapter examines the agency implications arising from key provisions in the Screening Regulation, the APR, and the Return Border Procedure Regulation. Altogether, the reforms limit access to asylum procedures.[33] The New Pact introduces a "seamless border procedure" transforming the EU external borders into a non-territory: a great portion of asylum seekers entering the EU will be confined at the border throughout all the stages of asylum procedures in light of arbitrary and automatic criteria. The implementation of a "fiction of non-entry" throughout border procedures entails the confinement of asylum in border areas. Here, they have their claims examined through substandard procedures with extremely limited safeguards and curtailed access to remedies.

[33] Regulation 2024/1349/EU of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148 [2024] OJ L, 2024/1349.

The APR also amplifies the external dimension of the EU's "protection elsewhere" policies with the expansion of the definition and application of safe country notions. Asylum seekers are redirected towards special asylum procedures considering the broadly defined safety of their country of origin, rather than their specific circumstances. Lastly, the chapter examines the Screening Regulation and APR provisions addressing secondary movements, which align with the overarching objective of the New Pact to restrict onward movements throughout all stages of the asylum process.

Chapter six concludes the analysis of the New Pact reforms addressing the CFM Regulation. The new legal text introduces a structured crisis management framework designed to address the effectiveness gap in the EU's toolkit for responding to migration-related emergencies. The chapter contends that the CFM Regulation falls short of providing clear and predictable guarantees to oversee the implementation of its emergency measures. The Regulation introduces derogations as an alternative to solidarity measures, undermining the harmonisation of the EU asylum framework and exacerbating divergences among national asylum systems. Furthermore, derogations negatively impact the position of asylum seekers in asylum procedures. By allowing Member States to bypass regular asylum standards, derogations restrict access to asylum, limit freedom of movement within the state, and restrict the availability of effective remedies – all without providing adequate safeguards.

The Second Part of the thesis performs a bird-eye overview of the main novelties introduced by the New Pact on Migration and Asylum, offering a comprehensive analysis of the provisions governing access to asylum and its examination process. This part addresses the core of the problem question, arguing that the reforms are still rooted in a conceptualisation of solidarity as a purely interstate principle operationalised in disregard of asylum seekers' choices. As such, the effectiveness of the new framework in solving the foundational imbalances of the CEAS is questionable.

Part III – Case Studies on the Spectrum of "Crisification"

The second part of the thesis ends by outlining the great influence of "crisification" over the reform process of the New Pact on Migration and Asylum.[34] The third and final part contextualises this claim by examining two case studies that highlight the starkly different outcomes that can arise when solidarity is coupled with an agency denial or recognition model in reaction to a crisis situation.

The seventh and last chapter compares the instrumentalisation approach with the Ukraine temporary protection scheme: the two models tackled migration flows affecting the Eastern land border around the same time, towards the end of 2021 and the beginning of 2022. The instrumentalisation approach codifies into law a socio-political concept that defines the exploitation of migration flows by third countries neighbouring the EU to extract political or economic concessions. After the failed attempts to target Belarus instrumentalisation via emergency measures, the EU included instrumentalisation among the crisis situations that can be addressed by the CFM Regulation, coupled with enhanced border controls regulated by the Schengen Borders Code.[35] Beyond its codification, instrumentalisation has been recently qualified by the Commission as a legitimate ground to trigger derogations to EU secondary asylum legislation in light of the Member States' duty to maintain law and order and to safeguard their national security.[36]

The instrumentalisation approach is the perfect example of the risks attached to the crisification of migration management: Member States now have *carte blanche* to take any measure they consider relevant to counter self-assessed instrumentalisation situations. Once labelled as

[34] Moreno-Lax (n 22).
[35] Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1.
[36] Communication on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders [2024] COM/2024/570 final.

instrumentalised, asylum seekers are commodified and deprived of any agency over access to the EU territory and asylum procedures. Examining the data on arrivals and the actions undertaken by the Member States facing instrumentalisation, the chapter argues that the instrumentalisation approach not only raises significant legal concerns but is also ineffective in achieving its objectives: reducing arrivals and ensuring compliance from Member States.

In contrast, the Ukrainian temporary protection scheme is an unprecedented solidarity model. The combination of the Temporary Protection Directive with the close relations between the EU and Ukraine implemented a de facto redistribution scheme built upon agency recognition.[37] Beneficiaries of temporary protection are allowed (and encouraged) to move to choose where to obtain and enjoy protection. The Ukrainian temporary protection scheme operationalises solidarity and agency complementarily, offering a normative alternative to the agency denial dogma that governs EU standard and emergency migration management. This approach is effective thanks to the political will showcased by Member States and the legal flexibility of the framework to adapt to the situation at stake. The success of this model, however, faces uncertainty regarding its long-term applicability, as it remains tied to the exceptional nature of the Ukrainian crisis.

The concluding section of the thesis explores potential ways forward. The crisification of migration management has led to the emergence of opposing agency-solidarity models. The New Pact codified the instrumentalisation approach without further developing the agency-compliant measures introduced by the Ukrainian temporary protection scheme. However, the

[37] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

thesis argues that the EU has the legislative and normative leeway to challenge the agency-denial model predominant within the CEAS.

Part I

Conceptual Framework & Status Quo

Chapter 1 - EU Asylum Law: Mapping an Island of Solidarity

The concept of solidarity can be tackled from multiple perspectives: as an individual attitude, as a sociological behaviour or as a political and legal principle. In this chapter, solidarity is approached from a legal standpoint, addressing its role in the EU legal framework and specifically in the asylum law realm.

The nature and definition of solidarity are "contentious and contested", especially if compared to other "grand ideas" of social history.[1] In the European continent, the codification of solidarity, whose roots can be identified in the Christian ethical concept of altruism,[2] dates back to the French Revolution: solidarity is the *Fraternité* which, together with *Liberté* and *Égalité*, forms the motto of the French Revolution that was eventually enshrined in the 1804 "Code Civil".[3] Since then, solidarity has been approached as a societal behavioural model, starting from the influential and comprehensive conceptualisation by Emile Durkheim.[4] Scholars have applied the concept of solidarity across various contexts and fields, ranging from political and social to legal studies.[5]

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[1] Markus Kotzur, 'Solidarity as a Legal Concept' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer International Publishing 2017).
[2] Steinar Stjernø, 'The Idea of Solidarity in Europe' (2011) 3 European journal of social law 156., p. 25.
[3] Kotzur (n 1).
[4] Émile Durkheim, *The Division of Labour in Society* (first published in French in 1893, Palgrave Macmillan 1984). Durkheim distinguished two models of solidarity: mechanic solidarity, which governs the relations of small and homogenous communities, and organic solidarity, whose characterise societies with a higher degree of diversity and division of labour.
[5] For an analysis of the evolution of the use and study of solidarity in Europe, see: Steinar Stjernø, 'The Idea of Solidarity in Europe' (2011) 3 European journal of social law 156; Maria Antonia Panascì, 'Solidarity in the European Constitutional Imaginary: The Currency of an EU Social Value' (2020) *Doctoral Thesis, Durham University*; Karel Wellens, 'Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations', *Towards World Constitutionalism* (Brill Nijhoff 2005).

Despite the coexistence of different ideas of solidarity according to the research field, three elements are common in most understandings of solidarity: i) the presence of a defined social group; ii) the sharing of advantages and burdens within the group; and iii) the decision to operate the share in a just manner.[6] In modern-day complex societies, the decision to operate solidaristically does not happen mechanically as a result of selflessness, given the high degree of distance and heterogeneity among the members of the community.[7] There are two coexisting factors determining the decision of complex societies to operate in solidarity. First, the "acceptance of differences", as theorised by Irina Domurath.[8] Second, the "enlightened self-interest":[9] the members of a community decide to operate in solidarity not just because it is the "right thing to do" morally but also because they are eventually going to gain a personal benefit as a result, direct or indirect. As theorised by Bayertz, solidarity is an "idea of a reciprocal relationship between members of a group".[10]

Against this background, solidarity can be framed as a cooperative attitude among a defined group that, accepting its heterogeneity and building reciprocal relationships, decides to evenly share advantages and disadvantages. Building on this definition, the following section will trace the evolution and application of the concept of solidarity throughout the process of EU integration; then, the role played by the principle of

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[6] Pieter Van Cleynenbreugel, 'Typologies of Solidarity in EU Law: A Non-Shifting Landscape in the Wake of Economic Crises', *Solidarity in EU Law* (Edward Elgar Publishing 2018).
[7] Modern societies are characterised by organic solidarity, as theorised by Durkheim. Durkheim (n 4).
[8] Domurath defines solidarity as "reciprocal support and cooperation within a community of interest which can be based on sameness within homogenous societies or the acceptance of differences in heterogeneous societies". Irina Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach' (2013) 35 Journal of European Integration 459. For an alternative conceptualisation, see: A Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213.
[9] The term, linking the concepts of self-interest and morality, was first introduced by Durkheim. Durkheim (n 4).
[10] Bayertz, Solidarity and the welfare state (Kluwer Academic, 1998), p. 11.

solidarity in the field of migration and asylum will be outlined, mapping its practical implementation according to a set of criteria: the actors involved, the purpose and type of solidarity action.

1 Solidarity in EU Law: Origin and Development

After its theorisation in the late nineteenth century, solidarity encountered a renaissance period in Europe in the aftermath of the Second World War. The concept gained a prominent role in after-war societies. Interpersonal solidarity, namely the solidarity among citizens of a state mediated by the public authority, was inserted in the Constitutions of many European States.[11] At the same time, a new understanding of solidarity emerged: interstate solidarity, where the actors deciding to cooperate solidaristically are States on the international stage.[12]

Interstate and interpersonal solidarity are among the principles governing international cooperation: for the United Nations, solidarity is "a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burden fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most".[13] Solidarity is therefore the vehicle to promote an equitable and cohesive international community, where cooperation between states is

[11] See, for example: Article 2 of the Italian Constitution (1948) and Article 2 of the Spanish Constitution (1978). Interpersonal solidarity found a concrete implementation in the idea of welfare state, as analysed here: Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990).
[12] Panascì (n 5), p. 17.
[13] UN General Assembly, resolutions 56/151 of 19 December 2001 and 57/213 of 18 December 2002, 'Promotion of a democratic and equitable international order'.

purposed to achieve common goals or to recover from critical situations.[14]

1.1 EU Primary Law and Solidarity: An Overview

The international forum where solidarity has had the most relevance is the EU. In the 1950 Schuman Declaration, solidarity is presented as the first step of the functionalist approach towards the creation of a united Europe: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements, which first create a *de facto* solidarity".[15] Solidarity is the underlying assumption and driver of integration, rather than its consequence: solidarity equals integration, therefore the more the Member States will deepen their cooperation, the more solidarity will emerge.[16] Solidarity here has a primarily symbolic meaning, and no concrete consequences attached.

Throughout the integration process, the importance of solidarity progressively increased. The solidarity-integration equation remained firmly present as the driver of the European project. In addition, a multi-layered and consequential understanding of solidarity emerged, where solidarity is considered a substantial matter of law.[17] In the late sixties, the Court of Justice of the EU (CJEU) referred to solidarity in strict connection to loyalty, being "the basis of ... the whole of the Community system"[18] and a "duty" permitting the Member States to "profit from the

[14] Ester di Napoli and Deborah Russo, 'Solidarity in the European Union in Times of Crisis: Towards 'European Solidarity'?' in Veronica Federico and Christian Lahusen (eds), *Solidarity as a Public Virtue?* (1st edn, Nomos Verlagsgesellschaft mbH 2018). For more information on the role of solidarity in international law, see: 'Solidarity: A Structural Principle of International Law' (2001) 5 Max Planck Yearbook of United Nations Law Online 751.
[15] The Schuman Declaration, 9 May 1950.
[16] Cleynenbreugel (n 6).
[17] Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23 Maastricht Journal of European and Comparative Law 965.
[18] Joined Cases 6/69 and 11/69, *Commission v* France, EU:C:1969:68, para 16.

advantages of the Community".[19] From the Treaty of Maastricht onwards, the Member States' desire to "deepen the solidarity between their peoples" is presented in primary law as one of the goals of integration.[20] Such developments vested solidarity with a new meaning: interstate solidarity was no longer only a prerequisite, but a cooperative action essential for the functioning of the Community.[21] At the same time, interpersonal solidarity, conceptualised as the relationship between EU citizens mediated by the Member States and the EU institutions, became an objective of Member States' cooperation.[22]

The amplified and multi-layered normative significance of solidarity in the EU legal framework was codified and broadened by the Lisbon Treaty, where solidarity is present in several provisions. First and foremost, the role of solidarity as the assumption of European integration is confirmed in Art. 2 of the Treaty of the European Union (TEU):[23] solidarity is enlisted among the values common to the Member States and situated at the level of citizens, alongside pluralism, non-discrimination, tolerance, justice, and equality. In conjunction with this interpersonal understanding of solidarity, Art. 3(3) TEU codifies interstate solidarity as one of the objectives of the Union: solidarity is acknowledged not to be just a prerequisite of integration, but also an

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[19] Case 39/72, *Commission v Italy*, EU:C:1973:13, para 24-25.
[20] Treaty Establishing the European Community (TEC) (Maastricht consolidated version) [1992] OJ C 224/1, Preambles.
[21] Küçük (n 17).
[22] On the evolution of solidarity in EU primary law, see: Andras Punkosty, 'Towards a Conceptualization of the Notion of Solidarity in the Legal Framework of the EU Part III: Developments in European Law' (2019) 2019 Hungarian Yearbook of International Law and European Law 347. Scholars have presented several conceptualisations of the employment of solidarity by the Court to shape the acquis of EU law. Here are some examples: Malcolm Ross, 'Promoting Solidarity: From Public Services to a European Model of Competition' (2007) 44 Common Market L. Rev. 1057; Cleynenbreugel (n 6); Yuri Borgmann-Prebil and Malcom Ross, 'Promoting European Solidarity: Between Rhetoric and Reality?' in M Ross and Y Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP 2010) 1. See also: Kurt Bayertz, 'Four Uses of Solidarity' in Kurt Bayertz (ed) *Solidarity* (Springer 1993) 3.
[23] Consolidated version of the Treaty on European Union [2016] OJ C 202/13. The Preamble also maintains the reference to the desire of the Member States to 'deepen the solidarity between their peoples' as already present in previous treaty versions.

operational tool to guide Union actions in all domains.[24] Furthermore, Art. 3(3) TEU introduces in the EU legal acquis a new dimension of solidarity: intergenerational solidarity. This third and last dimension of European solidarity innovatively addresses the challenges posed by demographic deficits and global challenges such as climate change. Here, the Union has the responsibility to tailor its policies in a spirit of solidarity that considers their impact on future generations.[25]

In Arts. 2 and 3 TEU solidarity is structured in three coexisting dimensions: interpersonal, interstate, and intergenerational solidarity.[26] All other primary law references to solidarity are inscribed in one of these three dimensions. The TEU refers to interstate solidarity connected to external action: Art. 21 TEU puts solidarity among the guidelines for the EU's international action; Arts. 24(2) and (3) TEU, along with Art. 31(3) TEU, links solidarity to common defence; and Art. 32 TEU contextualises solidarity in matters of foreign and security policy of general interest. Furthermore, the Treaty on the Functioning of the European Union (TFEU)[27] includes interstate solidarity in provisions governing asylum and immigration (Arts. 67(2) and 80 TFEU); economic governance (Art. 122(1) TFEU); energy (Art. 194 TFEU); and civil protection (Art. 222 TFEU, called "solidarity clause"). Finally, Chapter IV of the Charter of

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[24] For an analysis of the duality of solidarity as value and objective and as interpersonal and interstate concept, see: Maria Antonia Panascì, 'European Financial Solidarity : A Concept in Search of Definition' (European University Institute 2022) Working Paper.

[25] Domurath (n 8). For more information on the role of intergenerational solidarity in the European constitutional order, see: Markus W Gehring and Alexandra R Harrington, 'Intergenerational Equity and the European Constitution' in Alexandra R Harrington, Marcel Szabó and Marie-Claire Cordonier Segger (eds), *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions* (Cambridge University Press 2021).

[26] For alternative conceptualisations of the dimensions of solidarity in the EU multi-level system, see: Michèle Knodt and Anne Tews, 'European Solidarity and Its Limits: Insights from Current Political Challenges' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer International Publishing 2017); Jenő Czuczai, *The Principle of Solidarity in the Eu Legal Order – Some Practical Examples after Lisbon* (Brill Nijhoff 2017); Sangiovanni (n 8); Cleynenbreugel (n 6).

[27] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47.

Fundamental Rights is titled 'Solidarity' and the set of social rights in Arts. 27-58 is conceptualised as a manifestation of interpersonal and interstate solidarity.[28]

Under the Lisbon regime, solidarity is integrated across various policy areas. Unfortunately, the Lisbon Treaty does not solve the main conundrum surrounding the role of solidarity in EU law: solidarity is not defined, and its status in the EU hierarchy of norms is not specified.[29]

1.2 EU Solidarity: An Archipelago of Models in a Value-based Ocean

The coexistence of multiple references to solidarity in the EU legal order without legislative or judicial guidance on its definition bears the question: is solidarity a symbolic testament of the ever-closer Union between Member States and its citizens or a legal principle with normative content?

There is consensus in the literature that solidarity does not qualify as a general principle.[30] As framed in Arts. 2 and 3 TEU, solidarity does not impose legal obligations but rather it has a normative role: it gives the EU competence to act with no direct legal enforceability.[31]

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[28] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[29] So far, the issue has not been addressed by the CJEU. The Court, despite having referred to solidarity in a considerable number of cases, it has not expressly defined its contours. Küçük (n 17).

[30] Eglė Dagilytė, 'Solidarity: A General Principle of EU Law? Two Variations on the Solidarity Theme', *Solidarity in EU Law* (Edward Elgar Publishing 2018); Malcolm Ross, 'Solidarity—A New Constitutional Paradigm for the EU?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010); Punkosty (n 22); Kotzur (n 1); Marcus Klamert, 'Loyalty and Solidarity as General Principles' [2022] Research Handbook on General Principles in EU Law 118.

[31] Solidarity is inserted into the non-justiciable second half of Article 2 TEU. The reliance on Art. 2 TEU values as binding legal principles has been developed primarily in the context of the rule of law. See, inter alia: Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; Case C-216/18 PPU, *LM*, EU:C:2018:586; Case C-619/18, *Commission v Poland*, EU:C:2019:531; Case C-192/18, *Commission v Poland*, EU:C:2019:924. Rafał Mańko, 'ECJ Case Law on Judicial Independence: A Chronological Overview' (European Parliament 2023); Werner Schroeder, 'The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in Armin von Bogdandy and

Nonetheless, its role in the EU legal framework cannot be dismissed as merely symbolic. Solidarity under Arts. 2 and 3 TEU is a founding value of the EU legal system.[32] Under EU law, values are "moral aspirations" underpinning the EU legal framework by recommending EU institutions and Member States certain behaviours.[33] Hence, solidarity is a program-oriented tool guiding the EU in its integration process in all fields, despite not being justiciable. Solidarity, as a value, serves as a common denominator for its role throughout the entire EU legal system.

Besides being a value, solidarity does not possess a general application underpinning the whole EU legal framework. However, it assumes a more prescriptive role in specific policy areas where it is explicitly referenced as a principle, value, or guiding norm. Such policy areas constitute, as defined by Hilpold, 'islands of solidarity'.[34] On each island, the interplay of primary law provisions, secondary law implementation measures, and CJEU case law gives rise to a distinctive form of solidarity:[35] from the simple adherence to the common denominator role of solidarity as a guiding value to the conceptualisation of solidarity as a sectorial general principle. Besides immigration and asylum, topic of the present thesis, the other main islands of solidarity

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others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021); Dagilytė (n 30).

[32] Domurath (n 8).

[33] Dagilytė (n 30).

[34] Peter Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union' [2015] Yearbook of European Law.

[35] Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners (eds), *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020).

are: economic governance,[36] civil protection,[37] the Common Foreign and Security Policy (CFSP),[38] Energy,[39] and Citizenship.[40]

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[36] Under EU economic governance, solidarity is conceived as a conditional principle intertwined with the obligation of responsible fiscal governance. This understanding emerged in the *Pringle* case, in particular in the Opinion of Advocate General Kokott. Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, EU:C:2012:756; Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, Opinion of Advocate General Kokott, EU:C:2012:675. Vestert Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis* (Cambridge University Press 2020); Michael Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis' (2016) 53 Common Market Law Review 1237; Bruno De Witte and Thomas Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*' (2013) 50 Common Market Law Review.

[37] Article 122 TFEU has been broadly interpreted as embodying a spirit of solidarity among Member States in times of crisis. It provides a legal foundation for the Union's economic and financial assistance measures, reflecting the balance between solidarity and the principles of economic stability and shared responsibility that underpins EU governance. This solidaristic provision notably facilitated financial assistance measures such as those implemented through the Next Generation EU framework. Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, EU:C:2012:756. On solidarity under EU emergency law, see: Maria Antonia Panascì, 'Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution' (2024) 61 Common Market Law Review 13; Merijn Chamon, 'The Rise of Article 122 TFEU' (*Verfassungsblog*, 1 February 2023); Bruno De Witte, 'Guest Editorial : EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59 Common market law review 3; Susanna Villani, *The Concept of Solidarity within EU Disaster Response Law: A Legal Assessment* (Bonomia 2021).

[38] The legal status of solidarity within the CFSP remains predominantly political, with limited judicial enforceability due to the restricted jurisdiction of the CJEU in this domain. Solidarity is intergovernmental, binding only the Member States rather than the Union as a whole. Despite its normative ambiguity and symbolic character, solidarity holds a crucial role in preventing Member States from undermining the Union's collective interests. However, the absence of CJEU jurisdiction over CFSP solidarity clauses, except in narrow circumstances outlined in Arts. 24(1) TEU and 275 TFEU, underscores its limited prescriptive force. For an evaluation of the political nature of CFSP solidarity, see: Case C-848/19 *P - Germany v Poland (OPAL II),* Opinion of Advocate General Campos Sánchez-Bordona, EU:C:2021:218, para 97. See: Laura C Ferreira-Pereira and AJR Groom, '"Mutual Solidarity" within the EU Common Foreign and Security Policy: What Is the Name of the Game?' (2010) 47 International Politics 596; Anna Pau, 'The Solidarity Principle in the Context of the CFSP: The Adoption of Restrictive Measures as an Expression of Solidarity?' in Eva Kassoti and Narin Idriz (eds), *The Principle of Solidarity: International and EU Law Perspectives* (TMC Asser Press 2023).

[39] In the field of energy policy, the principle of solidarity has been recognised by the CJEU as a binding legal principle. This development was particularly evident in the OPAL cases, where the CJEU and the General Court elevated energy solidarity to a concrete legal obligation. The caselaw underscores solidarity's foundational role in ensuring equitable and cooperative energy governance within the EU. Case T-883/16, *Commission v. Poland (OPAL I)*, EU:T:2019:567; *Case C-848/19 P*, *Germany v Poland (OPAL II),* EU:C:2021:598. See: Anatole Boute, 'The Principle of Solidarity and the Geopolitics of Energy: Poland v. Commission (OPAL Pipeline)' (2020) 57 Common Market Law Review 889; Serenella Quari, 'The principle of energy solidarity at its first stress test: the mitigation of the energy crisis between national sovereignty and supranational integration' (*Diritti Comparati*, 30 November 2022).

[40] In the field of citizenship, solidarity holds a nuanced legal value grounded in the idea of mutuality between Member States and their citizens. The Court initially adopted an

In the absence of a general understanding of solidarity across the EU law acquis, the interlinks between solidarity as a value and the concept of "islands of solidarity" is the most appropriate framework to base the analysis of solidarity in EU asylum law. This understanding does not diminish the centrality of solidarity within the broader EU legal framework, while recognising that the "islands of solidarity" represent the frontier for the evolution of solidarity as a concept within EU law.

2 Solidarity in EU Asylum Law

Solidarity has been interlinked to asylum since the communitarisation of substantive aspects of this area under the Amsterdam Treaty.41 The "Area of Freedom, Security and Justice" (AFSJ), complemented the internal freedom of movement with a set of "flanking measures" designed to offset the communitarisation of the Schengen acquis.[42] In the AFSJ, migration

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expansive approach conceiving citizenship as a form of transnational solidarity, entailing the obligation for Member States to extend a degree of financial solidarity to citizens of other Member States in *Grzelczyk* (Case C-184/99). Such an interpretation was retracted in subsequent case law, particularly in the context of solidarity towards economically inactive citizens. The Court introduced the "genuine link" criterion, requiring a meaningful connection between the host Member State and the EU citizen to justify the imposition of obligations on the State (*Commission v Austria*, Case C-75/11). More recent judgments shifted towards more liberal interpretations of citizenship (*Chavez-Vilchez*, Case C-133/15 and *Ruiz Zambrano*, Case C-34/09). Solidarity hence remains central to EU citizenship, but its application appears fragmented. C-184/99, *Grzelczyk*, EU:C:2001:458; C-75/11, *Commission v Austria*, EU:C:2012:605; C-133/15, *Chavez-Vilchez*, EU:C:2017:354; Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124. See: Eleanor Spaventa, 'Earned Citizenship – Understanding Union Citizenship through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); E Spaventa, 'Citizenship: Reallocating Welfare Responsibilities to the State of Origin' in Panos Koutrakos, Niamh Nic Shuibhne and Philip Syrpis (eds), *Exceptions from EU free movement law : derogation, justification and proportionality* (Hart Publishing 2016); Daniel Thym, *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017); Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015); Stefano Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 European Law Journal 360.

[41] Kay Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) 35 Common Market Law Review. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1. All migration-related measures were grouped in one chapter, Title IV - Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons.

[42] The elimination of internal frontier controls forced EU leaders to question how to manage external border crossings and circulation of third-country nationals. MGW den Boer, 'An

management became a common issue requiring coordinated and common solutions.[43] Solidarity emerged as one of the guiding principles for better coordinating Member States and EU institutions when operating in this field.

The Amsterdam regime introduced the concept of responsibility-sharing, prescribing "a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons".[44] Solidarity was inserted in the Tampere Programme, containing programmatic strategies to meet the Amsterdam objectives, especially concerning the AFSJ.[45] The political programme tackled solidarity from two perspectives: first, EU leaders committed to creating an "open and secure European Union […] able to respond to humanitarian needs on the basis of solidarity".[46] This endorsement of interpersonal solidarity is a symbolic but inconsequential pledge to broaden the scope of solidarity to encompass beneficiaries of asylum policies. Second, the Tampere Programme framed solidarity between Member States as the matrix behind the creation of the CEAS, grouping all EU measures concerning asylum and irregular migration. Solidarity was linked with a specific measure on which Member States were pressed to agree on: temporary protection, a form of immediate and collective recognition conceptualised to manage sudden mass influxes of protection seekers.[47] With the Tampere Programme, the EU acknowledged

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Area of Freedom, Security and Justice: Bogged Down by Compromise', *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999).

[43] Even before the Amsterdam regime, the Member States convened outside the European Community forum to find a common set of rules concerning the national responsibility for the analysis of the asylum claims, the Dublin Convention (1990), as it will be outlined below. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention [1997] OJ C 254-1.

[44] Treaty establishing the European Community (Consolidated version 1997) [1997] OJ C 340-173, Article 63(2)(b).

[45] European Council, Presidency Conclusions, Tampere European Council [1999] (Tampere Programme).

[46] Tampere Programme, point n. 4

[47] Tampere Programme, point n. 16. For more information on the impact of the Tampere Programme, see: Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer, 'From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration' 160. On temporary protection, which will be addressed further below and in the next chapters, see:

the importance of interstate solidarity in setting up the common asylum policy. Such importance was confirmed and broadened in the Hague Programme in 2004, where solidarity was linked with fair sharing of responsibility with particular attention to its financial implications.[48]

The solidarity features in the Tampere and Hague programmes were eventually codified in primary law with the Lisbon Treaty. Art. 67(2) TFEU describes the common policy on asylum, immigration and external border control as "based on solidarity between Member States" and 'fair towards third-country nationals". Furthermore, solidarity is explicitly framed as a principle in Art. 80 TFEU, which states that "the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States". The Lisbon Treaty therefore codifies solidarity, coupled with fair-sharing of responsibility, as a single guiding principle of the EU migration and asylum policies.

Under the Lisbon regime, solidarity has gained increasing relevance in the EU policy programmes: The Stockholm Programme in 2010 deemed solidarity, alongside responsibility and partnership, to be necessary to achieve a dynamic and comprehensive migration policy.[49] In 2011 the Commission published a Communication on "enhanced intra-EU solidarity in the field of asylum", where it proposed a toolbox of measures aimed at reinforcing solidarity in the field of asylum.[50] Here, the interpolation of

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Meltem Ineli-Ciger, 'Eu Temporary Protection Directive', *Temporary Protection in Law and Practice* (Brill Nijhoff 2017). For information on temporary protection, see Chapter 7.2.

[48] The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1, points 1.2 and 1.7.1.

[49] The Stockholm Programme — An open and secure Europe serving and protecting citizens [2020] OJ C 115/1. After the Stockholm Programme, the Council strategic guidelines were published in 2014 (European Council, Presidency Conclusions [2014] EUCO 79/14), point 6.

[50] Communication on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust [2011] COM/2011/835 final. The Communication already identified four main areas of intervention: practical cooperation and technical assistance, financial solidarity, allocation of responsibilities, and improving tools for governance of the asylum system.

solidarity with fair-sharing of responsibility as a single principle was further elaborated. The reason behind the operationalisation of such a double-edged principle is the interdependency of national asylum systems, which means that dysfunctions in one Member State have "a clear impact on all the others, including through secondary movement". Solidarity and responsibility ultimately go hand in hand because "the need to keep one's house to avoid impacts on other Member States is a key aspect of solidarity".[51]

Solidarity-wise, the EU must assist Member States under pressure. At the same time, "solidarity must be coupled with responsibility" to fulfil obligations in international and European law. The conditionality of solidarity is reiterated in the subsequent 2012 Council conclusion: access to solidarity depends on the upholding by Member States of "responsibility and mutual trust", which are the "pillars on which the common framework should be built".[52]

In the early 2010s, the alignment of policy and legal frameworks underscored the necessity of embedding robust solidaristic elements within EU migration policies. However, neither primary law nor policy programmes or CJEU caselaw provided a definition of solidarity in asylum law. Furthermore, the relationship between solidarity and responsibility is not always easy to frame: if only a fully functional asylum system can be targeted by solidarity measures, it means that dysfunctional systems – most likely the ones most in need of solidaristic support – will not receive the necessary support.[53] In the absence of a legal definition, the role of solidarity in EU asylum policy can be articulated by examining its core theoretical dimensions: the actors engaged in solidaristic actions, the

[51] Communication on enhanced intra-EU solidarity in the field of asylum, p. 2.
[52] Council Conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows [2012] 3151st Justice and Home Affairs Council meeting.
[53] Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law Account* (Brill 2016).

objectives underpinning solidarity, and the measures undertaken to realise those objectives.[54]

2.1 The Actors of Solidarity: Interstate and Supranational Solidarity

Under EU law, Solidarity is shaped according to the actors involved in solidaristic actions: interpersonal solidarity (between individuals through the intercession of the public authorities), interstate solidarity (reciprocal relations between Member States) and intergenerational solidarity (acknowledgement by the current society of the effects its action will have on the future generations).

Art. 67(2) TFEU specifies that the common asylum policy should be based on "solidarity between Member States". Art. 80 TFEU states that the policies of the Union "shall be governed by the principle of solidarity and fair sharing of responsibility […] between the Member States". Therefore, Treaty provisions narrow down the dimension of solidarity to the cooperation between Member States.[55] The personal scope of interstate solidarity also includes the Union itself. When policing migration matters, not only Member States, but the Union as well is responsible for performing their duties with mutual respect and under the guidance of the principle of solidarity.[56] Solidarity between the Union and its Member States operates reciprocally: on one side, Member States have to fulfil the obligations arising from the Treaties and implement EU legislation without contravening the policies set up at EU level. On the other side, the EU is tasked to develop a

[54] There are also other academic categorisations of solidarity in EU migration law which are not taken into consideration here. See: Mark Bell, 'Irregular Migrants: Beyond the Limits of Solidarity?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010).

[55] Interstate solidarity is limited to EU states: Member States have to show solidarity between each other, and not towards third countries. While third countries are involved in EU migration management via funding and development programs, the Union actions when cooperating with them are not bounded to be solidaristic.

[56] Sonia Morano-Foadi, 'Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures' (2017) 19 European Journal of Migration and Law 223.

common asylum policy (Arts. 67(2) and 78 TFEU) in a spirit of solidarity (Art. 80 TFEU): solidarity is not only an aspiration but a "structural imperative" binding both the Union and the Member States in ensuring solidaristic outcomes upon necessity.[57]

EU institutions play a direct role in ensuring that Union actions in the field of asylum adhere to the principle of solidarity and fair sharing of responsibility. The Council, upon the proposal of the Commission, can set up emergency measures (Art. 78(3) TFEU) or activate the Temporary Protection Directive (hereafter, TPD) to support Member States under migratory pressure, both a manifestation of pragmatic solidarity.[58] Moreover, the Union can extend direct solidaristic support to Member States in migration management by mobilising funds or coordinating operations through EU agencies.[59] The interplay between the structured solidarity enshrined in Art. 80 TFEU and the exceptional solidarity invoked in emergencies defines the Union's solidaristic obligations towards Member States.[60]

Third-country nationals are not included in the scope of solidarity under primary law, excluding an interpersonal conceptualisation of solidarity in the EU asylum policy. However, third-country nationals are targeted by another principle: fairness (Art. 67(2) TFEU). The concept of fairness however is not as firmly entrenched as solidarity: it ensures that third-country nationals across the EU enjoy equal criteria and conditions

[57] Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy Special Issue: Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24 Maastricht Journal of European and Comparative Law 740.
[58] Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.
[59] Solidarity via funds and operations is addressed below. See Chapter 1(2)(3)(2) and 1(2)(3)(4).
[60] Moreno-Lax (n 57).

when applying for a status and residing in the EU, regardless of the Member State they are applying to or residing in.[61]

Under a solidarity perspective, fairness can be conceived as a form of "vertical solidarity" –from the Union to the beneficiaries of asylum policies, asylum seekers and beneficiaries of international protection – which complements the "horizontal solidarity" showcased in its interstate dimension.[62] The spirit of solidarity guiding EU action in the field of asylum has undoubtedly positive spillover effects also on the beneficiaries of asylum policies: In principle, the harmonisation of rules governing access to asylum procedures and the enjoyment of awarded status ensures the fair treatment of third-country nationals, irrespective of the host Member State, ultimately extending solidarity to them.[63]

2.2 The Purpose of Solidarity: Preventive, Rebalancing, and Emergency

Solidarity is both the basis and goal of Union action in the field of asylum (Arts. 67(2) and 80 TFEU). As such, it may serve different normative purposes. First, solidarity plays a preventive role by seeking to avert the emergence of imbalances among Member States through the establishment of a collaborative forum. Such a forum is the CEAS: the EU asylum *acquis* is designed, in principle, to ensure effective migration management guided by a spirit of solidarity and ensuring the fair sharing of responsibilities between Member States. Member States indeed align their national asylum systems with common minimum standards governing arrivals, asylum and

[61] Such conditions do not have to be equal to the ones ensured to European citizens, but they must always and everywhere satisfy some basic criteria. For more information, see: Jürgen Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law', *Solidarity in EU Law* (Edward Elgar Publishing 2018).
[62] The categorisation of solidarity under the "horizontal" and "vertical" dimension is theorised by Moreno-Lax here: Moreno-Lax (n 57).
[63] The role of fairness in the treatment of asylum seekers under EU asylum policy is explored in the context of agency in the following chapter.

return procedures, as well as reception conditions.[64] The harmonisation process is governed by mutual trust and enables the creation of a responsibility-allocation mechanism, the Dublin system, overseeing the distribution of asylum seekers among Member States according to objective criteria.[65]

Secondly, solidarity can have a rebalancing role. Under Art. 80 TFEU, the Union must give effect to the principle of solidarity and fair sharing of responsibility "whenever necessary". The necessity arises when, despite the establishment of the CEAS cooperative framework and the Dublin responsibility-allocation mechanism, imbalances among Member States either persist or emerge. Solidarity must therefore be deployed to address and rectify these imbalances.[66] As addressed in the next paragraph, the EU asylum acquis is equipped with different mechanisms to achieve rebalancing solidarity: the TPD to manage the sudden influx of protection seekers; the operational support provided by EU Agencies; and the allocation of funds to support national asylum policies.

Lastly, solidarity in EU asylum law can play an emergency role, assisting Member States facing critical situations arising from sudden influxes of arrivals and corresponding increases in asylum claims.[67] Migration flows are everchanging, influenced by a variety of factors that cannot be arbitrarily controlled: changes in countries of origin and transit can give rise to new migratory patterns, resulting in increased arrivals at the EU's external borders and placing significant strain on the reception systems of frontline Member States. In reacting to emergencies, the EU

[64] Giuseppe Morgese, 'The Dublin System Vis-à-Vis EU Solidarity before the European Court of Justice: The Law, The Whole Law, and Nothing But The Law!', *Migration Issues before International Courts and Tribunals, 2019, p. 381-408*.
[65] The principle of mutual trust and the Dublin system are analysed in detail in Chapter 2.2.
[66] In Chapter 2.3 the imbalances created by the Dublin system – which can be considered systemic failures – are addressed in detail.
[67] Ciprian-Constantin Mihai, 'The Principle of Solidarity - An Instrument for Managing Migration and Asylum at European Union Level EU Law' (2022) 12 Law Review 98.

must abide by the principle of solidarity and fair sharing of responsibilities prescribed in Art. 80 TFEU. Any adopted measure must therefore incorporate solidarity among its outputs. Emergency solidarity can be performed with ad hoc actions targeting the specific emergency via Art. 78(3) TFEU, which empowers the Union to adopt provisional measures to support "Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries". Since the "migration crisis" in 2015, emergency solidarity monopolised the migration debate.

Solidarity, conceived as both the foundation and objective of Union action in the field of asylum, serves as a comprehensive principle guiding EU policies at every stage of asylum management: from the harmonisation of asylum systems under the CEAS to the implementation of common asylum policies, and ultimately to its adaptation in response to structural or external factors. Solidarity cannot be only compensatory but must be conceived as a proactive and structural component of the CEAS.[68] As outlined above, depending on the objective pursued, solidarity can be operationalised through various types of action.

2.3 The Type of Solidarity: From Harmonisation to Relocation

Immediately after the communitarisation of the EU asylum policy, Gregor Noll introduced a tripartite categorisation of solidarity according to the type of actions performed.[69] The categorisation is still valid today, with some adjustments. According to Noll, solidarity between Member States can be performed with the sharing of norms, money and people. The increasing involvement of EU agencies in migration management at the EU external borders, especially after the Lisbon Treaty, requires adding to Noll's categorisation the sharing of operations.

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[68] Moreno-Lax (n 57).
[69] Gregor Noll (ed), *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000), p. 263.

2.3.1 Sharing of Norms: Harmonisation

The sharing of norms is the main manifestation of preventive solidarity in EU asylum law. It involves the harmonisation of laws to mitigate the inequalities resulting from varying levels of protection, guarantees, and rights provided by individual Member States. The standardisation of entry, reception, asylum and return procedures reduces the risks of normative dumping, namely the practice of increasing barriers to migration inflows to become a less attractive destination.[70] Normative harmonisation is beneficial not only for Member States, ensuring that everyone entering the EU is subjected to comparable standards and procedures, but for third-country nationals as well, who are granted a uniform level of protection in every Member State.

Since the entry into force of the Amsterdam Treaty, the CEAS introduced norms in the areas of reception conditions, asylum qualifications, and procedures. Each piece of legislation plays a crucial role in the harmonisation process and in implementing solidarity, which is consistently cited as an inspiration, guide, or principle in all legal texts.[71]

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[70] Daniel Thym and Evangelia Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24 Maastricht Journal of European and Comparative Law 605.

[71] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (Recital 2); Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 (Recitals 2 and 5); Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (Recital 9); Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31 (Recitals 7, 8, 9, 22, 25); Regulation (EU) 2021/ on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L 468/1 (Recitals 1, 6, 31). These legal texts compose the current legal framework. The New Pact on Migration and Asylum will greatly change the asylum *acquis*. In principle, the reforms do not challenge the sharing of norms premiss governing asylum legislation. See Chapters 4, 5 and 6.

The sharing of norms alone is not sufficient in making the EU migration policy compliant with the principle of solidarity.[72] First, the harmonisation process is far from being complete, as many crucial matters of the asylum policy are not addressed under EU law: from the rules on the positive mutual recognition of asylum status, which, despite being "valid across the Union" (Art. 78(2)(a)), remains legally recognised only in the issuing Member State, to the harmonisation of protection needs assessment procedures, which continue to differ significantly across Member States.[73]

Second, EU legislation *per se* does not automatically solve inequalities between Member States. It is the content of EU legislation that enables solidaristic actions: The Dublin system – discussed in the next chapter – is not designed to provide solidarity beyond its responsibility-allocation purpose and, as such, does not operate in a spirit of solidarity. Furthermore, European legislation needs national implementation to have pragmatic results and consequently enable solidarity to be effective. However, it is well-known that EU rules are not applied uniformly across the Union, with huge disparities between the Member States.[74] Lastly, legislative harmonisation alone cannot neutralise the disparities among Member States caused by non-legal factors, first of all, geography and proximity with the external borders.

2.3.2 Sharing Money: Funding Migration Management

To address distributional inequalities caused by geography, migration flows, or structural inefficiencies of national migration policies, the EU relies

[72] Some scholars also argue that harmonisation does not increase but rather diminishes solidarity between Member States. See: Eiko R Thielemann, 'Why Asylum Policy Harmonization Undermines Refugee Burden-Sharing' (2004) 6 European Journal of Migration and Law 47.
[73] PG Van Wolleghem and HG Sicakkan, 'Why Do Recognition Rates for Asylum Seekers Differ so Dramatically across the EU' (*LSE Blogs*, 23 November 2022); Valsamis Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24 Maastricht Journal of European and Comparative Law 721.
[74] Alberto Miglio, 'Solidarity in EU Asylum and Migration Law: A Crisis Management Tool or a Structural Principle?' in Elzbieta Kuzelewska, Amy Weatherburn and Dariusz Kloza (eds), *Irregular Migration as a Challenge for Democracy* (1st edn, Intersentia 2018).

on financial solidarity. Sharing money is a form of redistributive solidarity supporting Member States in the management of migration flows. Built upon the harmonisation of migration policies achieved via the sharing of norms, financial solidarity is the most used form of solidarity enforced by the EU in the field of migration.[75] The importance of financial support in the solidarity migration framework is confirmed by the wording of Art. 80 TFEU, which explicitly refers to financial support as one way (but not the only one) to give substance to the principle of solidarity and fair sharing of responsibility.

The first instrument devoted to financial solidarity dates back to 2000 when the European Refugee Fund (ERF) was introduced.[76] Prolonged for the period 2004-2008,[77] the ERF was then included in a wider programme, the "Solidarity and Management of Migration Flows" (SOLID), until 2013.[78] The ERF maintained similar tasks throughout the time, focusing on internal cooperation to support Member States in improving their asylum procedures, reception conditions, capacity enhancement, resettlement and relocation, as well as integration for refugees.[79] In doing so, the ERF had clear solidaristic purposes, supporting Member States in "receiving and bearing the consequences of receiving" refugees and displaced persons.[80]

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[75] Morano-Foadi (n 56).
[76] Council Decision 2000/596/EC Establishing a European Refugee Fund [2000] OJ L252/12.
[77] Council Decision 2004/904/EC Establishing the European Refugee Fund for the Period 2005 to 2010, [2004] OJ L 381.
[78] Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows and repealing Council Decision 2004/904/EC [2007] OJ L 144/1.
[79] In the period 2007-2013, funds for the ERF totalled 700€ million, while SOLID funding was assigned in total 4€ billion. As for the distribution key, every Member State was given an initial sum of 5€ million (Malta and Cyprus that, being more likely to be disproportionately invested by migration flows, received 10€ million). On top of that, every Member State was given a top up amount of funds on the basis of the preceding year's total asylum-seeker arrivals. Madeline Garlick, 'Solidarity Under Strain. Solidarity and Fair Sharing of the Responsibility for the International Protection of Refugees in the European Union' (2016) *Doctoral Thesis, Radboud University Nijmegen*, p. 180.
[80] Article 2(1) of Decision No 573/2007/EC. Being adopted under the Amsterdam regime, financial solidarity in the ERF is labelled as "responsibility-sharing".

In the Multiannual Financial Framework (MFF) 2014-2020, migration financial assistance was simplified and extended, with two funding programmes replacing the previous framework: The Asylum, Migration, and Integration Fund (AMIF)[81] and the Internal Security Fund (ISF).[82] While the ISF was devoted to funding external borders, visa and police cooperation, the solidarity-based objectives of the ERF were taken over by the AFIM. The programme had a wider set of objectives, among which the increase of solidarity and responsibility sharing between Member States, with a particular focus on those most affected by migration and asylum flows.[83] During the implementation period, AFIM totalled almost 10€ billion, a significant increase compared to the previous ERF programmes.[84] Despite the increase, the broadened scope of the programme raised some concerns regarding the allocation of the money, with fears of solidarity being side-lined by the fight against irregular migration.[85]

During the 2015 "migration crisis", the EU recurred to financial solidarity to showcase not only rebalancing but emergency solidarity as well. Besides expanding the budget and using the tools available within AFIM,[86] the EU adopted Regulation 6977/16 to provide direct and indirect financial support to Member States most affected by the mass inflow of

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[81] Regulation 516/2014/EU establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (AFIM Regulation) [2014] OJ L 150/168.

[82] Regulation 515/2014/EU establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC [2014] OJ L 150-143.

[83] According to the Preamble of AFIM, the programme "should express solidarity through financial assistance to Member States. It should enhance the effective management of migration flows to the Union in areas where the Union adds maximum value, by sharing responsibility between Member States and strengthening cooperation with third countries" (Recital 7, AFIM Regulation). Such an objective was reiterated in Arts. 3(2)(d) of the Regulation.

[84] AMIF was initially allocated 3.31€ billion initial allocation for 2014-2020, increased to over 6.6€ billion in the wake of the 2015 "migration crisis". In the periods 200-2003, 2004-2007, 2008-2013, the ERF funding never reached 1€ billion.

[85] Garlick (n 79), p. 182.

[86] AFIM was also equipped with and emergency assistance mechanism to 'address urgent and specific needs in the event of an emergency situation' (Article 21, AFIM Regulation).

migrants.[87] The Regulation listed several financial interventions through which the Commission could implement emergency support (Art. 14, Regulation 6977/16). Such actions were directly guided by the principle of solidarity: in the preamble, it is stated that "mutual assistance and support in the face of disasters is both a fundamental expression of the universal value of solidarity between people and a moral imperative".[88] Interestingly, the solidarity principle invoked is not based on Art. 80 TFEU, but on Art. 122 TFEU, the "solidarity clause" in the field of civil protection. Such a choice is a clear hint to the reluctance of Member States to explicitly link solidarity and migration management: Art. 80 remains the underlining policy principle guiding rebalancing and emergency financial solidarity but without proper recognition from EU institutions.[89]

In the period 2014-2020, financial solidarity emerged as one of the main solidaristic mechanisms at EU level to rebalance migration management across the EU and to address emergencies.[90] However, the funding programmes were given too little budget availability, requiring EU institutions to reassess the structure of financial solidarity in the MFF for 2021-2027.[91] The new MFF allocates 22.7€ billion to migration and border management, a significant increase from the 10€ billion budget in 2014-2020.[92] However, the increase is focused mainly on border management. The renewed AFIM, which maintained the same objectives (including solidarity), received about the same final amount of 2014-2020: 9,88€

[87] Regulation 2016/369/EU on the provision of emergency support within the Union [2016] OJ L 70/1.
[88] For more information on the Regulation 2016/369, see: Alberto Miglio, 'The Regulation on the Provision of Emergency Support within the Union: Humanitarian Assistance and Financial Solidarity in the Refugee Crisis' (2016) 2016 1 European Papers - A Journal on Law and Integration 1171.
[89] Garlick (n 79), p. 183. The lack of explicit references to Art. 80 TFEU in the EU migration policy will be addressed in the next Chapter.
[90] Leonhard Den Hertog, 'EU Budgetary Responses to the 'Refugee Crisis': Reconfiguring the Funding Landscape' (2016). CEPS Paper in Liberty and Security in Europe 93.
[91] Iris Goldner Lang, 'Financial Implications of the New Pact on Migration and Asylum: Will the Next MFF Cover the Costs?' (2020) 27 Odysseus Blog.
[92] Alessandro D'alfonso, 'Migration and Border Management: Heading 4 of the 2021-2027 MFF', (2021) EPRS - European Parliamentary Research Service.

billion.[93] Most of the funding programmes tackle the external dimension of migration and border management, such as the fight against irregular migration and border-control capacity building.[94] The 2021-2027 funding does not reflect particular advancements in solidarity-based funding: the budget targets mainly external migration actions, rather than internal cooperation between Member States. Nonetheless, the distribution key of the funds is no longer nationally pre-allocated but distributed according to the most pressing needs regarding future developments.[95]

Despite its success and widespread use, financial solidarity is not without its weaknesses: the effects of funding programmes are not immediate; their implementation, especially at the national level, can be hindered by bureaucratic issues; the identification of an appropriate distribution key is difficult. Consequently, another solidarity mechanism emerged during the 2015 "migration crisis" as a more immediate and (at least in theory) effective way to support Member States in managing sudden influxes of people: the relocation of incoming migrants, especially asylum seekers.

2.3.3 Sharing People: Relocation

In Noll's categorisation, people-sharing is a pragmatic yet inapplicable responsibility-sharing model. It is pragmatic because, through redistribution, Member States would share not only the costs related to the entry and residence of migrants, but also the fiscal, social, and political costs of integrating them into their societies. According to Noll, it would be however inapplicable, being much more intrusive for the concerned persons

[93] Regulation 2021/1147/EU establishing the Asylum, Migration and Integration Fund [2021] OJ L 251/1.
[94] Lang (n 91). For more information on the implications of the MFF for the EU migration policy, see: Sybille Münch, 'The Multiannual Financial Framework for 2021-2027 and the Struggle over Ideas about Migration and Border Management', *EU Policymaking at a Crossroads* (Edward Elgar Publishing 2022).
[95] Lang (n 91).

compared to the other options. Therefore, it was presented as an imaginative option, not likely to be implemented in the EU framework.[96]

Despite Noll's scepticism, sharing people has played an increasingly relevant role as a model of emergency solidarity. In the EU context, it is called "relocation" and is described as the transfer of beneficiaries or applicants for protection from a Member State facing a crisis situation to the others.[97] The first EU provision mentioning relocation was the TPD, which envisaged people-sharing among the measures to support the Member States targeted by a sudden mass influx of migrants.[98] The Directive is nowadays very well-known after its activation in the wake of the Russian invasion of Ukraine.[99] For two decades, however, it remained unused: the people-sharing provisions were considered one of the main reasons behind the reluctance of EU institutions to activate it.[100]

Compared to the other solidaristic actions outlined in this paragraph, the sharing of people has proven highly divisive, with many Member States strongly opposing it. The disagreement became evident during the 2015 "migration crisis" when the EU set up a mandatory solidarity mechanism with two relocation decisions based on a sharing of people model.[101] The

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[96] Noll (n 69), p. 263.
[97] The term relocation is used to distinguish it from "resettlement", a mechanism aimed at transferring people in need of protection directly from third countries in the EU. Bruno Nascimbene, 'Refugees, the European Union and the 'Dublin System'. The Reasons for a Crisis' (2016) 2016 1 European Papers - A Journal on Law and Integration 101.
[98] Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12, Articles 26-27.
[99] The TPD will be extensively analysed in Chapter 7.2.
[100] Ineli-Ciger (n 47); Achilles Skordas, 'Temporary Protection Directive 2001/55/EC' in Daniel Thym (ed), *EU Immigration and Asylum Law* (Nomos Verlagsgesellschaft mbH & Co KG 2016); H Deniz Genç and N Aslı ŞİRİN Öner, 'Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union' (2019) 7 International Journal of Political Science and Urban Studies 1; Meltem Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean' [2015] Seeking Asylum in the European Union 223.
[101] Council Decision 2015/1523/EU establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; Council

decisions prescribed the relocation of a total 160 000 asylum seekers from Italy and Greece, targeted by over 1 million irregular arrivals in 2015,[102] to other Member States according to pre-established quotas. The relocation mechanisms encountered persistent opposition from the "Visegrad Group" (the Czech Republic, Hungary, Poland and Slovakia), who voted against their adoption, challenged their validity, and refused to implement relocations.[103] The disagreements among Member States, coupled with severe implementation problems, resulted in the failure of the relocation mechanism to perform substantive solidarity: in total, less than 35 000 asylum seekers were relocated, around 21% of the 160 000 envisaged.[104]

Since then, mandatory relocations have no longer been used as a binding emergency solidarity mechanism.[105] After failing to introduce relocation as a permanent mechanism in the EU legal framework, the EU eventually abandoned any ambition in the field of sharing of people, adopting the model of "flexible and voluntary solidarity" sponsored by the Visegrad Group.[106]

Decision 2015/1601/EU establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80.

[102] UNHCR, 'Over one million sea arrivals reach Europe in 2015' (30 December 2015), https://www.unhcr.org/news/stories/over-one-million-sea-arrivals-reach-europe-2015#:~:text=UNHCR's%20latest%20figures%20show%20that,3%2C735%20were%20missing%2C%20believed%20drowned.

[103] Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece.' (LIBE Committee 2017); Steve Peers, 'Relocation of Asylum-Seekers in the EU: Law and Policy' (*EU Law Analysis*, 24 September 2015); Marco Borraccetti, '"To quota" or "not to quota"? The EU facing effective solidarity in its Asylum Policy' (*Eurojus*, 31 July 2015); Erika Colombo, 'Il meccanismo di ricollocazione dei richiedenti asilo davanti alla Corte di giustizia: spunti di riflessione per il legislatore dell'Unione' (*Eurojus*, 27 April 2020). The Relocation Decisions, their agency implications and the related CJEU interventions are analysed in detail in Chapter 2.3 and Chapter 3.5.

[104] European Court of Auditors, Special report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results [2019].

[105] Some Member States have agreed occasionally to take part to voluntary relocation schemes, whose voluntary nature irremediably weakens their solidaristic features and practical chances of success. See: Sergio Carrera and Roberto Cortinovis, 'The Malta Declaration on SAR and Relocation: A Predictable EU Solidarity Mechanism?' (2019) CEPS Policy Insight, 14; Roberto Cortinovis, 'CEPS In-Depth Analysis - The Declaration On A Voluntary Solidarity Mechanism' (2022).

[106] The model of flexible solidarity has a prime importance in the structure of the New Pact on Migration and Asylum, as it will be analysed in the Chapter 4. Maciej Duszczyk, Karolina

2.3.4 Sharing Operations: Frontex and EUAA Support

To complete the categorisation theorised by Noll, another sharing model must be introduced: sharing of operations. This model is a result of the "agencification" process the whole EU legal acquis underwent though since the entry into force of the Lisbon Treaty.[107] In the asylum field, EU Agencies have gained a key role in supporting Member States in managing migration flows, especially in situations of crisis. The actions and measures adopted by the EU and implemented by the Agencies represent a form of solidarity through operational cooperation with national authorities in border control and migration management activities.[108]

Concerning border controls, Frontex coordinates the patrolling efforts of national border and coast guards forming the European Border and Coast Guard (EBCG). The Agency monitors border crossing and addresses migratory challenges to "respect the overarching principle of solidarity".[109] Regarding asylum procedures, the European Union Agency for Asylum (EUAA) should enable "genuine and practical solidarity among Member States" ensuring uniformity in the procedures for international protection, reception conditions and the assessment of protection needs[110].

Both Frontex and EUAA have their *raison d'être* in the principle of solidarity: Member States need operational support to implement the sharing of norms introduced by the CEAS. Frontex and EUAA provide the

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Podgórska and Dominika Pszczółkowska, 'From Mandatory to Voluntary. Impact of V4 on the EU Relocation Scheme' (2020) 21 European Politics and Society 470; Juan Santos Vara, 'Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?' (2023) 2022 7 European Papers - A Journal on Law and Integration 1243.

[107] Koen Verhoest, 'Agencification in Europe' (2018) The Palgrave handbook of public administration and management in Europe 327.

[108] Evangelina Tsourdi, 'Hotspots and EU Agencies: Towards an Integrated European Administration? – EU Immigration and Asylum Law and Policy' (2017) EU migration law blog.

[109] Regulation 2019/1896/EU on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1, Recital 9.

[110] Regulation 2021/2303/EU on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L 468/1, Recital 6. EUAA replaced the European Asylum Office (EASO) in 2022.

capacity and operational building necessary to avoid inequalities arising among Member States, implementing rebalancing solidarity. Furthermore, the staff of the agencies can be deployed to provide immediate assistance to Member States facing increased and critical migratory pressure, performing tasks typical of emergency solidarity.[111]

3 Conclusion

The chapter conceptualised solidarity in EU law on two coexistent levels: First, a value-based ocean, where solidarity is a founding value guiding EU institutions and Member States when operating under the scope of EU law. Second, an archipelago of "islands of solidarity," where a combination of primary and secondary law provisions, alongside CJEU case law, has led to diverse interpretations of solidarity, depending on the policy area involved.

Among the islands of solidarity, EU asylum law has a peculiar position, given the fast and recent development of the EU legal acquis in the past decades. Solidarity is not only the base upon which the EU asylum policy lies on (Art. 67(2) TFEU) but also the guiding principle governing Union actions in the asylum field (Art. 80 TFEU). The solidarity envisaged in primary law operates at the interstate and supranational level, binding EU institutions and Member States to operate in a spirit of solidarity when necessary. Within this framework, solidarity can serve three purposes – preventive, rebalancing, and emergency – which are implemented through measures grouped into four main clusters: normative, financial, operative, and people-sharing.

[111] For more detailed information on how Frontex and EUAA provides operational solidarity to the Member States, see: Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law 667; Philippe De Bruycker, 'The European Border and Coast Guard: A New Model Built on an Old Logic' (2016) 2016 1 European Papers - A Journal on Law and Integration 559.

The harmonisation of national asylum policies under the CEAS established a framework for cooperative efforts among Member States and operationalised solidarity in a preventive manner, aiming to create a level playing field for all participating Member States. Financial and operational solidarity allows Member States to share the burdens arising from participation in asylum policy and to address persistent or emerging imbalances among them. Laws, money and operations are therefore the ingredients used by the EU to perform solidarity in the EU migration policy at the preventive and rebalancing levels. However, the 2015 "migration crisis" unveiled the unpreparedness of the EU migration policy to swiftly react to situations of crisis. Relocation was presented as the most suitable model of emergency solidarity to address the challenges faced by EU migration management in crisis situations. However, its feasibility and efficiency are questioned after the failed implementation of the Relocation Decisions in 2015-2017.

As currently designed, EU asylum solidarity can be summarised with one concept: burden-sharing. The Union and the Member State engage in solidarity with a purely interstate and supranational mindset and implement it by sharing norms, money, operations and people. One model of solidarity is visibly absent in the EU asylum acquis: vertical solidarity, namely from the Union to the beneficiaries of asylum policies, asylum seekers and beneficiaries of international protection. Albeit not prescribed by EU primary law, solidarity towards asylum seekers is an important feature of the international refugee law framework, as outlined in the next Chapter.

Chapter 2 – Asylum Seekers' Agency in EU Asylum Law: Choosing Where to Seek and Enjoy Asylum

Solidarity in the EU asylum policy can be summarised with the concept of "burden-sharing". It is a purely interstate model where Member States strive to distribute responsibility in managing the inflow of asylum seekers. As summarised in the previous chapter, burden-sharing is pursued in four main domains: sharing of norms (harmonisation), sharing of money (EU funding targeting asylum), sharing of people (relocation plans), and sharing of operations (EU agencies support). Since the communitarisation of the Common European Asylum System (CEAS), several initiatives have been promoted in each sector. However, the adherence of the resulting EU asylum policy to the principle of solidarity and fair sharing of responsibilities is questionable. Consistently lacking in the operationalisation of solidarity in the CEAS is the involvement of asylum seekers in the decision-making process. The EU asylum policy targets asylum as a state prerogative disregarding asylum seekers' desires or intentions, especially concerning where to seek and enjoy protection.

The present Chapter defines and positions asylum seekers' agency in the CEAS as it stands before the entry into force of the New Pact on Migration and Asylum reforms. The new rules were officially adopted in May 2024, but they will have full effect only after a two-year implementation period ending in mid-2026.[1] Therefore, the next paragraphs will deal with

[1] Council of the EU, 'The Council adopts the EU's pact on migration and asylum' (14 May 2024), https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum. The texts of the adopted reforms are available here: https://eur-lex.europa.eu/oj/daily-view/L-series/default.html?&ojDate=22052024.

the still-in-force rules governing EU asylum policies, while the New Pact reforms will be addressed in self-standing chapters.[2]

The concept of asylum seekers' agency is defined and contextualised looking at its origin and relevance in international and EU refugee law. Subsequently, a legislative review investigates the presence of agency-enhancing provisions in the CEAS, with a focus on the Dublin system, which governs the allocation of responsibility for the analysis of asylum claims among Member States. Acknowledging the lack of agency provisions in the current EU legislative framework, the Chapter looks at the interlinks between the denial of agency and the incomplete and weak operationalisation of Art. 80 TFEU in the CEAS.

The lack of agency provisions, coupled with the inefficiency of the solidarity mechanisms in place, is problematised as one of the reasons behind the systemic failures of the Dublin system during and after the 2015 "migration crisis". Under the existing framework, solidarity and agency are irreconcilable concepts: inter-State solidarity is considered efficiently working only insofar as asylum seekers are voided of any role in the burden-sharing mechanisms in place in both standard and emergency situations. However, the Dublin system is vitiated by systemic failures – outlined in the final paragraph of the Chapter – which demonstrate the need to integrate asylum seekers into the system, rather than excluding them.

1 Agency: Definition and Relevance in International and EU Primary Law

Throughout the thesis, agency is defined as the ability of asylum seekers to choose and enjoy asylum in a country of their preference.[3]

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[2] Chapters 4, 5 and 6.

[3] Under the EU asylum policy, the term "asylum seeker" refers to "a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken" (derived from Art. 3(13) of the Asylum

Agency is a notion which is neither defined nor codified in international and EU asylum law. However, it is strictly connected with the right to asylum.

1.1 Agency Provisions in International and EU Law

In international law, the role of refugees is rather passive: they can ask for protection, but States retain the ultimate discretion, albeit regulated by international, regional and national norms, to decide who qualifies as a beneficiary of international protection.[4] The interlinks between the rights and obligations bestowed by asylum upon individuals and States are encapsulated in the two foundational sources of the right to asylum: the Universal Declaration of Human Rights (hereafter, UNHRD) and the 1951 Geneva Convention and the 1967 Protocol (hereafter, Geneva Convention).[5]

Article 14 UNHRD is the first source of international law providing for a right *to* asylum referred to individuals, establishing that "everyone has the right to seek and to enjoy in other countries asylum from persecution." Art. 14 UNHRD does not entail a right to be granted asylum de jure.[6] However, it provides refugees with clear permission to migrate to seek protection and, if recognised, enjoy it outside their country of origin. Given the non-binding nature of the UNHRD, the content of its rights is implemented through international conventions binding on their

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Procedures Regulation (APR), Regulation 2024/1348/EU stablishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L, 2024/1348). To make an asylum application means to "expresses in person to a competent authority […] a wish to receive international protection from a Member State" (Art. 21(1), APR).

[4] In international law the term used to describe protection seekers is "refugees". The term "refugee" is used here to generally indicate someone who, forced to flee their own country, seeks safety in another State. The term is used to qualify people on the move who seek for asylum under international law. CJ Harvey, 'Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy', *Current Issues of UK Asylum Law and Policy* (Routledge 1998)., p. 221.

[5] Universal Declaration of Human Rights [1948] UNGA res. 217 A(III); United Nations, Convention relating to the Status of Refugees [1951] and Protocol Relating to the Status of Refugees [1967]. MT Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union's Law' (2008) 27 Refugee Survey Quarterly 33.

[6] Alice Edwards, 'Human Rights, Refugees, and The Right "To Enjoy" Asylum' (2005) 17 International Journal of Refugee Law 293.

signatories.[7] Art. 14 UNHRD was therefore implemented via the Geneva Convention. The Convention tackles asylum through a purely state-centric perspective.[8] However, Art. 14 UNHDR is implicitly enforced within the Convention.[9] The right to seek asylum is safeguarded by the principle of non-refoulement enshrined in Art. 33 of the Convention. This provision obliges Member States to initiate asylum procedures to prevent returning individuals to countries where they would face persecution.[10] The right to enjoy asylum is concretised via the introduction of a common definition of "refugee" (Art. 1 Geneva Convention) and with the provision of a minimum set of rights that all Contracting parties must provide to refugees (Arts. 3-34 Geneva Convention).[11]

Art. 14 UNHRD and the Geneva Convention therefore introduced a right to seek and enjoy asylum which imposes procedural obligations upon States when granting a protection status. Under EU law, the individual right to asylum is more explicitly linked with states' obligations. Art. 18 of the Charter of Fundamental Rights of the EU (Hereafter, Charter) states: "The right to asylum shall be guaranteed with due respect for the rules of the

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[7] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 European Journal of Migration and Law 439.

[8] Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) 88 Nordic Journal of International Law 315.

[9] Subrata Roy Chowdhury, 'A Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law' (1995) 7 International Journal of Refugee Law 100., p. 105.

[10] Art. 33 of the Geneva Convention states: "No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

[11] Other international conventions tackle rights which are connected to the enjoyment of the right to asylum, including the the Convention on the Elimination of All Forms of Racial Discrimination (1965), the Covenant on Civil and Political Rights (1966), especially Arts. 7, 9 and 13, the Convention against Torture (1984), especially Art. 3, the Convention on the Rights of the Child (1989). The European Convention on Human Rights (ECHR), while not including among its provisions a right to asylum, contains some rights which are particularly relevant for refugees, especially Arts. 3, 5, 8 and 13. Gammeltoft-Hansen and Gammeltoft-Hansen (n 7); Terje Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de Facto Asylum' (1990) 2 International Journal of Refugee Law 361.

Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".[12]

Although Art. 18 lacks an explicitly defined subject, the travaux préparatoires, along with the Charter's object and context, clarify that its personal scope is directed towards individuals rather than Member States.[13] The right to asylum provided by the Charter is a substantial right, ensuring asylum seekers a subjective and enforceable right to asylum once a set of criteria building upon – though not exclusively – the 1951 Geneva Convention are fulfilled.[14] The material scope of Art. 18 Charter does not amount to an unconditional right to obtain asylum but is nonetheless a manifestation of vertical solidarity: Member States must grant protection to those qualifying for it. However, Art. 18 Charter does not impose specific obligations on Member States, confirming the vagueness of the concept of vertical solidarity and of the content of the right to asylum.[15]

No other provision of EU primary law provides active rights specifically addressed to asylum seekers. In the TFEU, they are addressed as recipients of Member States' actions, with no agency recognised to them. Concerning solidarity provisions, all references to solidarity outlined in the previous chapter are explicitly state-centric: Art. 67(2) TFEU refers to "solidarity between Member States" as the basis of the common policy on asylum, immigration and external border control. Art. 80 TFEU provides for a solidaristic obligation targeting both Member States and EU institutions which is to be achieved via the allocation of responsibility on fair terms.[16]

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[12] Charter of Fundamental Rights of the European Union [2012] OJ C 326-391.
[13] Gil-Bazo (n 5).
[14] The access to asylum is not restricted to solely those fulfilling the criteria of Art. 1A of the Geneva Convention, but grants protection to everyone whose protection grounds are stablished in international law. ibid.
[15] Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 European Law Journal 94.
[16] Karageorgiou (n 8).

Therefore, asylum seekers are not among the direct addressees of EU primary law solidarity provisions.

However, third-country nationals are targeted by another principle in the TFEU: fair treatment. The EU migration policy is not only based on interstate solidarity but also "fair towards third-country nationals" (Art. 67(2) TFEU). Fairness is the final objective of the EU migration policy. Despite the lack of a definition in the Treaties, fair treatment provides for, at the very least, compliance with fundamental rights.[17] The sources of fundamental rights for refugees are not only the field-specific treaties such as the 1951 Geneva Convention but also regional fundamental rights treaties and *in primis* the European Convention on Human Rights (ECHR) and the EU Charter.[18]

Looking at the wording of Art. 67(2) TFEU, there is an instrumental relationship between solidarity and fairness: inter-state solidarity is the basis for pushing European action on migration matters towards ensuring fair treatment of third-country nationals present on the EU territory.[19] Fairness is a constituent element of both the CEAS and the EU common immigration policy.[20] In the CEAS, it is ensured by establishing a common policy on asylum, subsidiary protection and temporary protection with a view to "offering appropriate status to any third-country national requiring international protection" (Art. 78(1) TFEU). Such appropriate status should

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[17] Loïc Azoulai and Karin De Vries, *EU Migration Law: Legal Complexities and Political Rationales* (OUP Oxford 2014), p. 4.

[18] Council of Europe, European Convention on Human Rights, 1950. All EU Charter provisions which are not expressly limited in personal scope apply to EU citizens and non-EU citizens alike. Steve Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' (2001) 3 European Journal of Migration and Law 141.

[19] Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy Special Issue: Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24 Maastricht Journal of European and Comparative Law 740.

[20] Art. 79(TFEU) mirrors Art. 67(2) stating that EU action is aimed "at ensuring, at all stages, the efficient management of migration flows, *fair treatment of third-country nationals residing legally in Member States*, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings". Art. 79(1) TFEU, *emphasis added*.

be awarded through "common procedures" (Art. 78(2)(d)) and should amount to a "uniform status of asylum […] valid throughout the Union" (Art. 78(2)(a)) or a "uniform status of subsidiary protection" (Art. 78(2)(b)).[21]

The Treaties are silent on the modalities to ensure refugees such an appropriate status, as well as what makes a status "uniform". Through fairness provisions, asylum seekers have nonetheless the right to ask for asylum and access to fair procedures on the EU territory in compliance with their fundamental rights. Fairness however does not grant any right to choose where to enjoy protection.[22] Looking at the system governing the responsibility-allocation among Member States to analyse asylum claims, refugees' agency is neither recognised nor precluded by primary law: Art. 78(2)(e) provides for the CEAS to establish "criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection". No definition nor connotation is given on how such criteria and mechanisms should be designed.

Asylum seekers' position vis à vis EU primary law is not centred on agency but rather on fair treatment. Solidarity and fairness provisions governing the CEAS are strictly intertwined: EU policies are based on solidarity (Art. 67(2) TFEU), which should govern, together with fair sharing of responsibilities, the Union action (Art. 80 TFEU). The ultimate purpose of solidarity is to offer appropriate protection according to standards laid down in international law and EU secondary law.[23] Fairness is however a treatment awarded to asylum seekers which does not empower them to decide where to seek and enjoy protection.

[21] The system of European protection is completed with a "common system of temporary protection" (Art. 78(2)(c)).
[22] Lukasz Dziedzic, 'Solidarity and Critique in the EU: A Case Study of Asylum' (PhD Thesis, Tilburg University 2022).
[23] Karageorgiou (n 8).

1.2 The Denial of Agency via "Protection Elsewhere" Policies

Art. 18 of the Charter, together with Art. 14 UNHRD and the Geneva Convention, empowers asylum seekers to ask for asylum, to have their claim assessed and to enjoy protection if awarded. There is instead no reference on where and how such a right to asylum can be exercised. The ambiguity of international and EU primary law over the right to choose the country of asylum, neither explicitly provided nor denied, is due to the context in which international refugee law was adopted: the general practice regarding asylum jurisdiction was based on the assumption that the first country of asylum, namely the one where an application is lodged, was the one responsible for assessing it.[24] Without any rule saying otherwise, the understanding of the right to asylum implicitly recognised refugees' agency on where to exercise it, or at the very least it protected them from being forced to file an application in a specific country.[25]

The absence of agency provisions in international refugee law, perceived as unnecessary, was inconsequential until the introduction of "protection elsewhere" policies by many Global North countries in the 1970s.[26] Through these policies, States started to deflect their responsibility to assess asylum applications when lodged by applicants who had the chance to ask for protection in another country along their journey.[27] The main criterion to individuate the "other" responsible country is the notion of "safe third country" (STC).[28]

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[24] Gamze Ovacik, 'The Right to Choose Country of Asylum: The 1951 Convention and the EU's Temporary Protection Directive' (*Asile*, 31 August 2022).
[25] For two contrasting opinions on the level of freedom of choice enjoyed by asylum seekers on where to seek and enjoy asylum see: ibid; Kay Hailbronner, 'Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway' [2016] Verfassungsblog.
[26] Berfin Nur Osso, 'Unpacking the Safe Third Country Concept in the European Union: B/Orders, Legal Spaces, and Asylum in the Shadow of Externalization' (2023) 35 International Journal of Refugee Law 272.
[27] UNHCR, 'The Concept of "Protection Elsewhere"' (1995) 7 International Journal of Refugee Law 123.
[28] Other practices linked to 'protection elsewhere' policies involve the concepts of 'first country of asylum' (a state where the applicant has already received protection) and 'safe country of origin' (a state generally considered safe for its nationals). More information on

An STC is normally defined as a "safe country with which the applicant has a genuine connection and where he/she should have applied for international protection".[29] There are two requirements for a country to qualify as an STC: first, to offer effective protection to the refugee. The meaning of "effective" protection is debated in the literature: UNHCR considers the criterion fulfilled if the safe third country complies with basic human rights, if it respects the principle of non-refoulement and if it ensures access to protection assessment procedures.[30] Second, a connection between the refugee and the third country. There is no common and unequivocal understanding of what constitutes a connection: from family ties to integration or mere transit, the definition varies among state practices.[31] If these conditions are fulfilled and a "protection elsewhere" policy is in place under national law, a State can discharge its responsibility to analyse the claim in substance and return the refugee to the safe third country where they can ask for protection.

The STC notion is rooted in the ambiguity of international refugee law concerning the responsibility allocation of asylum claims analysis.[32] Lacking any explicit legal basis for their establishment, promoters of the STC relied on Art. 33 Geneva Convention, which forbids refugees' transfers only when in breach of refoulement. *A contrario*, transfers not breaching refoulement

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the difference between the concepts here: Nadine El-Enany, 'The Safe Country Concept in European Union Asylum Law: In Safe Hands' (2006) 2 Cambridge Student Law Review 1. "Protection elsewhere" policies are examined in Chapters 5.2.2 and 5.3.2, focusing on their application within asylum procedures as revised under the New Pact on Migration and Asylum.

[29] EUAA, Asylum Report 2023 [2023], p. 117.

[30] See: EXCOM Conclusion No. 85 (XLIX) of 1998 on International Protection. Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and P Weckel (eds), *Migration & refugee protection in the 21st century: legal aspects* (Martinus Nijhoff 2015); Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State Special Feature' (2006) 28 Michigan Journal of International Law 223.

[31] Sílvia Morgades-Gil, 'The "Internal" Dimension of the Safe Country Concept: The Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts' (2020) 22 European journal of migration and law 82.

[32] Luisa Feline Freier, Eleni Karageorgiou and Kate Ogg, 'The Evolution of Safe Third Country Law and Practice' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

are assumed compliant with the Convention. Art. 31 Geneva Convention is used to further support the legality of STC: the provision prohibits states from imposing penalties on refugees who come "directly" from a territory where their life and freedom are threatened. Such obligation is then considered not to apply to people arriving indirectly and passing through safe countries. Scholars pointed out several legal issues arising from an interpretation of the Geneva Convention as silently availing STCs.[33] Nonetheless, STCs are currently a consolidated practice in many legal systems, first and foremost the EU, under the auspices of the UNHCR.[34]

The widespread application of STCs disentangles the right to seek from the right to enjoy asylum. Refugees can seek protection anywhere, but it is up to the receiving State to assess whether they are responsible for analysing the claim and granting protection or not. The implementation of "protection elsewhere" practices is justified by the assumption that a refugee in genuine need of protection will seek it in the first place available: States seek to counteract the phenomenon of "asylum shopping", whereby refugees attempt to identify the most favourable forum for lodging their asylum claims rather than selecting the nearest safe country.[35] At the same time, the introduction of STCs is also sponsored as beneficial for refugees, diminishing the risks of "asylum in orbit": with clear rules in place, refugees are ensured that one precise State is in charge of their claim, avoiding

[33] Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' (n 31). Moreno-Lax contests the legality of the STC altogether. Foster (n 31). argues that the Convention neither authorizes nor prohibits STC.
[34] The focus of UNHCR shifted across time from an equal attention to States necessities and refugees intensions (EXCOM Conclusions 15, Refugees Without an Asylum Country [1979] points H(iii) and H(iv)), to an increasingly state-centric approach limiting the autonomy of the refugees (in EXCOM Conclusions 58, movements of refugees whose protection is already recognised by a country were defined "irregular movements": EXCOM Conclusions 58, Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection [1989]). The position of UNHCR on STCs and the conditions to fulfil to apply the notion is summarised here: UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers [2013].
[35] Nadine El-Enany, 'The Safe Country Concept in European Union Asylum Law: In Safe Hands' (2006) 2 Cambridge Student Law Review 1.

situations of responsibility dumping which could leave people in need without access to protection.[36]

"Protection elsewhere" policies are designed to diminish the burden on national asylum systems by deflecting the responsibility for status determination to third countries.[37] Through STCs, States implemented a system of allocation of responsibility disregarding refugees' agency. By arbitrarily deciding in which countries refugees should ask for asylum, migration journeys are divided into two categories: One, primary movements, out of the country of origin and towards a safe country to seek protection. These movements are involuntary and forced, hence legitimate. Two, every movement beyond the primary one is considered a "secondary movement", through which refugees who already escaped from persecution further travel to a specific country where to claim asylum.[38] Such a movement is considered voluntary and hence a phenomenon of irregular migration: in their onward travel, refugees are driven by reasons outside protection needs, such as socio-economic prospects of life or the likelihood of receiving protection.[39] Such distinction does not adhere to the complexity of migration movements to and within the countries and regions of asylum: onward movements could be as forced as the primary ones or based on a lack of knowledge of the applicable rules or on the desire to connect with communities or family members and hence increase integration prospects.[40]

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[36] Joanne Van Selm, 'Access to Procedures: "Safe Third Countries", "Safe Countries of Origin" and Time Limits' (UNHCR 2001).

[37] See, in particular: Sergio Carrera and others, 'When Mobility Is Not a Choice: Problematising Asylum Seekers' Secondary Movements and Their Criminalisation in the EU.' (CEPS 2019).

[38] Throughout the thesis, the term "secondary movements" is employed only to signal its use by authorities, especially at EU level. When referring to the movement *per se*, terms such as "onward movements", or in the EU context "intra-EU mobility", are used.

[39] Van Selm (n 36).

[40] For more information between the perceived and detected reasons behind onward movements, see: Sergio Carrera and others, 'European Union Policies on Onward and Secondary Movements of Asylum-Seekers and Refugees'; Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 International Journal of Refugee Law 567; Daniel Thym, 'Secondary Movements: Overcoming the Lack of Trust among the Member States?'

The distinction between primary and secondary movements is particularly evident in the EU asylum policy.[41] In the EU context, the denial of asylum seekers' agency has both an external and internal dimension. Externally, the EU codified the STC notion in the Asylum Procedures Directive, serving as an optional basis for the inadmissibility of asylum claims.[42] Concurrently, the internal dimension of agency denial underpins the EU's responsibility-allocation mechanism, which distributes among Member States the duty to examine asylum claims. Within the current framework, this mechanism is governed by the Dublin system.

2 Agency in EU Secondary law: the Dublin System

Art. 78(2)(e) TFEU leaves full discretion to secondary law to establish the criteria for determining the responsible Member States for analysing asylum claims in the EU. However, well before primary law conferred upon the EU the competence to establish such criteria through the Amsterdam Treaty,[43] some Member States had already adopted an intergovernmental treaty – the Dublin Convention – on allocating responsibilities for managing asylum claims.[44] The system, introduced in 1990, has then been gradually extended to all Member States and EFTA States and it was incorporated in the EU legal *acquis* in 2003 with Regulation 343/2003 (Dublin II

(*EU Immigration and Asylum Law and Policy*); Heaven Crawley and Katharine Jones, 'Beyond Here and There: (Re)Conceptualising Migrant Journeys and the "in-Between"' (2021) 47 Journal of Ethnic and Migration Studies 3226; Heaven Crawley and Jessica Hagen-Zanker, 'Deciding Where to Go: Policies, People and Perceptions Shaping Destination Preferences' (2019) 57 International Migration 20.

[41] Izabella Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on Their Movement under EU Law' (2021) 40 Refugee Survey Quarterly 82.

[42] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60, Arts. 33 and 38. See Chapters 5.2.2. and 5.3.2.

[43] Treaty establishing the European Community (Amsterdam consolidated version) [1997] OJ C 340-174, art. 63(1)(a).

[44] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention [1997] OJ C 254-1. The first signatories back in 1990 were: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

Regulation).[45] A subsequent recast, Dublin III Regulation, was carried out in 2013.[46] Throughout all reform processes, the so-called "Dublin system" preserved unchanged its main purpose, the determination of the responsible Member State for examining asylum applications, and the criteria and mechanisms to achieve it.

The Dublin system is built upon three founding principles: first, every asylum application lodged must be examined by a Member State, to comply with the right to asylum enshrined in Art. 18 Charter; second, each application must be examined by a single State, avoiding to overburden national asylum systems with simultaneous applications; third, the responsible Member State must be identified according to "objective and fair" criteria outlined in the Dublin III Regulation[47]. The first criterion is family reunification, which assigns as responsible the Member State where a family member is already present. The eligible family members are restrictively identified as the spouse or partner, minor children and – if the applicant is a minor – the parents or adult responsible. Another element restricting the applicability of the family reunification criterion is the limitation of its personal scope to only families already existing in the country of origin (Arts. 9-11 Dublin III Regulation). The second criterion is based on the legal relationship with a Member State, such as the possession of a valid residence document or a visa (Arts. 12-15 Dublin III Regulation). The third and last criterion is the "first country of entry" rule, which assigns responsibility to the Member States whose external borders the applicant irregularly crossed to enter the EU (Art. 13(1) Dublin III Regulation). If no criterion is applicable, the default rule prescribed in Art. 3(2) Dublin III

[45] Council Regulation (EC) 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50-1 (Dublin II Regulation).
[46] Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180-31 (Dublin III Regulation).
[47] Recital 5 and Art. 3(1), Dublin III Regulation.

Regulation identifies as responsible the Member State where the asylum application was lodged.

The Dublin system identifies a simple and unequivocal system providing the CEAS with "a clear and workable method for determining the Member State responsible for the examination of an asylum application" (Recital 4, Dublin III Regulation). Such criteria are enforced thanks to the mutual trust between Member States and are "fair […] both for the Member States and the persons concerned" (Recital 5 Dublin III Regulation). The system does not consider asylum seekers' agency but rather is implemented through coercive and punitive measures.

2.1 Mutual Trust in the Dublin System

The Dublin system is an STC model based on the principle of mutual trust. Mutual trust is the cornerstone of judicial cooperation in the EU: in its seminal opinion on the accession to the ECHR, the CJEU described mutual trust as a "fundamental premiss […] that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded". [48] Thanks to this premiss, mutual trust requires "each […] State, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[49] In the context of the Dublin system, mutual trust implies that all Member States are considered safe countries for third-country nationals (Recital 3 Dublin III Regulation). Such safety presumption is justified by the shared commitment of Member States to respect the principle of non-refoulement and supported by the collective participation of Member States not only in the Geneva Convention, but also in the ECHR, and by their implementation

[48] Opinion C-2/13, *Accession of the EU to the ECHR* [2014] ECLI:EU:C:2014:2454, paras 166-168. For more information, see: Eleanor Spaventa, 'A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 Maastricht Journal of European and Comparative Law 35.
[49] Opinion C-2/13, para 191.

of minimum standards on reception, qualification and procedures prescribed by the CEAS.[50]

The principle of solidarity and fair sharing of responsibility plays a very marginal role in the Dublin system: only at recital 25, the necessity to strike a balance between responsibility criteria in a spirit of solidarity is prescribed as instrumental to creating an area without internal frontiers. The marginality of solidarity, acknowledged by EU institutions themselves,[51] is confirmed by the administrative-oriented Dublin criteria. The criteria follow an "authorisation principle", according to which responsibility is allocated to the Member State who "allowed" the presence of the asylum seekers in the EU by either granting protection to close family members, issuing a visa or residence permit or by not patrolling efficiently its external borders.[52] Under this regime, agency-based criteria such as meaningful links between the Member State and the asylum seeker are irrelevant.[53] The STC model implemented by the Dublin system provides for rapid procedures characterised by a high degree of automaticity: asylum seekers are expected to comply with responsibility decisions made according to objective criteria which disregard their intentions.[54]

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[50] Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2017 2 European Papers - A Journal on Law and Integration 7592; Chiara Favilli, 'Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'Unione Europea' (2015) 98 Rivista di Diritto Internazionale 701.

[51] In a 2007 Green Paper, the Commission admitted that "Dublin system may *de facto* result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location". European Commission, 'Green Paper on the future of the Common European Asylum System' [2007] COM (2007) 301 final, p. 10.

[52] Violeta Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward' (EU Red Cross 2016).

[53] Vincent Chetail, Philippe De Bruycker and Francesco Maiani, *Reforming the Common European Asylum System: The New European Refugee Law* (BRILL 2016)., p. 67.

[54] The automaticity governing the Dublin system has been addressed by the CJEU in several cases balancing the principle mutual trust with asylum seekers' fundamental rights. The CJEU case law will be addressed in the next Chapter.

By focusing on rapidity over solidarity, however, there is an underlining tension within the Dublin system:[55] the only permanent mechanism managing the allocation of responsibility amongst Member States is not governed by Art. 80 TFEU objectives, solidarity and fairness.[56] Such tension arises when applying mutual trust and fairness to the role of asylum seekers within the system.

2.2 Fairness Implications in the Dublin System

In principle, mutual trust ensures asylum seekers access to a levelled playing field of protection. Each asylum application is supposed to respect CEAS standards and be assessed fairly: whichever Member State is responsible for assessing the claim, it shares with all other Member States a floor of procedural and substantial standards compliant with fundamental rights. Such standards concern not only the reception conditions and qualification criteria but also the way Member States evaluate their responsibility for assessing their claim.

Under the Dublin system, fairness provisions are particularly relevant, given the incremental recognition of the impact of its rules on asylum seekers' fundamental rights: both Dublin II and Dublin III Regulation reforms did not challenge "the principles underlying the system" but intervened to implement the "necessary improvements in the light of experience" (Recital 5 Dublin II Regulation and Recital 9 Dublin III Regulation). In particular, the Dublin III reform was purposed not only to improve the effectiveness of the Dublin system but the "protection granted to applicants" as well (Recital 9 Dublin III Regulation). As will be explained in detail in the next chapter, the Dublin III reform is a necessary adaptation of the former framework to the interventions of the Court of Justice of the

[55] Violeta Moreno-Lax, 'Mutual (Dis-)Trust in EU Migration and Asylum Law: The "Exceptionalisation" of Fundamental Rights' in Sara Iglesias Sánchez and Maribel González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (1st edn, Cambridge University Press 2021).
[56] Karageorgiou (n 8).

EU (CJEU), whose case law drastically impacted the functioning of the system.[57] While leaving the tenets and objectives of the Dublin system unchanged, the Dublin III Regulation, therefore, flanked the efficiency focus of the system with a human-rights-oriented spirit dealing with the protection of individuals.

In increasing the fairness of the system, Dublin reforms also introduced timid agency recognition provisions under the shape of procedural rights and exceptions to the application of the objective criteria of the system. First, a discretionary clause was introduced at Art. 3(2), forbidding transfers of applicants to Member States where "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter of Fundamental Rights of the European Union". Second, family-related transfers are conditional upon the consent of the applicant to be reunited with the family member: only if the applicant provides the express desire to be transferred the Dublin procedures can be carried out (Arts. 9-10). Concerning unaccompanied minors, transfers for reasons other than family unity with relatives are forbidden (Art. 8 Dublin

[57] See Chapter 3.1, and particularly: ECtHR, *M.s.s v Belgium and Greece*, Judgment of 21 January 2011, Application no. 30696/09; Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865. For more analysis of the Dublin III reform, see: Valsamis Mitsilegas, 'Solidarity and Trust in the Common European Asylum System' (2014) 2 Comparative Migration Studies 181; Francesco Maiani, 'Responsibility Allocation in the Common European Asylum System' in Philippe De Bruycker and Evangelia Tsourdi (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022); Ermioni Xanthopoulou, 'Case Study II: Dublin Transfers', *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Oxford: Hart Publishing 2020); Steve Peers, 'Reconciling the Dublin System with European Fundamental Rights and the Charter' (2014) 15 ERA Forum 485; Constantin Hruschka, 'The (Reformed) Dublin III Regulation—a Tool for Enhanced Effectiveness and Higher Standards of Protection?' (2014) 15 ERA Forum 469; Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?', *Reforming the Common European Asylum System* (Brill Nijhoff 2016).

III Regulation).[58] Third, Member States retain the power to assert responsibility over any asylum claim lodged on their authorities in derogation to the Dublin criteria thanks to the discretionary clause (Art. 17(1) Dublin III Regulation): at any time during Dublin procedures, Member States can decide to take up responsibility even if not formally responsible.

Other important protection-oriented addenda of the Dublin III Regulation concern procedural rights, with the explicit reference to the right to information (Art. 4), and the mandatory provision of a personal interview during Dublin procedures (Art. 5). Member States are obliged to give applicants information on the main elements of the Dublin Regulation – *in primis* its objective and related procedural rights – via a common leaflet in a language understandable by the applicant. The personal interview is instrumental for the determination of the Member State responsible and for reiterating the information provided per Art. 4. It is mandatory except for two scenarios: when the applicant absconds and when the applicant already provided sufficient information to determine the responsible Member State. The mandatory provision of an interview acknowledges the possibility for the asylum seeker to at least influence the decision-making process and secures the right to be heard.[59] Furthermore, the reform introduces specific procedural safeguards concerning the right of defence: Arts. 26-27 ensure each applicant is notified of a transfer decision and can challenge it. The access to effective remedies, which could have a suspensive effect (Art. 27(4)), is strengthened through provisions on free legal assistance and legal aid (Art. 27(6)). A last procedural provision regards more precise information on the time limits to Dublin procedures, which can last for a maximum of 11 months (if no appeal is lodged) (Arts. 23-24).

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[58] The Regulation contains other provisions concerning the right of minors and family members, such as the guarantees for minors listed at Art. 6; the expansion of the family reunification criterion (Arts. 9 and 11); the inclusion of family ties as primary element to take into consideration when determining the Dublin criteria (Art. 7(3)); and the discretionary clause (former sovereignty clause) of Art. 17.
[59] Hruschka (n 57).

Despite the improvement introduced by the Dublin III Regulation, the Dublin system does not entail an explicit recognition of asylum seekers' agency.

2.3 Denial of Agency under the Dublin System

Under the Dublin system, there is no place for agency. The system is rooted in "interstate cooperation based on automaticity and trust".[60] Automaticity and trust are achieved by depriving the people involved in the responsibility allocation criteria of any say in the decision-making process. Neither their preferred choice nor consent to the allocation is provided for in the Dublin III Regulation.[61]

Under the Dublin system, any onward movement upon arrival in the EU is labelled as a secondary movement.[62] Secondary movements are opposed because of the risk of "asylum shopping": through their onward movements, asylum seekers would choose where to lodge an application and even make multiple claims.[63] At the same time, the automatic and clear hierarchy of criteria within the Dublin system swiftly allocates asylum

[60] Mitsilegas (n 57).
[61] The only exception is for family-related transfers (Arts. 9-10) and for the activation of the discretionary clause through which a Member State can ask another one to take charge of the applicant for humanitarian reasons (Art. 17(2)). In both cases, the applicant must express their consent.
[62] While absent in the Dublin III Regulation, the fight against secondary is listed among the purposes of the approximation of rules prescribed by most secondary law provisions composing the CEAS: Directive 2011/95/EU, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] O.J. 337/9, Recital 13; Directive 2013/32/EU, on common procedures for granting and withdrawing international protection [2013] O.J. L 180/60, Recital 13; Directive 2013/33/EU, laying down standards for the reception of applicants for international protection [2013] O.J. L 180/96, Recital 12.
[63] The "asylum shopping" term refers to the fear of asylum seekers taking advantage of the absence of internal frontiers within the EU to lodge several asylum claims in different Member States. Sílvia Morgades-Gil, 'Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power to Issue Humanitarian Visas?' (2017) 2017 2 European Papers - A Journal on Law and Integration 1005.

jurisdiction and prevents Member States from leaving asylum seekers "in orbit", namely without a country of asylum.[64]

Despite its professed beneficial effects for asylum seekers, the Dublin system can be defined as an "instrument of coercion",[65] in that it disregards asylum seekers' preferences when allocating responsibility and implemented through fingerprinting and limitation of mobility rights also via detention and forced transfers.[66] Fingerprinting upon arrival is an inherent part of the Dublin system, instrumental to understanding the applicable responsibility criteria, and the data collected is stored in EURODAC.[67] If a Member State other than the one where the asylum seeker is present is deemed responsible, detention is widely used – at times on a near-systematic basis – to prevent the "risk of absconding" and forcedly implement a Dublin transfer.[68]

To support the coercive nature of the Dublin system, the Schengen *acquis* contains several rules to detect and fight against asylum seekers' onward movements: first, asylum seekers do not enjoy freedom of movement within the Schengen area. While they have the right to remain in the territory of the Member State pending the analysis of their application, intra-EU movements are regulated under national law, which in

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[64] Esin Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22 European Law Journal 448.
[65] Elspeth Guild and others, 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection' (LIBE Committee 2015)., p. 17.
[66] Chetail, Bruycker and Maiani (n 53)., p. 79.
[67] Regulation (EU) 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180-1.
[68] Detention is regulated at Art. 28 of Dublin III Regulation. Guild and others (n 65), p. 84.

most cases does not allow exiting the national territory.[69] Furthermore, the Schengen Border Code (SBC) contains tools aimed at impeding asylum seekers' onward movements: from the temporary reintroduction of border controls in case of sudden inflows of irregular migration – widely used during the 2015 "migration crisis"–[70] to the use of police spot-checks.[71] Many other instruments under EU law coerce asylum seekers within the Dublin system and punish onward movements: for example, in case of absconding reception conditions can be limited and procedural guarantees reduced.[72] Through the interactions between different instruments pertaining to migration management and border controls, asylum seekers are subject to contain and control, whose only requirement throughout the asylum procedures is to comply with the rules in place.

To solidify the denial of agency built in the CEAS, mutual trust and coercion interlink in the uneven implementation of mutual recognition of asylum decisions, which varies depending on the outcome. Mutual recognition is an underlining principle governing EU law in the field of citizenship,[73] internal market,[74] and the Area of Freedom, Security and Justice, especially concerning criminal judicial cooperation.[75] It is a minimum harmonisation principle providing for decisions made in one

[69] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60, Art. 9. The prohibition of intra-EU mobility is achieved via the limited territorial validity of the residence permit issues to asylum seekers: See for example in Italy, Decreto Legislativo 2015, n. 142, Art. 4.
[70] Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1, Chapter II. Chiara Favilli, 'Schengen e Dublino: una convivenza impossibile?', *Per una politica europea dell'immigrazione e dell'asilo* (Edizioni Fondazione Basso 2018); Sergio Carrera and others, 'The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016' (LIBE Committee 2018).
[71] Art. 23 SBC. Carrera and others, 'European Union Policies on Onward and Secondary Movements of Asylum-Seekers and Refugees' (n 40).
[72] Carrera and others, 'When Mobility Is Not a Choice: Problematising Asylum Seekers' Secondary Movements and Their Criminalisation in the EU.' (n 37).
[73] Paul Magnette, 'How Can One Be European? Reflections on the Pillars of European Civic Identity' (2007) 13 European Law Journal 664.
[74] Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 European Papers 93.
[75] Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405.

Member State to be enforceable beyond its borders and across the Union.[76] Mutual recognition is the pragmatic consequence of mutual trust, as Member States share confidence in the trustworthiness of the decisions taken by each of them given the harmonisation pursued at both international and EU levels. Differently from other EU policy areas, mutual recognition in EU asylum law is incomplete: asylum decisions within the Dublin system are indeed subjected to mutual recognition only when negative, while positive asylum decisions have limited territorial application in the Member State where the decision is made.

Negative mutual recognition of asylum decisions is provided for by the Asylum Procedure Directive: Member States can consider inadmissible and unfounded any subsequent application for international protection if another Member State has already rejected it (Art. 33, 2013 APD).[77] By refusing to examine the substance of the new request, the second Member State recognises the legal validity of the decision adopted by the first Member State.[78] Negative recognition can result in a "take-back" request, through which the Member State that rejected the asylum application must readmit the asylum seeker and begin a return procedure.[79] Negative mutual recognition follows the aim of ensuring that only one Member State is responsible for examining asylum claims, thus preventing asylum seekers from making multiple applications. It is justified by the fact that Member States are bound by the same fundamental rights provisions and assess each asylum claim by applying common CEAS procedures.[80]

[76] Eleanor Spaventa, Systemic v administrative mutual trust: recomposing the disconnection between mutual trust and fundamental rights protection (2025) Maastricht Journal of European and Comparative Law, forthcoming.
[77] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180-60, Art. 33.
[78] Moreno-Lax, 'Mutual (Dis-)Trust in EU Migration and Asylum Law' (n 55).
[79] Art. 23, Dublin III Regulation.
[80] Mitsilegas (n 57)., p. 10.

The reasoning is not extended to positive decisions, which should award refugees a "uniform status valid throughout the Union".[81] There is indeed no obligation for Member States to recognise such status or grant an equivalent one on their territory. On the contrary, the 2013 Asylum Procedure Directive allows Member States to reject any asylum claim lodged by an applicant whose international protection status has been already recognised by another Member State.[82] A positive asylum decision is therefore recognised by Member States only as a valid status, with no extension of its effects beyond the Member State that issued it, which remains the sole responsible one to deliver the right deriving from it.

The lack of positive mutual recognition of asylum decisions is another coercive measure denying refugees' agency also after protection has been granted. No mobility rights are attached to the international protection statuses.[83] Furthermore, the possession of such statuses can be used as a ground for refusing protection by all other Member States. Beneficiaries of international protection are therefore coerced within a "golden cage of protection": they are granted protection but are legally confined in one Member State without the possibility of moving within the Union.[84] The only way for beneficiaries to escape the golden cage is to obtain the long-term resident status regulated by the Long-term Residence Directive.[85] To qualify for the status, beneficiaries of international protection are required to have resided "legally and continuously for five years" within the territory of a Member State. However, only half of the duration spent as an asylum seeker

[81] Art. 78(2)(a). Elspeth Guild and others, 'Enhancing the Common European Asylum System and Alternatives to Dublin' (LIBE Committee 2015) Study 83., p. 39
[82] Directive 2013/32/EU, on common procedures for granting and withdrawing international protection [2013] O.J. L 180/60, art. 33(2)(a).
[83] Favilli, 'Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'Unione Europea' (n 50).
[84] Guild and others (n 81)., p. 42.
[85] Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44. In 2011, the Directive was amended to include in its personal scope also beneficiaries of international protection. Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

may be counted towards this requirement.[86] Furthermore, they need to comply with additional conditions, such as possession of sufficient resources, health insurance and fulfilment of integration conditions (Art. 5, Long Term Residents Directive).

Upon acquisition of the status, long-term residents can move and reside in other EU countries. This right to intra-EU mobility is however not automatic but subject to several conditions.[87] The road towards the obtainment of mobility rights for refugees is therefore long and impervious. Beneficiaries of international protection must attain a certain economic success to fulfil the requirements to obtain long-term resident status. Furthermore, even after the recognition of long-term status the exercise of mobility rights may be constrained by the second Member State. This State may impose labour market tests if the movement is intended for employment purposes or, more broadly, restrict the total number of individuals eligible for residence rights. Furthermore, the acquisition of the status does not amount to a transfer of legal responsibility for protection, explicitly excluded by the Directive, and the two statuses cannot be accumulated.[88] Therefore, only a small number of beneficiaries of international protection manage to escape the golden cage of protection and exercise agency in the choice of State of residence by playing by the rules.[89] Consequently, non-authorised onward movements are a

[86] Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1, Art. 3(2)(a). Exceptionally, the whole period may be counted if the person spent more than 18 months in the asylum process.

[87] Long-term residents can move to exercise an economic activity in an employed or self-employed capacity. However, Member States can subject mobility rights to an assessment of the situation of their national labour markets (Art. 14, Directive 2003/109/EC). More information on the directive here: Behnam Balali, 'Long-Term Residents Directive: Can It Achieve the Tampere Programme's Objectives?'; Sonja Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back' (2005) 42 Common Market Law Review 1011; Kees Groenendijk, Elspeth Guild and Robin Barzilay, 'The Legal Status of Third Country Nationals Who Are Long-Term Residents in a Member State of the European Union' 120.

[88] Directive 2011/51/EU, Recital 9.

[89] Alberto-Horst Neidhardt, 'Beyond Relocations and Secondary Movements: Enhancing Intra-EU Mobility' (EPC 2023).

widespread practice also beyond protection recognition, despite Member States' commitment to deny asylum seekers the choice of their destination.

3 The Systemic Failures of the Dublin System

The Dublin system is notoriously inefficient, fittingly defined as "an instrument of coercion, with massive human costs with little public purpose".[90] The hierarchy of criteria allocating responsibility for examining asylum applications lodged in the EU – with the prime role played by the "first country of entry" rule – remained substantially unchanged since its introduction in 1990. At the same time, the system is affected by structural weaknesses limiting the practical execution of transfers.

Only a fraction of the asylum applications lodged in the EU is followed by a successful responsibility-allocation procedure: in 2022, out of 955,500 asylum applications, only 14,502 resulted in a transfer, 1.5% of the total.[91] Furthermore, the majority of transfers carried out under the Dublin system involve take-back procedures, sanctioning secondary movements and enforcing the system's underlying aim of agency denial. By contrast, only 30% of transfers arise from take-charge requests – the procedure designed to implement the responsibility allocation mechanism – with nearly 50% based on the irregular entry criterion.[92]

In 2022, 98,5% of asylum seekers were not subject to Dublin transfers and their asylum request was processed by the country where they lodged the application.[93] This overview, which pertains to 2022 but has remained consistently stable in recent years, highlights the systemic failure of the Dublin system. The objective and fair criteria it introduced have proven largely ineffective in shaping the distribution of asylum seekers

[90] Guild and others (n 65)., p. 17.
[91] Eurostat (migr_asyappctza), (migr_dubti) and (migr_dubto).
[92] 70% of Dublin transfers were instead take-back procedures.
[93] ECRE, 'Eternal Dublination: The Implementation of the Dublin System in 2022'.

among Member States, rendering the Dublin system an "expensive waste of time".[94]

The Dublin system is flawed by the non-compliance of Member States and the resistance of asylum seekers to its mechanisms. The system indeed does not promote a collaborative attitude among Member States but rather a "burden-shifting" model.[95] The objective criteria for responsibility allocation arbitrarily distribute responsibility among Member States without considering their reception capacity. The irregular entry criterion remains by far the most frequently applied, disproportionately burdening frontline Southern Member States, which serve as the primary destination for the majority of arrivals via the Mediterranean.[96] At the same time, data on asylum reception shows a different picture, with non-frontline Member States such as Germany and France consistently reporting the highest number of asylum applications lodged.[97] Such discrepancy is the result of the disobedient and competitive behaviour adopted by Member States. Southern Member States are notoriously flexible in fulfilling their fingerprinting and asylum registering and processing duties, *de facto* enabling onward movements and escaping the responsibility assigned by Dublin criteria.[98] This behaviour undermines the mutual trust that forms the foundation of the Dublin system and erodes solidaristic attitudes from Northern Member States, who, in turn, accuse frontline States of complicity in weakening the system's effective functioning.[99]

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[94] Steve Peers, *EU Justice and Home Affairs Law: EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law: 1* (4° edizione, OUP Oxford 2016)., p. 300.
[95] Maiani, 'The Dublin III Regulation' (n 57).
[96] Jorrit Rijpma, Maarten Den Heijer and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607.
[97] In 2022, Germany and France received 25% and 16% respectively of the total asylum applications. This primacy, stable since 2018, is in contrast with the number of applications lodged within the first-reception Member States such as Italy (9%) and Greece (4%). Data retrieved from: migr_asyappctza.
[98] Karageorgiou (n 8).
[99] Dziedzic (n 22), p. 219.

The Dublin system as a burden-shifting mechanism functions, as described by Noll, as a "common market of deflection".[100] Given the incomplete harmonisation governing the EU asylum policy, Member States remain in charge of designing their own policies, competing in a race to the bottom of protection: lowering the level of guarantees and protection offered might shield them from being targeted by unregulated secondary movements.[101]

The race to the bottom between Member States negatively impacts asylum seekers, as it leads to increased coercive practices and lowered reception conditions across the EU. At the same time, non-compliant attitudes and mistrust between Member States drive asylum seekers to resist the system, attempting to reach a Member State of their choice.[102] Such a form of de-facto agency is subject to great costs and risks. Resistance against the system indeed requires avoiding identification, refusing to be fingerprinted, absconding and remaining in a legal limbo. Furthermore, to continue their onward journey, asylum seekers often rely once again on smugglers, with the risk of being intercepted, detained, and transferred back.[103]

The reluctance of both Member States and asylum seekers to comply with the Dublin responsibility criteria, considered unsolidaristic and irrelevant, is the main symptom of the systemic failure of the Dublin system.[104] Such behaviour was exacerbated by the 2015 "migration crisis", when the already fragile Dublin system collapsed due to the arrival of a million protection seekers via the Mediterranean route highlighting the lack of a proper EU solidarity mechanism.[105] The "migration crisis" definitively

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[100] Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000)., p. 270.
[101] Rijpma, Heijer and Spijkerboer (n 96).
[102] Francesco Maiani, 'The Reform of the Dublin III Regulation' (LIBE Committee 2016).
[103] Guild and others (n 65), p. 21.
[104] Maiani, 'The Reform of the Dublin III Regulation' (n 102).
[105] Polly Pallister-Wilkins, 'Interrogating the Mediterranean "Migration Crisis"' (2016) 21 Mediterranean Politics 311. Eurostat, Record number of over 1.2 million first time asylum

dismantled the mutual trust illusion governing the Dublin system. As the number of arrivals in Italy and Greece increased, frontline Member States failed to uphold their identification obligation, prompting many Member States to reinstate internal frontier checks to oppose onward movements.[106]

The existing tools designed to face emergency situations were either ineffective or unused: the early warning mechanism of the Dublin III Regulation did not provide clear instructions on how to defuse a crisis of such magnitude and did not entail any concrete actions.[107] The Temporary Protection Directive, designed specifically to address mass influxes, was not triggered due to a lack of political will.[108] The most concrete action taken at EU level, the two relocation decisions outlined in the previous chapter, were faced with harsh opposition and non-implementation by some Member States (most notably, the Visegrad Group).[109] In the end, their implementation was unsatisfactory.[110]

As for asylum seekers' agency, the priority when facing the "migration crisis" was first and foremost to stop onward movements, confining asylum seekers at the external borders of the EU. The relocation decisions were indeed conditional upon the implementation in Italy and Greece of the

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seekers registered in 2015 [2016] https://ec.europa.eu/eurostat/web/products-euro-indicators/-/3-04032016-ap

[106] Cyrille Fijnaut, 'The Refugee Crisis: The End of Schengen?' (2015) 23 European Journal of Crime, Criminal Law and Criminal Justice 313.

[107] Art. 33 Dublin III Regulation. Chiara Favilli, 'La Crisi del Sistema di Dublino: Quali Prospettive?', *La crisi migratoria tra Italia e Unione europea* (Editoriale scientifica 2017).

[108] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12. Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive' (2016) 18 European Journal of Migration and Law 1. The activation of the Temporary Protection Directive in the Ukrainian context is addressed in Chapter 7.2.

[109] See Chapter 1.2.3.3. Council Decision 2015/1523/EU establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; Council Decision 2015/1601/EU establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80. Favilli, 'La Crisi del Sistema di Dublino: Quali Prospettive?' (n 107).

[110] European Court of Auditors, Special report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results [2019].

"hotspot approach". Hotspots were originally envisaged in the 2015 European Agenda on Migration as areas where EU agencies could support Member States to identify, register and fingerprint incoming migrants.[111] Upon the adoption of the relocation decisions, the approach was operationally linked to the implementation of the relocation programme: hotspots, from which asylum seekers were prevented from exiting awaiting identification, were the only places where candidates for relocation were selected.[112] The centres therefore became places of containment, focused on coercion rather than on reception and assistance.[113] Furthermore, the relocation programmes did not envisage the active participation of asylum seekers in the decision-making: while private, family and personal circumstances were taken into account when performing relocation, asylum seekers had no say on where to be relocated.[114] More generally, they could not request nor refuse a relocation: "Considering that an applicant does not have the right under EU law to choose the Member State responsible for his or her application, the applicant should have the right to an effective remedy against the relocation decision […] only in view of ensuring respect for his or her fundamental rights".[115]

The selection process was arbitrary and inefficient due to insufficient information, frequent delays, and cancellations. Asylum seekers viewed the relocation scheme with scepticism, mirroring the resistance behaviours seen in the Dublin System.[116] Additionally, the failure to implement the scheme effectively and the denial of agency in relocation decisions

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[111] Communication COM(2015) 240 final from the Commission on A European Agenda on Migration [2015].
[112] Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece.' (LIBE Committee 2017)., p. 45.
[113] Eleni Karageorgiou and Gregor Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 Jus Cogens 131.
[114] Recital 28, Council Decision 2015/1523/EU; Recital 34 Council Decision 2015/1601/EU.
[115] Recital 30, Council Decision 2015/1523/EU; Recital 35 Council Decision 2015/1601/EU. More information here: Steve Peers, 'Relocation of Asylum-Seekers in the EU: Law and Policy' (*EU Law Analysis*, 24 September 2015).
[116] Maiani, 'The Reform of the Dublin III Regulation' (n 102).

contributed to its overall inability to alleviate migratory pressure on Italy and Greece.

Both the Dublin system and the compensatory mechanism are built on the denial of asylum seekers' agency. Upon their arrival in the Union, asylum seekers are expected to renounce any influence over selecting their final destination. The responsible Member State is decided according to pre-established criteria designed first and foremost to ensure mutual trust between Member States and to prevent onward movements.

4 Conclusion

Refugees' agency is notably absent in both international and EU refugee law. The UNHCR and the Geneva Convention do not recognise the right to choose the country of asylum, operating on the premiss that the State responsible for assessing an asylum claim is the one where the claim is lodged. This way, refugees are de facto empowered to choose where to seek and enjoy asylum. However, the ambiguity of international law led to the emergence of "protection elsewhere" policies in many Global North countries, including European States and the EU. The right to seek asylum was disentangled from the right to enjoy asylum: States employ the STC notion to deflect responsibility towards countries along migratory routes. "Protection elsewhere" policies empowered States to refuse to recognise refugees' agency and label their onward movements as irregular "secondary movements".

The denial of agency through the fight against "secondary movements" is evident in the EU context. EU asylum policy recognises asylum seekers' right to asylum under Art. 18 Charter, as well as their entitlement to fair treatment throughout asylum procedures and following the recognition of protection. Nonetheless, EU primary law is silent on where asylum should be assessed and enjoyed. The determination of the Member State responsible for analysing asylum claims is regulated by the Dublin

system with a hierarchy of "objective and fair" criteria. The system implements an STC model where all Member States are equally safe for asylum seekers. The safety presumption is backed by the principle of mutual trust, which ensures a high degree of automaticity when transferring asylum seekers to their responsible Member State.

The functioning of the Dublin system has notable solidarity, fairness and agency implications for asylum seekers. Solidarity provisions under EU asylum law are exclusively conceived with an intra-state dimension. Asylum seekers are not involved in the responsibility-allocation procedure, as the Dublin system is deeply rooted in coercion: upon arrival, asylum seekers are fingerprinted and detained in case of risk of absconding. In addition, any intra-EU movement is forbidden. Coercion and asylum are strictly interlinked also through the uneven mutual recognition of asylum decisions: while negative decisions are recognised and implemented across Member States, the effects of positive decisions have a territorial validity limited to the Member State that granted the status. Beneficiaries of international protection are locked in a "golden cage of protection" and denied access to intra-EU mobility. Only the (difficult) acquisition of long-term resident status provides some limited mobility rights.

Despite the promised rapidity and automaticity, the coercive Dublin system is flawed by systemic failures. Both Member States and asylum seekers have adopted non-compliant attitudes towards its mechanisms, perceived as unsolidaristic and unfair. The inefficiency of the Dublin system became evident after the 2015 "migration crisis", when it was paralysed by the sudden influx of arrivals and the Schengen area was invested by more-or-less tolerated "secondary movements". The solidaristic reaction of the EU institutions was once again rooted in coercion and denial of agency: The relocation decisions adopted to alleviate migratory pressure on Italy and Greece did not involve asylum seekers in any way regarding the decision of whether or where they would be relocated

It is therefore evident that EU institutions see solidarity and agency as mutually exclusive concepts: agency does not qualify as a "fair and objective" criterion for the allocation of responsibility. Furthermore, any showcase of solidarity under emergency circumstances is exclusively purposed to support Member States.[117] Asylum seekers are considered a "burden" to be shared or shifted and not active actors within the system whose compliance and involvement are required for its efficient functioning.

Despite the resolute support by EU institutions on the coercive and rapidity-driven structure of the Dublin system, the CJEU intervened on multiple occasions to strike the balance between mutual trust and the protection of asylum seekers' fundamental rights. In doing so, it provided some agency recognition to asylum seekers, enhancing their participation in the decision-making surrounding the choice of the country of asylum. The case law of the Court is analysed in detail in the next Chapter.

[117] The relationship between solidarity and agency under crisis situations is the topic of Chapter 7.

Chapter 3 - Balancing Mutual Trust and Fundamental Rights Protection: the Role of the CJEU in Upholding Asylum Seekers' Agency

Since the 2015 "migration crisis", the systemic failures of the Dublin system have severely hindered its functioning. However, until 2024, all reform attempts have been unsuccessful.[1] At the same time, the EU relentlessly backed the existing responsibility allocation system as the only model to successfully implement the CEAS. Concurrently, the automatism of transfers embedded into the system has been increasingly scrutinised by the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR).

The chapter focuses on the Dublin case law developed by the CJEU and on the influence of relevant ECtHR case law. The mutual trust premiss and the objective criteria designed to ensure rapid and automatic Dublin procedures have conflicted with the risks of fundamental rights violations arising from their application. Through judicial intervention, the CJEU enhanced the protection of fundamental rights within Dublin procedures. Furthermore, the Court gradually acknowledged the need to involve asylum seekers in the decision-making surrounding the choice of the responsible Member State to process their asylum claims.

[1] In 2016, the Commission tabled the Dublin IV proposal, which provided for more solidarity provisions in the wake of the 2015 "migration crisis", but never met the approval of the co-legislators, especially the Council. On May 2024, the Asylum and Migration Management Regulation (AMMR) was adopted as part the New Pact on Migration and Asylum, repealing the Dublin III Regulation. The AMMR is addressed in Chapter 4. See: Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of "Sharing People"' (2017) 24 Maastricht Journal of European and Comparative Law 622; C Hruschka, 'Enhancing Efficiency and Fairness?' (2016) 17 ERA Forum 521.

The case law of the CJEU is divided here into four strains. The analysis begins with the "systemic deficiencies" doctrine, the first and most prominent exception to the automaticity of Dublin transfers, arising from the risk of violations of Art. 4 Charter.[2] Second, the case law targeted the influence of individual circumstances of the asylum seeker – mostly vulnerability-based – in assessing the compliance of a Dublin transfer with Art. 4 Charter. Third, the CJEU enhanced asylum seekers' access to remedies, allowing them to challenge the wrong or delayed application of Dublin rules. Lastly, in recent cases the Court intervened on the "systemic deficiencies" doctrine, first expanding and then sensibly narrowing its scope.

The CJEU addressed the extent to which asylum seekers can influence the decision-making process regarding the determination of their country of asylum. This chapter explores whether the CJEU's jurisprudence can address the "agency gap" in the Dublin system, which operates on coercion and objective criteria that disregard the preferences of asylum seekers in determining Member State responsibility. Can the CJEU limitations to the automatism of Dublin procedures be conceptualised as a juridical implementation of solidarity and agency recognition? While undeniably increasing the protection-oriented features of the Dublin system, the CJEU case law cannot solve the built-in denial of agency of the Dublin system. Following a strict statutory interpretation approach, the Court interventions rarely depart from the blackletter of the Dublin III Regulation and the direction taken by the ECtHR. The Luxembourg Court ultimately defers the task of reforming the Dublin system to the EU legislature. The New Pact on Migration and Asylum has ultimately repealed the Dublin III Regulation, bringing significant consequences for the agency of asylum seekers. This shift challenges the application of existing case law to the new framework.

[2] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

1 The "Systemic Deficiencies" Doctrine: Limiting the Dogma of Mutual Trust

Since its entry into force with the 1990 Convention, the Dublin system operated under the premise of automaticity entailing a safety presumption covering all Member States: to make the system fast and efficient, the identification of the responsible Member States and the subsequent eventual transfer were designed to be triggered with little bureaucratic burdens and no involvement of the asylum seeker in the decision-making.[3] Such automaticity came under the scrutiny of first the ECtHR and then the CJEU, who questioned the absolute automaticity of Dublin transfers vis à vis the protection of asylum seekers' fundamental rights.

In January 2011, the ECtHR Grand Chamber published its judgment in the case *M.S.S. v Belgium and Greece*.[4] It was a ground-breaking case, marking the first time that an EU national asylum system was deemed so dysfunctional to violate Art. 3 of the European Convention on Human Rights (ECHR).[5] More importantly, the ECtHR acknowledged that a Dublin transfer could potentially violate human rights.[6] The case concerned an Afghan national who arrived in Greece and subsequently applied for asylum in Belgium, which in application of the Dublin criterion on the first country of entry issued a take-charge request and returned him to Greece. Here, M.S.S. was repeatedly detained and forced to be homeless with no support from the State.

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[3] See the Chapter 2.2.
[4] ECtHR, *M.s.s v Belgium and Greece*, Judgment of 21 January 2011, Application no. 30696/09.
[5] Council of Europe, European Convention on Human Rights, 1950. Article 3 ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[6] Vincent Chetail, Philippe De Bruycker and Francesco Maiani, *Reforming the Common European Asylum System: The New European Refugee Law* (BRILL 2016).

The Grand Chamber condemned Greece for the detention conditions[7] and the living conditions endured by MS.S. upon his return from Belgium,[8] which amounted to a violation of Art. 3 ECHR. Greece's manifest disregard for the CEAS standards and the inefficiencies in its asylum procedures were found to breach Art. 13 ECHR (right to an effective remedy), as they could amount to the refoulment of M.S.S to his country of origin (Afghanistan).[9]

Looking at Belgium's conduct, the Court considered the *Bosphorus* doctrine not to apply to the case at stake.[10] The Bosphorus doctrine establishes a rebuttable presumption that when a Member State acts in accordance with EU law, it is presumed to comply with the ECHR.[11] The presumption is based on the consideration that the human rights protection afforded by EU law, along with the oversight of the CJEU, is considered equivalent to the protection provided by the Convention.[12] The Bosphorus doctrine is applicable only to the extent that the Member State has no discretion in the application of the EU measure.[13]

The Grand Chamber considered the Dublin system not to completely deprive Member States of discretion on whether to implement a transfer or not: despite the automaticity built into the system, Member States can always trigger the "sovereignty clause", taking up responsibility for any asylum claim lodged in their territory derogating from the Dublin criteria

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[7] ECtHR, *M.s.s v Belgium and Greece*, Judgment of 21 January 2011, Application no. 30696/09, para 234.
[8] Ibid., paras 252 and 264. The Court defined the conditions in Greece as "extreme material poverty".
[9] Ibid., para 321.
[10] Ibid., para 340.
[11] ECtHR, *Bosphorus Hava Yollari Turïzm Ve Tïcaret Anonïm Şïrketï v Ireland*, Judgment of 30 June 2005, Application no. 45036/98, paras 152-153, 155-157, and 160.
[12] The presumption can be challenged when the EU measure in question results in a manifest deficiency in the protection of fundamental rights.
[13] For a comprehensive analysis of the Bosphorus doctrine, see: Elisa Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine*, vol 118 (Brill 2017).

(Art. 3(2), Dublin II Regulation).[14] The ECtHR therefore examines Belgium's responsibilities for the human rights violations suffered by MSS upon his transfer to Greece, violations that would not have occurred had the transfer not taken place. As Greece, Belgium was found liable for violations of Arts. 3 and 13 of the ECHR. Recalling its previous case *T.I. v. the United Kingdom*, the Court stated that "when they apply the Dublin Regulation […], the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Art. 3 of the Convention".[15] In the case at stake, Belgium violated Art. 3 ECHR for having exposed M.S.S. to risks arising from the deficiencies in the Greek asylum procedures,[16] as well as to the living and detention conditions experienced in Greece.[17]

Lastly, Belgium violated Art. 13 of the Convention by exposing M.S.S. to the Greek asylum procedure, which lacks an appropriate remedy procedure, and therefore exposing him to refoulement risks.[18] Belgium's conduct is a Convention violation because it did not stop the transfer, despite having the means to do so, and it "knew or ought to have known that [M.S.S.] had no guarantee that his asylum application would be seriously examined by the Greek authorities".[19] Despite its previous case law requiring the applicant to bear the burden of proof over the non-

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[14] ECtHR, *M.s.s v Belgium and Greece,* Judgment of 21 January 2011, Application no. 30696/09*,* para 340. Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.
[15] ECtHR, *M.s.s v Belgium and Greece,* Judgment of 21 January 2011, Application no. 30696/09, para 342; ECtHR, *T.I. v. The United* Kingdom, Judgment of 7 March 2000, Application n. 43844/98. In the *T.I.* case, German asylum procedures were deemed compliant with the ECHR.
[16] ECtHR, *M.s.s v Belgium and Greece,* Judgment of 21 January 2011, Application no. 30696/09, para 360.
[17] Ibid., para 368.
[18] Ibid*.,* para 396.
[19] Ibid., para 358.

compliance of a Contracting Party,[20] the Court considered the inhumane and degrading conditions awaiting transferees in Greece to be evident, due to the numerous reports by NGOs and international organizations, in primis the UNHCR, criticizing the living conditions of asylum seekers in Greece.[21]

With *M.S.S.*, the ECtHR limited the practice of automatic Dublin transfers leveraging on the "sovereignty clause" as a guarantee of protection of human rights in the Dublin system.[22] The Court ruled the mandatory activation of the clause when the transfer of an asylum seeker could expose them to a risk of violating Article 3 of the ECHR.[23] In this landmark case, the ECtHR did not dismantle completely the mutual trust-based automaticity of Dublin transfers, nor it awarded asylum seekers the subjective right to stop transfers. However, it introduced an automatic exception: Member States must check if mutual trust can be confirmed vis à vis Art. 3 ECHR, and if not, they must activate the sovereignty clause annulling the transfer and taking up responsibility for the asylum seeker.

The *M.S.S.* case received extensive attention in the literature, and had wide-ranging practical, judicial, and legislative consequences.[24] Practically, after the delivery of the case Member States suspended transfers to Greece

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[20] Ibid*.,* para 343; ECtHR, *K.r.s v the United Kingdom (decision on admissibility),* Judgment of 2 December 2008, Application no. 32733/08.
[21] The Council of Europe Commissioner for Human Rights, the UNHCR, the AIRE Centre, Amnesty International and the Greek Helsinki Monitor were third party interveners in the case.
[22] The Court was particularly critical of the systematic application by the Belgian Aliens Office of the Dublin Regulation for transferring asylum seekers to Greece, "without so much as considering the possibility of making an exception". ECtHR, *M.s.s v Belgium and Greece,* Judgment of 21 January 2011, Application no. 30696/09, para 352.
[23] Sílvia Morgades-Gil, 'The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?' (2015) 27 International Journal of Refugee Law 433.
[24] Marian Paul Seidenberg, 'Mutual Trust 2.0: How the N.S./ M.E. and the M.S.S. Cases Put an End to Blind Mutual Trust in the Dublin System'; Violeta Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' (2012) 14 European Journal of Migration and Law 1; Patricia Mallia, 'Case of MSS v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation' (2011) 30 Refugee Survey Quarterly 107.

and never re-started them, despite a 2016 Commission Recommendation in favour of the resumption of Dublin returns to Greece.[25] Judicially, the ECtHR judgment was followed a few months later by a similar case delivered by the CJEU: with the *N.S*. case, the Court found Dublin transfers to Greece to be in breach of Art. 4 of the EU Charter, which mirrors Art. 3 ECHR prohibiting inhuman and degrading treatment.[26] At the legislative level, the *M.S.S.* case was the first step towards the reform of the Dublin system.

The *N.S.* case involved asylum seekers who arrived in Greece and subsequently applied for asylum in the U.K. (N.S.) and Ireland (M.E. and others). Acknowledging the structural problems of the Greek asylum system, the British and Irish judges suspended the proceedings, requesting the CJEU's interpretation of the compatibility of the transfers with fundamental rights and the consequences of a potential refusal of transfer. The Grand Chamber first restated the importance of mutual trust and safety presumption as the pillars of the CEAS. However, it admitted that "it is not […] inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights."[27] Not any risk of fundamental rights breach is considered enough to trigger a suspension of transfer: if "the slightest infringement" of fundamental rights infringement could be liable of impeding Dublin transfers, the system would no longer work.[28]

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[25] Commission Recommendation 2016/2256/EU addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013 of the European Parliament and of the Council [2016] OJ L 340/60. See: ECRE, 'Eternal Dublination: The Implementation of the Dublin System in 2022'; AIDA, Country Report: Greece, 2022 update, [2022], p. 72.
[26] Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865.
[27] Ibid., para 81.
[28] Ibid., paras 82; Mitsilegas (n 2).

The CJEU therefore introduced a strictly defined exception to the safety presumption: "The Member States […] may not transfer an asylum seeker to the 'Member State responsible' […] where they *cannot be unaware* that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter".[29]

The CJEU had no choice but to uphold the ECtHR interpretation given in *M.S.S.*, as the meaning and scope of Charter rights must be at least the same laid down by the corresponding ECHR rights (Art. 53(3) Charter). Nonetheless, the rebuttal of safety and its consequences presents significant differences between *M.S.S.* and *N.S.* The Strasbourg court deemed all transfers liable for annulment in case of a risk of infringement of Art. 3 ECHR. The Luxembourg court instead specified that only breaches of Art. 4 Charter caused by "systemic deficiencies" could halt transfers. If a transfer must be annulled, the ECtHR imposes the mandatory activation of the sovereignty clause. The CJEU mandates the Member States to "continue to examine the criteria set out in […] Chapter [III of Dublin II Regulation] to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application".[30] The annulment of the transfer is therefore followed by the responsibility-allocation procedure, not the activation of the sovereignty clause. The transferring Member State must activate the clause only when the responsibility-allocation mechanism takes "an unreasonable length of

[29] Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, para 94 (*emphasis* added).
[30] Ibid., para 96.

time" and consequently "worsen[s] a situation where the fundamental rights of that applicant have been infringed".[31]

The *N.S.* case confirmed the cessation of the absolute presumption of safety which governed for over 20 years the Dublin system.[32] Unlike the ECtHR, the CJEU felt compelled to balance the necessity to protect asylum seekers' fundamental rights with the preservation of the functioning of the Dublin system.[33] According to the Court, the system is not designed to enhance the protection of asylum seekers' fundamental rights; rather, it aims to efficiently and swiftly determine the Member State responsible for processing asylum claims to "avoid forum shopping".[34] The "systemic deficiencies" threshold limits the applicability of the safety presumption exception. It requires Art. 4 Charter violations to be caused by a systemic flaw, which arises when: there is a structural error within the system not caused by special circumstances; the asylum seeker is likely to be affected by the flaw; and the resulting violation is sufficiently serious.[35] The doctrine elaborated by the CJEU symbolises the hierarchy of prerogatives for the Court: first, the preservation of mutual trust, and only second the protection of asylum seekers' fundamental rights.

The case law subsequent to *N.S.* and preceding the repeal of the Dublin II Regulation showcases the Court's efforts to safeguard mutual trust from the potential extensive dismantling of the safety presumption that underpins the Dublin system. *Kaveh Puid* restated that the "systemic

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[31] Ibid., para 98.
[32]Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof Special Section: "EU and ECHR: Conflict or Harmony?"' (2013) 9 Utrecht Law Review 135.
[33] Giulia Vicini, 'The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust' (2015) 8 European Journal of Legal Studies 50.
[34] Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, para 79.
[35] Anna Lübbe, '"Systemic Flaws" and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?' (2015) 27 International Journal of Refugee Law 135.

deficiencies" doctrine does not confer any individual right to asylum seekers to force a Member State to take up responsibility according to Art. 3(2) upon the halting of a transfer.[36] Such an emphasis derives from the strict interpretation of the objectives of the Dublin II Regulation, which does not confer any right to asylum seekers but rather regulates the sharing of competence among Member States.[37]

In *Abdullahi*, the Court confirmed "systemic deficiencies" of national asylum systems as the only ground for review available to asylum seekers under the Dublin II Regulation.[38] The Court firmly denied the possibility to challenge a transfer decision "on the grounds that the criteria laid down in Chapter III of that regulation have been misapplied".[39] According to the Grand Chamber, the Dublin system is a set of "organisational rules governing the relations between the Member States",[40] therefore designed first and foremost as an instrument of intra-State cooperation to establish "a clear and workable method for determining rapidly the Member State responsible".[41] The Court strived to limit as much as possible the exceptions to the system in favour of the automaticity of transfers and mutual trust: consequently, "the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State".[42]

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[36] Case C-4/11, *Bundesrepublik Deutschland v Kaveh Puid*, EU:C:2013:740, paras 37-37.
[37] Vicini (n 33). Even more explicit is Advocate General Jdiiiskinen, which states that: "Nothing in Regulation No 343/2003, as interpreted in accordance with the objectives of the Common European Asylum System, vests asylum seekers with any subjective right to compel an identified Member State to examine an application for asylum". Case C-4/11, *Bundesrepublik Deutschland v Kaveh Puid*, Opinion of Advocate General Jääskinen, EU:C:2013:244, para 73.
[38] C-394/12, *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813.
[39] Ibid., para 42.
[40] Ibid., para 56.
[41] Ibid., para 59.
[42] Ibid., para 62.

The case law on "systemic deficiencies" is firmly rooted in the conceptualisation of the Dublin system as an administrative system only incidentally touching asylum seekers' fundamental rights. The automaticity of Dublin transfers can be rebutted in extreme cases related to the flaws of national systems, with no subjective right awarded to asylum seekers in having a transfer decision annulled. However, the doctrine empowered asylum seekers to challenge transfer decisions based on "systemic deficiencies" in the responsible Member State. This allowed them, for the first time, to exercise some agency in contesting the validity of a Dublin transfer, thereby affirming their desire not to be returned there.

The "systemic deficiencies" doctrine was codified in the Dublin III Regulation with the new discretionary clause of Article 3(2), which introduced the *N.S.* definition into secondary law.[43] The legislative reform went beyond the CJEU interpretation, introducing the protection of applicants as an objective of the Regulation alongside the creation of a rapid and effective allocation system (Recital 9, Dublin III Regulation). As highlighted in the previous Chapter, the Dublin III Regulation introduced new provisions enhancing the position of asylum seekers in the system, especially concerning procedural rights. This change had an immediate impact on the case law of the CJEU, with cases focusing on the status of asylum seekers, emphasising their vulnerability, procedural rights, and, ultimately, a reconsideration of the scope of the "systemic deficiencies" doctrine.

[43] Regulation 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180-31. The definition of "systemic deficiencies" precisely codifies para 94 of *N.S.* For an overview of the potential of the discretionary clause to protect asylum seekers' fundamental rights in Dublin proceedings, see: Chiara Favilli, 'L'applicazione della clausola di discrezionalità del regolamento Dublino tra reciproca fiducia e tutela dei diritti dei richiedenti asilo', *I flussi migratori e le sfide all'Europa* (Giappichelli 2020).

Further influencing the CJEU case law was the *Tarakhel* ECtHR case, which elaborated the ECtHR understanding of the safety presumption governing the Dublin system.[44] As hinted in *M.S.S.*, the ECtHR stressed that the presence of systemic failures in a national asylum system is a sufficient but not necessary condition to halt a Dublin transfer.[45] The Court assessed the human rights impact of a transfer of a family with five minor children from Switzerland (not an EU Member State but part of the Dublin system) to Italy. While acknowledging that "the current situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment", "the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded".[46] The applicants, a family of asylum seekers, are particularly vulnerable. Hence, the Court imposed on Switzerland "to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together".[47] In the absence of such guarantees, the transfer would be a violation of Art. 3 ECHR.[48]

The *Tarakhel* case reaffirmed that, when assessing the transferability of an applicant under the Dublin system, "the source of the risk [of a potential Art. 3 ECHR violation] does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal".[49] Member States are therefore required to consider both systemic and individual circumstances concerning the risk of

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[44] ECtHR, *Tarakhel v Switzerland,* Judgment of 4 November 2014, Application no. 29217/12.
[45] Vicini (n 33).
[46] ECtHR, *Tarakhel v Switzerland,* Judgment of 4 November 2014, Application no. 29217/12, paras 114 and 120.
[47] Ibid.
[48] Ibid., para 122.
[49] Ibid., para 104.

inhuman or degrading treatment when deciding whether to implement a Dublin transfer. The individualised examination must be proportionality-based: despite acknowledging that ill-treatment must "attain a minimum level of severity" to fall within the scope of Art. 3 ECHR, the Court stressed that such a minimum is relative and that asylum seekers are a "particularly underprivileged and vulnerable" population group requiring "special protection".[50] Therefore, the ECtHR regarded individual circumstances, and not only systemic deficiencies, to be liable for compromising asylum seekers' human rights.[51] It took time for the CJEU to (partly) incorporate the *Tarakhel* judgment, in combination with the new provisions of the Dublin III Regulation.

2 Vulnerability Case Law: The Influence of Asylum Seekers' Status on Dublin Transfers

Even before the Dublin III reform and the *Tarakhel* case, the CJEU introduced some limited status-based exceptions to the automatism of transfers governing the Dublin system. Such derogations from the Dublin rules are grounded not in "systemic deficiencies" within national asylum systems but in the applicant's individual circumstances, particularly their vulnerability: the more vulnerable the applicant, the greater the scrutiny of the fundamental rights implications of their transfer.[52]

In the 2012 *K v Bundesasylamt* case, the CJEU ruled on the application of the humanitarian clause in cases of dependency:[53] Art. 15(2) Dublin II Regulation obliges Member States to "normally keep or bring together" an

[50] Ibid., para 118.
[51] Steve Peers, 'EU Law Analysis: Poundshop Free Movement? Long-Term Resident Non-EU Citizens: The EU Commission's New Proposal (Part 2)' (*EU Law Analysis*, 15 May 2022).
[52] Aysel Küçüksu, 'The Role of the European Court of Justice in Framing the Principles of Global Distributive Justice through the Area of Asylum' (PhD Thesis, Luiss University 2020)., p. 186.
[53] Case C-245/11, *K v Bundesasylamt*, EU:C:2012:685.

asylum seeker with a family member on whom they are "dependent [for] assistance". In the situation at stake, *K.* entered Poland, where she lodged an asylum application, and then she moved to Austria, where she lodged a subsequent asylum application and joined her adult son who already enjoys refugee status along with his spouse and their three minor children. Her daughter-in-law was dependent on *K.* for childcare and mental health issues.[54] The Austrian authorities rejected *K.*'s asylum application and issued a take-back decision, which *K.* contested on appeal. The Austrian court referred the matter to the CJEU, seeking clarification on the binding nature of the humanitarian clause to maintain family unity, despite Austria not expressing an intention to invoke it.[55] The Court, deeming the situation to fall in the scope of Art. 15(2) Dublin II Regulation,[56] interpreted the obligation to "normally keep or bring together the asylum seeker with another relative" as binding Member States to trigger the humanitarian clause when the conditions of Art. 15(2) are satisfied, except when an exceptional situation has arisen.[57] The *K.* case introduced a mandatory exception to the Dublin criteria based on a broad conceptualisation of vulnerability, dependency and family unity. A Dublin transfer can therefore be suspended based on the individual circumstances of the asylum seeker, irrespective of the conditions of the national asylum system in the transferred Member State.[58]

Even more absolute is the protection of the best interest of the child in situations involving unaccompanied minors.[59] In *MA and others*, the CJEU

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[54] Ibid., para 16.
[55] Ibid., para 26.
[56] Ibid., paras 36 and 38. The Court stated that the concept of dependency covers a situation of dependence of the asylum seeker on a relative, or vice versa, and that the concept of family relative must be interpreted extensively to cover also the daughter-in-law.
[57] Ibid., paras 46-47. The Court did not provide for a definition of what means "exceptional situation".
[58] Ulrike Brandl, 'Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?', *Reforming the Common European Asylum System* (Brill Nijhoff 2016).
[59] Ciara Smyth, 'The Dublin Regulation, Mutual Trust and Fundamental Rights: No Exceptionality for Children?' (2022) 28 European Law Journal 242.

introduced the general rule of the non-transferability of unaccompanied minors within the Dublin system.[60] When multiple asylum claims are made in different Member States and no family member is present within the Union, the Member State responsible is the one where the minor is physically present after submitting an asylum application.[61] As a general rule, the Court stressed that Member States should not "prolong unnecessarily the procedure for determining the Member State responsible, and [should] ensure that unaccompanied minors have prompt access to the procedures for determining refugee status".[62] The absolute prohibition of transferring unaccompanied minors is grounded in their inherent vulnerability and aligns with the principle of the best interests of the child, as mandated by Art. 24 Charter. The general rule introduced in the *MA and Others* case was partly codified in the Dublin III Regulation, specifically referencing the best interests of the child under Art. 8(4).

Under the Dublin III Regulation, the most prominent vulnerability-based case was delivered in 2017. With the *C.K. and Others* case, the Court considered the rebuttal of the Member States' safety presumption applicable also outside the "systemic deficiencies" context.[63] The CJEU was asked to assess the fundamental rights implications of a Dublin transfer from Slovenia to Croatia involving a family whose mother, C.K., was in a critical state of mental health.[64] The Court held that "in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, that transfer would constitute inhuman and degrading treatment".[65] National authorities have to devise

[60] C-648/11, *The Queen, on the application of MA and Others v Secretary of State for the Home Department*, EU:C:2013:367, para 55.
[61] Ibid., para 66.
[62] Ibid., para 61.
[63] Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127.
[64] Ibid, para 37. A psychiatrist evaluated C.K.'s health and attributed her severe mental distress to both post-partum conditions and the uncertainty surrounding her status.
[65] Ibid., para 74.

precautions to protect "appropriately and sufficiently" the state of health of the person at issue during the transfer,[66] and national courts have to evaluate their effectiveness in excluding any real risk of inhuman or degrading treatment in the event of transfer.[67] If such risk cannot be ruled out, the transfer must be suspended.[68]

The *C.K. and Others* case marked a significant jurisprudential shift, as the Court moved away from the rigid interpretation of "systemic deficiencies" established in *Abdullahi*. This departure was made despite Advocate General Tanchev's recommendation to uphold the *Abdullahi* precedent, stressing that "systemic deficiencies" should be the "only hypothesis in which it is impossible to transfer the applicant", to safeguard the principle of mutual trust and the effectiveness of the Dublin III Regulation.[69]

The important novelties are a declared consequence of the changes brought by the Dublin III Regulation, which "differs in essential respects from the Dublin II Regulation", especially as it strives "to make the necessary improvements […] not only to the effectiveness of that system, but also to the protection granted to asylum seekers under that system."[70] Consequently, non-transferability is based not on the systemic deficiencies of the national asylum system, as they were not detected in the case at stake,[71] but more generally on potential breaches of Art. 4 Charter arising from individual circumstances.[72] Referencing the ECtHR case law, the Court

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[66] Ibid., para 77.
[67] Ibid., para 84.
[68] Ibid., para 85.
[69] Case C-578/16 PPU, *C. K. and Others v Republika Slovenija,* Opinion of Advocate General Tanchev, EU:C:2017:108, paras 51-56. Cecilia Rizcallah, 'The Dublin System: The ECJ Squares the Circle Between Mutual Trust and Human Rights Protection' (*EU Law Analysis*, 20 February 2017).
[70] Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127, paras 61-62.
[71] Ibid., para 71.
[72] As already stated in *N.S.*, only breaches of Article 4 of the Charter meet the threshold to stop a transfer: Article 4 is indeed an absolute right of "fundamental importance" to

considered "suffering which flows from naturally occurring illness, whether physical or mental" liable of being covered by Art. 4 Charter.[73]

The CJEU was aware of the possible wide-ranging consequences of an individualised rebuttal of the safety presumption governing the Dublin System. Therefore, it did not incorporate completely the ECtHR *Tarakhel* judgment, contrary to the opinion advanced by some scholars.[74] First, the burden of proof is put firmly in the hands of the asylum seeker, while Member States are under an obligation to assess the risk arising from the evidence provided.[75] Second, the Court reiterated the position established in N.S. regarding the non-obligation of Member States to assume responsibility for examining an asylum claim when a transfer is halted: the discretionary clause of Art. 17(1) Dublin III Regulation does not "imply an obligation on that Member State to make use of it". Upon suspension of transfer and if the health status is not expected to improve in the short term, Member States "may choose to […] make use of the 'discretionary clause'".[76] The non-prescriptive nature of the discretionary clause can be pragmatically circumvented by looking at the timeframes for transfers introduced by the Dublin III Regulation: if the transfer cannot happen "before the expiry of the six months provided for in Article 29(1) of the Dublin III Regulation, the Member State responsible would be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State".[77] Lastly, *C.K. and*

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ensure the compliance of Dublin III Regulation with the fundamental rights, given its strict link with the respect of human dignity. Ibid., para 59.

[73] Ibid., paras 66-67.

[74] Lukasz Dziedzic, 'Solidarity and Critique in the EU: A Case Study of Asylum' (PhD Thesis, Tilburg University 2022); Rizcallah (n 69); Ecre, *Beyond Solidarity: Rights and Reform of Dublin* [2018] Legal note 3. The case is never quoted in the judgment. The two cases also differ in the subject matter opposing the transfer: while in *Tarakhel* the risk of a human rights breach was linked to the impact of the living conditions in Italy on the family, in *C.K. and Others*, the focus was on the impact of the transfer itself on C.K.'s mental health, with the state of the Croatian asylum system playing no role in the evaluation.

[75] Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127, para 75.

[76] Ibid., para .

[77] Ibid., para 89.

Other did not have the same gravitas as the previous case law on the matter: it was delivered not by the Grand Chamber but by the Fifth Chamber, and throughout the case, the Court restated multiple times the exceptional character of the situation.[78]

The *C.K. and Others* is the most innovative CJEU intervention so far protecting asylum seekers' fundamental rights based on their individual status. The case highlighted the potential of vulnerability assessments in balancing mutual trust with the growing emphasis on protecting asylum seekers within the Dublin system.[79] According to the Court, the increased influence of Art. 4 Charter in scrutinising the executability of transfers is not only in line with but implementing the principle of mutual trust: in case of a transfer in breach of Art. 4 Charter – as the case at stake – the resulting inhuman and degrading treatment would not be attributable to the authorities of the Member State responsible, but to the first Member State alone.[80] Ultimately, the protection of asylum seekers is not in conflict but interdependent with the principle of mutual trust.

3 The Procedural Rights Case Law: Increasing Asylum Seekers' Protection and Agency

Alongside the vulnerability case law, the Court gradually introduced new exceptions to the automaticity of transfers, not linked to the rebuttal of the safety presumption, but rather to the new set of procedural rights introduced with the Dublin III Regulation. As outlined in the previous Chapter, such rights include important novelties on the right of defence, with Art. 27 granting asylum seekers the right to an effective remedy, "in

[78] Rizcallah (n 69).
[79] Küçüksu (n 52)., p. 194.
[80] Rizcallah (n 69). Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127, para 95.

the form of an appeal or a review, in fact and in law, against a transfer decision".[81] This right has been interpreted by the CJEU in a series of judgments empowering applicants to contest the grounds, as well as the modalities and consequences, of a Dublin decision. Despite its technical nature, this strand of case law empowers asylum seekers to challenge the automaticity of transfers, ultimately enabling them to assert their agency in influencing the decision-making process regarding the choice of their country of asylum.

The first cases on procedural matters, *Ghezelbash*[82] and *Karim,*[83] were delivered on the same day in 2016 by the Grand Chamber. The Court clarified the scope of the new right of appeal (Art. 27 Dublin III Regulation) in the context of misapplied rules and procedures in the responsibility allocation procedure. In *Ghezelbash*, the Court deemed it possible for an applicant to challenge the misapplication of the Dublin criteria listed in Chapter III of the Dublin III Regulation.[84] In *Karim* instead, the applicant contested the Dublin transfer to Slovenia, since he left its territory for more than three months after his first asylum application: According to Art. 19(2) Dublin III Regulation, the obligations of the Member State responsible cease when the applicant has left the territory of the Member States for at least three months.[85] In declaring the admissibility of remedies based on the misapplication of the referred rules, the Court grounded its interpretation on two considerations: first, the new objective of fundamental rights

[81] Art. 27 Dublin III Regulation also provides for the suspensive effect and legal assistance provisions to ensure full access to the right to an effective remedy.
[82] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409.
[83] Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410.
[84] In the case at stake, Ghezelbash questioned the allocation of responsibility to France based on Art. 12 Dublin III Regulation (possession of a visa). He claimed the transferring Member State, Netherlands, was the correct responsible state. Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para 22.
[85] Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410, para 12.

protection of the Dublin III Regulation; second, the compliance of the right to appeal with the principle of mutual trust.[86]

In Ghezelbash, the Court stressed that the Dublin III Regulation "differs in essential aspects" from the Dublin II Regulation, especially concerning the "rights enjoyed by asylum seekers".[87] Such change led to a repeal of the restrictive *Abdullahi* case law, limiting the challenging of Dublin transfers to only cases of "systemic deficiencies", as no longer applicable to the new reality of the Dublin III Regulation.[88] The Court acknowledged the foundational change within the Dublin system, shifted from a system "introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible", to a system devoted to "involve asylum seekers in that process".[89] According to the CJEU, Art. 27 Dublin III Regulation, read in conjunction with Recital 19, not only protects asylum seekers from wrong decisions, but it *includes* them in the decision-making process:[90] the involvement of asylum seekers in the responsibility-allocation procedure via the provision of information "of the criteria for determining responsibility and [of the] opportunity to submit information relevant to the correct interpretation of those criteria". [91] Lastly, asylum seekers are involved by the conferral of "the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process". [92]

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[86] In *Karim*, the Court refers extensively to *Ghezelbash*. Ibid., para 22.
[87] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para 46.
[88] Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?*, vol 98 (Bloomsbury Publishing 2020).
[89] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para 51.
[90] Recital 19 Dulin III Regulation states: "In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union".
[91] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para 51.
[92] Ibid.

The conceptualisation of the right of appeal as a tool of both protection and agency at the disposal of asylum seekers has "no bearing on the principle of mutual trust".[93] On the contrary, the involvement of asylum seekers in the decision-making, albeit limited, is instrumental to ensuring the functioning of mutual trust, avoiding that "the Member State to which the applicant was to be transferred was not the Member State responsible".[94] With *Ghezelbash* and *Karim*, the Court opened up to the possibility of mutual trust and protection of asylum seekers' rights to function in unison, instead of in opposition: through the exercise of the right of appeal, asylum seekers are involved in policing the correct implementation of the Dublin rules.[95]

The importance of a correct application of Dublin rules is at the centre of the case law concerning the timing of transfers. In *Mengesteab*, the Court was asked whether the three-month deadline to make a take-charge request (Art. 21(2) Dublin III Regulation) should be interpreted as preventing the execution of a transfer once the deadline has expired, even if the requested Member State is willing to accept the transfer.[96] The Court relied on *Ghezelbash* to restate the new protection-focus of the Dublin system:[97] the willingness of Member States to implement a transfer is a necessary but not sufficient condition to proceed, else it would restrict the effective and complete judicial protection afforded to asylum seekers by the Dublin III reform.[98] In *Majid Shiri*, the Court adopted the same reasoning

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[93] Ibid., para 55.
[94] Ibid.
[95] Moreno-Lax underlines how this ex-post individual assessment can be symptomatic of a structural weakness of the overall system. This consideration is however absent in the Court reasoning. Violeta Moreno-Lax, 'Mutual (Dis-)Trust in EU Migration and Asylum Law: The "Exceptionalisation" of Fundamental Rights' in Sara Iglesias Sánchez and Maribel González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (1st edn, Cambridge University Press 2021).
[96] Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, ECLI:EU:C:2017:587, para 41. The Court also defined an asylum application as lodged when a written document, or only the main information it contains, reaches the competent authority. Ibid., para 103.
[97] Ibid., paras 41-49.
[98] Ibid., paras 58-59.

as *Mengesteab* in the context of the six-month deadline for implementing a transfer decision (Art. 29 Dublin III Regulation).[99] To ensure both effective protection to asylum seekers and the rapid determination of the responsible Member State, "the applicant must have an effective and rapid remedy available to him which enables him to rely on the expiry of the six-month period that occurred after the transfer decision was adopted".[100] The prescriptiveness of Dublin transfers time limits was more recently confirmed in the *Germany v MA and Others* case, where the Court held that even exceptional circumstances such as the material impossibility to implement a transfer due to the COVID-19 pandemic did not suspend the 6 months deadline.[101] Here the Court linked procedural rights with the vulnerability case law: the suspension of two transfers to Italy adopted by Germany after the beginning of the pandemic cannot justified under Art. 27(4) Dublin III Regulation, allowing national authorities to suspend the implementation of a transfer defection – hence of the deadline to implement it – pending the outcome of the appeal or review.[102] The two types of suspension decisions cannot be equalised because the COVID-19 suspension "does not have a direct link with the judicial protection of the person concerned".[103] COVID suspension decisions do not put on hold the 6 months deadline, as the time limit still applies to "situations where the person concerned cannot be transferred because of his or her state of health" as stated in *C.K.*[104] Furthermore, the Court held that the suspensive effect of transfer decisions is purposed to ensure asylum seekers effective protection, and not to cover

[99] Case C-201/16, *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl* , EU:C:2017:805
[100] Ibid., para 44. The Court specified that the expiry of such deadline can he challenged even if it happens after the adoption of a transfer decision, as the periods prescribed at Article 29 cover not only the adoption but also the implementation of the transfer decision. Ibid., para 41.
[101] Joined Cases C-245/21 and C-248/21, *Bundesrepublik Deutschland v MA and Others*, EU:C:2022:709, para 65.
[102] Ibid., para 62.
[103] Ibid.
[104] Ibid., para 69.

situations where it was materially impossible to implement a transfer decision.[105]

Building upon the case law on the incorrect application of Dublin rules, the Court strengthened its new understanding of the Dublin system as a balance between speediness and protection of asylum seekers' rights, especially procedural rights. These objectives are in principle equal, as "the EU legislature did not intend to sacrifice the judicial protection of the persons concerned to the requirement of the expedition in the processing of applications for international protection and, on the contrary, significantly enhanced […] the procedural safeguards offered".[106]

In the years following the seminal *Ghezelbash* and *Mengesteab* cases, the Court enhanced asylum seekers' procedural rights in other areas, starting from the evaluation of subsequent circumstances following a transfer decision. In *Hasan*, the Court considered asylum seekers to be able to rely on "circumstances subsequent to the adoption of the decision to transfer him, when the correct application of the Dublin III Regulation depends upon those circumstances being taken into account".[107] Here, the Court allowed national courts to consider circumstances arising not only after the adoption of a transfer decision but also following the transfer itself when assessing an appeal.[108] The Court stressed that a Dublin transfer "does not, in itself, definitively establish the responsibility of the Member State to which the person concerned has been transferred":[109] it is indeed possible for transfers to be erroneous or overturned after they have been executed.[110] Consequently, failing to consider circumstances arising after

[105] Ibid., paras 60 and 65.
[106] Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, ECLI:EU:C:2017:587, para 57; Joined Cases C-245/21 and C-248/21, *Bundesrepublik Deutschland v MA and Others*, EU:C:2022:709, para 60.
[107] Case C-360/16, *Bundesrepublik Deutschland v Aziz Hasan*, EU:C:2018:35, para 31.
[108] Ibid., paras 33 and 40.
[109] Ibid., para 35.
[110] Ibid., para37.

the transfer in a review procedure would undermine the judicial protection of the applicant.[111]

The conclusion reached in *Hasan* was more recently developed into a subjective procedural right in the *H.A.* case.[112] Recalling the obligation of the Dublin system to comply with Art. 47 Charter and to ensure sufficient judicial protection,[113] the Court stated that remedies must enable asylum seekers to rely on "circumstance[s] arising after the transfer decision" which preclude its implementation.[114] *Hasan* and *H.A.* impacted the automaticity of Dublin transfers while increasing judicial protection of asylum seekers: even if the system is developed to rapidly adopt and implement transfer decisions, the adoption of such decisions cannot be regarded as final and definitive. Asylum seekers are empowered to rely on events following the adoption of a transfer decision to impact its execution, and even its legality after the transfer is completed.

Lastly, in two Grand Chamber cases delivered on the same day in August 2022, the Court extended the application of procedural rights concerning a particular category of applicants, minors. The cases have important general repercussions. In *RO*, the Court stressed the importance of procedural rights in applying the rules on family unity targeting a minor born in a country – where he applied for asylum – different from the one which granted international protection to his parents.[115] The family was subject to take-back decisions. If the minor situation were to be indissociable from the one of their family members – applying by analogy Art. 27(3) Dublin III Regulation – it would entail his transfer to a country where he never applied for asylum and had no connection to. The adoption

[111] Ibid., para 38.
[112] Case C-194/19, *H.A. v État belge*, EU:C:2021:270.
[113] Ibid., para 43.
[114] Ibid., para 47.
[115] Case C-720/20, *RO légalement représentée v Bundesrepublik Deutschland*, EU:C:2022:603.

of a transfer decision without the proper take charge decision would lead to the circumvention of the procedural safeguards attached to it, in particular the respect of the time limits.[116] The transfer of the minor to the Member States responsible for his family members is subject to the "express condition that the persons concerned have expressed their desire in writing": when "no such desire is expressed", the transfer is precluded (Art. 9 Dublin III Regulation).[117] The court is adamant in excluding any derogation from the requirement that the desire of the persons concerned be expressed in writing, including the justification on the grounds of prevention of secondary movements.[118] In *RO* the Court interpreted with a protection-driven mindset the only legislative provision within the Dublin system recognising some agency to asylum seekers: the transfer made on family grounds must always be agreed on by the asylum seeker.

In I.S., the Court extended the subjective right to challenge a transfer decision, established in Ghezelbash, to cover the refusal of a Member State to take responsibility for an asylum application.[119] Here, a minor requested to be transferred from Greece to the Netherlands, where his uncle was legally resident and able to take care of him (Art. 8(2), Dublin III Regulation). However, the Dutch authorities refused the take-charge request, on the ground that the alleged family relationship could not be established. The applicants' appeal against the decision was deemed inadmissible as the Dublin III Regulation does not provide for the possibility for applicants to challenge a decision refusing a take charge request.[120] The CJEU adopted a systemic reading of the right of an effective remedy provided by Art. 27 Dublin III Regulation to include take-back refusals among the procedures subjectable to an appeal by the applicant, despite

[116] Ibid., paras 36-38.
[117] Ibid., para 41.
[118] Ibid., para 42.
[119] Case C-19/21, *I and S v Staatssecretaris van Justitie en Veiligheid,* ECLI:EU:C:2022:605.
[120] Ibid. para 19.

not being explicitly referred to in the provision.[121] To support its conclusion, the Court referred to the obligation of secondary law to be applied in accordance with fundamental rights and to the necessity of the right to an effective remedy at Art. 27 to be read in light of Arts. 7, 24, and 47 Charter.[122] With these cases, the Court restated its commitment to recognise asylum seekers' rights and participation in Dublin procedures.[123]

In light of the special protection awarded to minor applicants by Art. 24 Charter guaranteeing the best interest of the child,[124] the CJEU limited Member States discretion in cherry-picking Dublin provisions functional to fight secondary movements. In doing so, the Court introduced further leeway for asylum seekers to escape the rigid application of Dublin rules. *I.S.* is one of the few cases where the Court relied upon the Charter - other than Art. 4 – to support its protection-driven stance and expand the procedural rights of asylum seekers beyond the blackletter of the Dublin III Regulation.

The procedural rights case law following the Dublin III reform is the area where the CJEU has been the most active: Building on the procedural rights introduced by the Dublin III Regulation, the Court departed from its restrictive approach in *Abdullahi*, establishing additional exceptions to the automaticity of Dublin transfers. These exceptions align with the ECtHR's reasoning in *Tarakhel*, which had already been partially integrated into the Court's vulnerability case law.[125] Though procedural rights, the CJEU allowed for individual circumstances related to the application of Dublin rules but detached from "systemic deficiencies" to be relied upon to

[121] Ibid., para 32. On s literal interpretation, Art. 27 provides for a remedy only for the purpose of challenging a transfer decision.
[122] Ibid., paras 33 - 35.
[123] Stefan Salomon, 'Taking Asylum Seekers Rights Seriously under the Dublin III Regulation (C-720/20 and C-19/21)' (*EU Law Live*, 27 September 2022).
[124] Recital 13 of Dublin III Regulation.
[125] As for the vulnerability case law, also when tackling procedural rights the CJEU never explicitly referred to *Tarakhel.*

challenge a transfer decision. The Court gradually extended the set of procedural rights awarded to asylum seekers to reconcile the Dublin system with the fundamental rights awarding judicial protection, especially Art. 47 of the Charter. In doing so, the CJEU changed the "underlying telos" of the Dublin system.[126] The system is no longer exclusively purposed to avoid secondary movements and enforce a rapid method of allocation of responsibility. Instead, such objectives coexist with the commitment to protect and involve asylum seekers in the responsibility-allocation procedure. In this new conceptualisation of the Dublin system, the effectiveness of the system via mutual trust remains firmly at the top of the priorities of the CJEU oversight: besides being a forum of protection, procedural rights are an additional tool to ensure the correct application of Dublin procedures, instrumental hence to monitor the compliance of Member States with the rules which enable mutual trust to function.[127]

4 Beyond Systemic Deficiencies… And Back

The Dublin III reform prompted the CJEU to develop its vulnerability and procedural rights case law. Through its judgments, the Court enabled asylum seekers to influence the responsibility-allocation mechanism by invoking individual circumstances liable to halt a Dublin transfer. At the same time, the "systemic deficiencies" doctrine remained untouched since its codification in the Dublin III Regulation. Only in 2019, the Grand Chamber delivered two strictly interrelated judgments which expanded the possibility of rebutting the safety presumption beyond the concept of "systemic deficiencies". In *Jawo*, the Court was asked about the legality of a transfer if, upon the eventual recognition of international protection, the

[126] Daniel Thym, 'Court of Justice Judicial Maintenance of the Sputtering Dublin System on Asylum Jurisdiction: *Jafari, A.S., Mengesteab* and *Shiri*' (2018) 55 Common Market Law Review 549.
[127] Maarten den Heijer, 'Remedies in the Dublin Regulation: Ghezelbash and Karim' (2017) 54 Common Market Law Review 859.

living conditions in the transferred Member State would be below the standards of Art. 4 Charter.[128] Similarly, in *Ibrahim and others*, the Court ruled unlawful the transfer of a beneficiary of international protection to a Member State where they enjoy protection but the living conditions could be considered inhumane and degrading.[129]

The two cases addressed different categories of third-country nationals, asylum seekers and beneficiaries of international protection, and interpreted different legal instruments, the Dublin III Regulation and the Asylum Procedures Directive.[130] However, the CJEU followed the same reasoning looking at the situations through the lenses of the "systemic deficiencies" doctrine.[131] In *Jawo*, the Court acknowledged the limited scope of the doctrine as outlined in *N.S.* and codified in Art. 3(2) Dublin III Regulation, where only systemic flaws in the asylum procedure and the reception conditions of applicants for international protection are liable of halting a transfer.[132] Given the new protection-oriented objective of the Dublin III Regulation, the Court stressed the requirement for the Regulation to be interpreted "in a manner consistent with the fundamental rights guaranteed by the Charter" and in particular with Art. 4 Charter. The "general and absolute" nature of Art. 4 Charter is strictly linked with the respect of human dignity (Art. 1 Charter) and therefore is of "fundamental importance".[133] Consequently, it is "immaterial" whether a risk of suffering inhuman or degrading treatment occurs "at the very moment of the

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[128] Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218.
[129] Joined Cases C-297/17, C-318/17, C-319/17 C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, EU:C:2019:219. Here, as in *Jawo*, the focus was on the living conditions specifically of beneficiaries of international protection. Differently from *Jawo*, such conditions were not hypothetical upon the recognition of the status but certain as the case involved an applicant who was already a beneficiary of international protection.
[130] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.
[131] As *Ibrahim and Others* follows for most part the reasoning of *Jawo*, the next paragraphs will focus on *Jawo*, adding elements from *Ibrahim and Others* when necessary.
[132] Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218, para 87.
[133] Ibid., para 78.

transfer, during the asylum procedure or following it".[134] The rebuttal of the safety presumption can be claimed for any risk of breach of Art. 4 Charter resulting from the adoption of a transfer decision, which includes the living conditions to which an applicant might be subjected if awarded a protection status. Aware of the far-reaching consequences of such interpretation, the CJEU introduced a strict evaluation criterion to assess whether an asylum seeker would find themselves in a situation breaching Art. 4 Charter upon transfer: the situation should attain a "high level of severity" resulting in "extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity".[135] Very importantly, extreme material poverty does not necessarily have to result from systemic deficiencies of the national asylum system, but it can be caused also by "the existence of exceptional circumstances that are unique to him" if they can be demonstrated by the asylum seeker.[136] In *Ibrahim and Others*, the CJEU applied by analogy the reasoning in *Jawo*: a Dublin decision must be annulled if a beneficiary of international protection upon transfer would be exposed to a risk of suffering inhumane or degrading treatment due to deficiencies, "which may be systemic or generalized, or which may affect certain groups of people".[137]

The *Jawo* and *Ibrahim and Others* cases end a long discrepancy between the CJEU and ECtHR case law concerning the compliance of the Dublin system with fundamental rights: moving past the "systemic deficiencies" doctrine, the CJEU empowered asylum seekers to appeal against a transfer exposing them to inhumane and degrading treatment

[134] Ibid., para 88.
[135] Ibid., para 92.
[136] Ibid., para 95.
[137] Joined Cases C-297/17, C-318/17, C-319/17 C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, EU:C:2019:219, para 88.

resulting from aspects other than systemic flaws of the transferred State asylum system. Such a position finally fully incorporates the ECtHR *M.S.S.* case. There, the ECtHR deemed situations of extreme material poverty – and not only systemic flaws of the asylum systems – liable for breaching Art. 3 ECHR.[138] The CJEU referred to *M.S.S.* when outlining the criteria to assess whether a Dublin transfer could be in breach of Art. 4 Charter.[139] While the concept of extreme material poverty is taken *verbatim* from the ECtHR judgment, the CJEU introduced a specific list of conditions that such a situation must attain to attain a "particularly high level of severity": it should result from the applicant being wholly dependent on the State and not able to meet their most basic needs, undermining their physical or mental health.[140] By specifying that such conditions can arise from either systemic deficiencies or exceptional circumstances unique to the applicant, *Jawo* not only incorporates but expands *M.S.S.*: it links extreme material poverty conditions with individual circumstances, as raised in the ECtHR case *Tarakhel* and the CJEU vulnerability case law.[141] In particular, *Jawo* relies on *C.K.* by including physical and mental health among the conditions to evaluate the presence of a situation of extreme material poverty. The health status of the asylum applicant is therefore crucial not only during the transfer but also after its execution. *Ibrahim and Others* further expands the application of the *M.S.S.* doctrine by significantly extending its personal scope: while the ECtHR based its extreme material poverty benchmark on the premise that asylum seekers are "member[s] of a particularly underprivileged and vulnerable population group in need of special protection"[142], the CJEU extended the necessity for living conditions to comply with Art. 4 to also cover beneficiaries of international protection.

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[138] *M.s.s v Belgium and Greece,* Judgment of 21 January 2011, Application no. 30696/09, paras 252-254.
[139] Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218, paras 91-92.
[140] Ibid., para 92.
[141] Ibid., para 95.
[142] *M.s.s v Belgium and Greece,* Judgment of 21 January 2011, Application no. 30696/09, para 251.

Despite the very different legal position between asylum seekers and beneficiaries of international protection, the CJEU based its interpretation on the absolute prohibition of inhumane and degrading treatment instead of on the special vulnerability of asylum seekers.[143]

Jawo and *Ibrahim and Others* greatly expanded the possibilities for asylum seekers and beneficiaries of international protection to exercise some agency in appealing a transfer decision. However, the Court restated that the principle of mutual trust can be limited only by Art. 4 Charter.[144] Nonetheless, the new *Jawo* benchmark forces Member States to evaluate not only the compliance of a Dublin procedure with Art. 4 Charter but also the consequences of such procedure, namely the recognition of international protection and the living conditions attached.[145] The criteria to fulfil such a benchmark are designed to limit the possibility for any individual circumstance falling short of homelessness to meet the extreme material conditions threshold: the applicants in both *Jawo* and *Ibrahim and Others* were indeed considered not to meet this threshold. In *Jawo*, the combination of lack of family structures, shortcomings in the implementation of integration programmes, and less favourable living conditions in the transferred Member State were not deemed to expose the applicant to a real risk of inhumane and degrading treatment.[146] In *Ibrahim and Others*, the absence or low level of subsistence allowance was deemed not to meet the threshold.[147]

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[143] Maarten Den Heijer, 'Transferring a Refugee to Homelessness in Another Member State:Jawo and Ibrahim', (2020) 57 Common Market Law Review 539.
[144] Joined Cases C-297/17, C-318/17, C-319/17 C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, EU:C:2019:219, para 92.
[145] Heijer (n 143).
[146] Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218, paras 94, 96 and 97.
[147] Joined Cases C-297/17, C-318/17, C-319/17 C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, EU:C:2019:219, para 93.

With *Jawo* and *Ibrahim and Others,* the CJEU expanded the situations liable of challenging the automatism of Dublin transfers, even if still anchored to Art. 4 Charter violations and interpreted in line with the principle of mutual trust. The inclusion of socio-economic rights among the conditions for upholding asylum seekers' dignity is an important step towards the recognition of the heavy impact of Dublin procedures on their lives and hence of the necessity to empower them to challenge their application. Simultaneously, the CJEU firmly upheld the principle of mutual trust, strictly interpreting the concept of extreme material conditions to strike a balance between safeguarding asylum seekers' rights and preserving the efficiency and automaticity of the Dublin system.

The case law on systemic deficiencies, vulnerability exceptions, procedural rights, and extreme material poverty conditions progressively narrowed the gap between the two objectives of the Dublin III Regulation: protecting asylum seekers and ensuring rapid, efficient responsibility allocation procedures. On multiple occasions, the Court underlined the importance of the protection of asylum seekers' rights to work in unison, and not in opposition to, mutual trust. With two recent cases, however, the CJEU took a divergent approach, emphasising the exceptional nature of the protection-driven case law vis à vis the overarching objective of maintaining mutual trust as the fundamental premiss of the Dublin system.

In November 2023, with the *Ministero dell'Interno* case, the Court addressed jointly two issues already touched in the past: first, the content of the procedural rights granted to asylum seekers subjected to Dublin decisions; second, the definition of the exceptions to the safety presumption prescribed by the principle of mutual trust.[148] On procedural rights, the cases addressed the failure of Italian authorities to provide applicants with

[148] Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934.

the common leaflet[149] and, in one case, also to conduct a personal interview before issuing a take-back decision.[150] The referring courts asked whether the breaches of the right to information and to be heard (Arts. 4 and 5, Dublin III Regulation), in conjunction with the right to an effective remedy (Art. 27, Dublin III Regulation), provided for the annulment of the take-back decisions.[151] In line with its previous case law, extensively quoted, the Court stressed that asylum seekers are liable to "affect the determination of the Member State responsible" through Art. 27 Dublin III Regulation, which prescribes the right to an effective remedy with no "limitation of the arguments that may be raised".[152] The unjustified absence of a personal interview leads to the annulment of a transfer decision unless the person concerned can appeal against the decision and, "in the context of that appeal, set out in person all of his or her arguments against that decision."[153] In light of the principle of effectiveness, a national judge can annul a decision taken without the provision of the common leaflet "only if it considers […] that the failure to provide [it], even though the personal interview has taken place, actually deprived that person of the possibility of putting forward his or her arguments, to the extent that the outcome of the administrative procedure […] could have been different."[154]

The CJEU for the first time linked together all the procedural rights introduced by the Dublin III Regulation, looking at the interrelations between the rights to information and to be heard and the right to an effective remedy.[155] Under the Dublin system, the rights to information and

[149] Cases C-228/21, C-315/21 and C-328/21.
[150] Case C-315/21.
[151] Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934, para 73.
[152] Ibid., paras 100 and 107.
[153] Ibid., para 127.
[154] Ibid., para 128.
[155] The prescriptiveness of the right to be heard was interpreted by the CJEU in the context of the Asylum Procedure Directive in *Sacko*. Case C-34 8/16, *Sacko*, EU:C:2017:591. Chiara Favilli, 'The Standard of Fundamental Rights Protection in the Field of Asylum: The

to be heard cannot be overlooked by national authorities and their infringement has clear legal consequences. If national authorities do not comply with their information obligation, asylum seekers are empowered to ask for the revision of the adopted decision to make full use of their procedural rights. Remedies, thanks to the extensive reading of Art. 27, are confirmed as the main avenue for asylum seekers to exert some agency over the implementation of Dublin procedures. Here, the possibility of appeal is linked with the automatic annulment of the decision once some criteria are satisfied: if an applicant is not heard either through a personal interview or during the appeal, the transfer decision must be annulled.[156]

The second and most noticeable part of the *Ministero dell'Interno* case is a regression from the expansive *Jawo* case law back to the blackletter of the "systemic deficiencies" doctrine. In essence, the Court was asked in three joined cases whether national courts are allowed to assess the risk of indirect refoulement arising from a take-back procedure.[157] The applicants had their first asylum claims rejected, meaning that upon transfer they would be subjected to return procedures. They argued that the return to their countries of origin would expose them to inhumane and degrading treatments, in breach of the principle of non-refoulement. However, such a breach would not happen if the Dublin transfers from Italy do not take place: implementing the transfer, Italy would *indirectly* breach the principle of refoulement.

The Italian judges were dubious about the compliance of the Dublin transfers with Art. 4 Charter, given the substantive differences in the assessment of the protection needs of the applicant between the

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Case of the Right to an Effective Remedy between EU Law and the Italian Constitution' (2019) 12 Review of European Administrative Law 167.

[156] As previously noted, the consequences of failing to provide the common leaflet, due to its administrative nature, are less automatic and more discretionary.

[157] Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934, para 129.

transferring and the transferred Member States.[158] Aware of the implications of the conflict between Member States' protection needs assessments over the principle of mutual trust, the referring courts referred the cases to the CJEU to address two main issues: first, the possibility for national courts to examine the risk of indirect refoulement when reviewing a transfer decision.[159] Second, whether national courts can or must activate the discretionary clause (Art. 17(1) Dublin III Regulation) when they disagree with the evaluation made by the administration.[160]

With a rather short analysis, the Court presented systemic deficiencies in the asylum procedure and in the reception conditions of the transferred Member State as the only situations liable to rebut the safety presumption governed by mutual trust.[161] As the situations at stake did not fall within any of the exceptions individuated in the case law, the Court concluded that the difference in the assessment of asylum claims is "not, in principle, relevant for reviewing the validity of the transfer decision."[162] The CJEU presented such interpretation as inevitable to preserve the aims of the Dublin III Regulation which are, "inter alia, to establish a clear and effective method for determining the Member State responsible and to prevent secondary movements of asylum seekers between Member

[158] Germany in C-297/21 and C-315/21 and Sweden in C-254/21. Such discrepancy was especially evident concerning Afghanistan – the country of origin of two of the applicants (Cases C-254/21 and C-297/21) – given the non-cohesive country of origin information provided by authoritative sources such as the United Nations High Commissioner for Refugees (UNHCR) and the EU Asylum Agency (EUAA). See: *UNHCR*, Guidance Note on the International Protection Needs of People Fleeing Afghanistan (February 2022); *UNHCR*, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (August 2018); *EUAA*, Country Guidance Afghanistan 2020 (December 2020), p. 42-43.

[159] Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934, para. 129.

[160] Ibid., para. 143.

[161] Ibid., para 142.

[162] The Court noticed that the German and Swedish asylum systems were not affected by systemic deficiencies and that the *C.K.* exception was not applicable, as none of the applicants had a particularly serious underlying mental and physical condition. Ibid., paras 137, 139 and 140.

States".[163] To uphold the principle of mutual trust, national courts reviewing the legality of a transfer decision must avoid conducting substantive assessments regarding potential refoulement risks. Judges must take as established the fact that the transferred Member State's authorities will correctly assess the risk of refoulement connected to the return and provide the applicant with appropriate venues to challenge the return decision after the transfer.[164] Consequently, national courts cannot impose on the transferring Member State the activation of the discretionary discretion clause (Art. 17 Dublin III Regulation), whose optional nature is once again recalled, when they believe in the existence of a refoulment risk in the transferred Member State.[165]

The reasoning in *Ministero dell'Interno* on indirect refoulment is in stark contrast with the Court's previous case law developing and expanding the "systemic deficiencies" doctrine. The Court addressed the issue relying on the blackletter of existing case law and legislation, without providing any further elaboration. The focus of the judgment is to restate the fundamental importance of mutual trust, whose exceptions are presented in their most literal sense limiting as much as possible an extensive interpretation to encompass the situation at stake.[166] The blackletter interpretation of the "systemic deficiencies" doctrine, anchored to the original *N.S.* interpretation, is critical for three main reasons.

First, systemic deficiencies relate only to state practices hindering the access to asylum procedures, or the enjoyment of the status. In her Opinion, Advocate General Kokott explicitly included the judicial system as

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[163] Ibid., para 141.
[164] Ibid.
[165] *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others* [2023] ECJ Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21., para 150.
[166] Marcella Ferri, 'Nel Nome Della Fiducia Reciproca! La Corte Di Giustizia Si Pronuncia Sul Rischio Di Refoulement Indiretto Nei Trasferimenti Dublino: L'unica (e Sempre Più Restrittiva) Eccezione Delle Carenze Sistemiche e Le (Limitate) Prerogative Del Giudice Nazionale' [2024] EUROJUS 40.

an area where systemic deficiencies might arise and lead to a rebuttal of mutual trust.[167] The Court instead is silent on the issue. It remains therefore unclarified whether state practices affecting the judicial systems involved in asylum recognition can trigger the systemic deficiencies doctrine. Such divergence of interpretation did not lead to a different result in the present case: as (rightfully) stated by the Advocate General, the German and Swedish judicial systems are not flawed by relevant systemic deficiencies.[168] Nonetheless, the inclusion of the judicial system among the areas covered by the systemic deficiencies doctrine would have an important precedential value, protecting asylum seekers from transfers violating their fundamental right to a free trial in the context of (sadly not hypothetical) infringements of the rule of law.[169]

Second, refoulement risks can arise even outside systemic deficiencies situations. However, the Court refused to apply the solutions identified in its previous case law, specifically in *Jawo* and *C.K.*, to cover possible protection gaps. In particular, *Jawo* is voided of any relevance outside a systemic flaws situation: it applies only in situations characterised by "deficiencies, which may be systemic or generalised, or which may affect certain groups of people".[170] Such an interpretation clashes with the aim of

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[167] *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, Opinion of Advocate General Kokott, ECLI:EU:C:2023:316, para. 162 and 168.
[168] Ibid., para. 66.
[169] A more favorable position on the rebuttal of mutual trust in case of breaches of judicial independence was adopted in the context of the European Arrest Warrant. With the *LM* case, the CJEU stated that an arrest warrant must be suspended when the requesting Member State's criminal system is affected by systemic deficiencies which breach the essence of the right to a fair trial of the claimant. Case C-216/18, PPU *LM*, EU:C:2018:586. Differently from *Ministero dell'Interno*, in *LM* the issue of systematically deficient judicial systems had a pivotal role in the Court's reasoning. For an overview of the rebuttal of mutual trust in the context of the EAW as interpreted in *LM*, see: M. Bonelli, 'Intermezzo in the Rule of Law Play: The Court of Justice's LM Case', in A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States* (Springer, 2021) p. 455; T. Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-Execution of a European Arrest Warrant: LM', 56 *Common Market Law Review* (2019), p. 743-770.
[170] Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934, para. 136.

the *Jawo* case, which rules out a transfer in "*any* situation in which there are substantial grounds for believing that the applicant runs [a] risk [of inhuman and degrading treatment]".[171] Such a situation may arise also when an applicant can "demonstrate the existence of exceptional circumstances that are unique to him" which would put him at risk of a breach of Art. 4 Charter. In *Ministero dell'Interno*, the Court does not refer to "exceptional circumstances" and refuses to apply *Jawo* to individual situations.[172] Furthermore, the Court ruled the *C.K.* case not applicable undermining its general scope. In *C.K.*, the Court indeed stated that it would be "manifestly incompatible with the absolute character of [the] prohibition [of Art. 4 Charter violations] if the Member States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum seeker […] that does not result from a systemic flaw".[173]

Third, the CJEU judgment is in contrast with the ECtHR case law, which considers *any* Art. 3 ECHR violation liable of halting a Dublin transfer and the prohibition of indirect refoulement applicable also when the intermediary country is participating in the Dublin system.[174] The *Ministero dell'Interno* case therefore reopened the protection gap between the Strasbourg and Luxembourg Courts, despite the recent re-alignment with the *Jawo* case.[175] Ultimately, the CJEU interpretation confirms the concerns expressed by Costello and Tsourdi about "the potential [of the systemic

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[171] Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218, para. 87 (*emphasis* added).
[172] Joined Cases C-228/21, C-254/21, C-297/21, C-315/21, C-328/21 *Ministero dell'Interno*, para. 135. Compare with Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218, para. 95.
[173] Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127, para. 93.
[174] ECtHR, *Tarakhel v Switzerland*, Judgment of 4 November 2014, Application No. 29217/12, para. 104; and ECtHR, *T.i v the United Kingdom (dec)*, Judgment of 7 March 2000, Application No. 43844/98. G. Vicini, 'The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust', 8 *European Journal of Legal Studies* (2015), p. 50-72.
[175] Lucia van der Meulen, 'Risk of Indirect Refoulement Cannot Lead to the Refusal of a Dublin Transfer in the EU (C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21)' (*EU Law Live*, 18 December 2023).

deficiencies doctrine] to fragment the absolute prohibition of refoulement".[176]

The CJEU justifies its restrictive approach as the only one compatible with the objectives of the Dublin system. Interestingly, the protection of asylum seekers does not appear among the aims listed by the Court. The Court's emphasis on secondary movements sharply contrasts with the protection-oriented approach taken by the Court in procedural rights case law, where it was explicitly equated with the need to safeguard asylum seekers' rights.[177] With *Ministero dell'Interno*, the CJEU deviated from its gradual progression towards balancing mutual trust with the protection of fundamental rights. It instead asserted the primacy of mutual trust and the inter-state characteristics of the system over any other objective of the Dublin system.

The CJEU blackletter interpretation of the "systemic deficiencies" doctrine was confirmed in the recent *X* case, delivered on February 2024.[178] The case examined the risks of pushbacks and inhumane detention conditions that an asylum seeker feared facing if a take-back procedure from the Netherlands to Poland was carried out.[179] The case is contextualized in the "instrumentalisation" approach adopted by the EU and Eastern Member States facing increased arrivals at the EU Eastern land border in winter 2021: Poland adopted a series of measures greatly

[176] E. Tsourdi and C. Costello, ''Systemic Violations' in EU Asylum Law: Cover or Catalyst?', 24 *German Law Journal* (2023), p. 982-994.
[177] Case C-720/20, *RO légalement représentée v Bundesrepublik Deutschland*, EU:C:2022:603, para 42.
[178] Case C-392/22, *X v Staatssecretaris van Justitie en Veiligheidœ,* EU:C:2024:195.
[179] Ibid., paras 14 and 15. *X* claimed it was already subject to these practices upon his arrival to Poland – which include also unbearable living conditions, lack of assistance from interpreters, ill-treatment from Polish authorities – and that he was afraid his fundamental rights would have been infringed again upon his transfer to Poland.

impacting asylum seekers' personal freedom and access to asylum to fight the instrumental use of migration flows by the Belarus regime.[180]

The referring court supported the applicants' claim by stating that "objective, reliable, specific and properly updated information shows that the Republic of Poland has, for a number of years, systematically infringed a number of fundamental rights of third-country nationals".[181] Consequently, the CJEU was asked to clarify whether, "if systemic infringements of fundamental rights are taking place in a Member State with respect to an applicant or to third-country nationals generally, the competent authority must refrain from taking a decision to transfer someone to that Member State, or whether the principle of mutual trust continues to apply fully."[182] In essence, the Court was asked whether the "systemic deficiencies" doctrine, especially following the opening interpretation of the *Jawo* case, covered pushbacks and generalised detention practices.

In *X,* the CJEU restated the restrictive reasoning of *Ministero dell'Interno*, presenting mutual trust as hierarchically superior over fundamental rights violations concerns.[183] The Court found the practice of pushback and generalised detention to be contrary to EU law and symptomatic of serious flaws in asylum procedures and reception conditions.[184] However, EU judges concluded that these issues "[do] not in

[180] The Instrumentalisation approach adopted by the EU and several Member States since the end of 2021 will be covered in Chapter 7.1. For more information on the national actions adopted, see: Mirko Forti, 'Belarus-Sponsored Migration Movements and the Response by Lithuania, Latvia, and Poland: A Critical Appraisal' (2023) 2023 8 European Papers - A Journal on Law and Integration 22.
[181] Case C-392/22, *X v Staatssecretaris van Justitie en Veiligheidœ,* EU:C:2024:195, paras 20-21.
[182] Ibid., para 22.
[183] Ibid., paras 43-45.
[184] Ibid., paras 50-56.

[themselves] preclude the transfer of that third-country national to that Member State."[185]

To reach this conclusion, the Court made a literal and unimaginative analysis of Art. 3(2) Dublin III Regulation. It deemed necessary for a situation to activate the rebuttal of safety presumption, and therefore halting a transfer, to fulfil two cumulative conditions: being "systemic" and "resulting in a risk of inhuman or degrading treatment".[186] According to the Court, practices such as pushbacks and unlawful detention do not as such fulfil per se such conditions. First, if the referring court does not consider the flaws systemic, the transfer is not precluded.[187] If instead, the practices under review are an expression of a systemic flaw, the transfer can be annulled only if the referring court assesses whether they "result in a risk, for the person concerned, of being exposed to treatment that is contrary to Article 4 of the Charter."[188] If the systemic flaw does not impair the individual enjoyment of Art. 4 Charter, then the transfer can be implemented. When pushback and generalised detention are symptomatic of systemic flaws and individually impact the applicant, the CJEU relied on *C.K.* to further limit the possibilities to annul a transfer decision: if the transferring Member State receives "individual guarantees" which are "both credible and sufficient to rule out any real risk of inhuman or degrading treatment", it may still carry on the transfer.[189]

The *X* case strengthened the reasoning adopted by the CJEU in *Ministero dell'Interno*, further limiting the range of situations rebutting the safety presumption governing the Dublin system. By developing a set of subsequent exceptions to disapply the principle of mutual trust, the CJEU anchored the "systemic deficiencies" doctrine to its most literal and

[185] Ibid., para 65.
[186] Ibid., paras 57-58.
[187] Ibid., para 61.
[188] Ibid., par 62.
[189] Ibid., paras 80-81.

exceptional application. Despite acknowledging the seriousness and unlawfulness of pushbacks and generalized detention in Poland, the Court refrained from categorising them as systemic flaws outright. Even more problematically, systemic flaws are a necessary but insufficient condition to halt the transfer, with the asylum seeker having the burden of proof to demonstrate that they result in a specific and real risk of exposing them to treatment that is contrary to Art. 4 Charter.[190] It is hard to imagine how it can pragmatically be demonstrated that a systemic flaw would or would not apply to a specific person: its systematic feature provides for its application irrespective of the person concerned.[191]

The risk of being subject to pushback and generalised detention risks is relevant only insofar as it exposes the applicant to a violation of Art. 4 Charter. Even when all these conditions are fulfilled, the transfer can be still implemented if the transferring Member States receive credible guarantees from the transferred Member State. The Court referred to the *C.K.* case only to further limit the consequences of a rebuttal of the safety presumption: when a Member State is deemed unsafe for transfer, a mere exchange of reassurances between national authorities suffices to bypass the "systemic deficiencies" doctrine and proceed with the execution of the transfer.

The recent CJEU caselaw restricts, rather than broadens, the role of asylum seekers in the decision-making process regarding the allocation of responsibility. It does so by selectively applying elements from previous

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[190] Ibid., para 63.

[191] In *N.S* there is as well a link between systemic deficiencies and individual circumstances: systemic flaws prevent a transfer when there are "substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter". The connection is however not as explicit and prescriptive as in the case at stake. Pragmatically, the identification of systemic deficiencies has been used as a blanket ground to suspend the transfer of all asylum seekers to the deficient Member State, as it is the case with Greece. Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, para 94.

judgments to strategically fence the triggering of Art. 3(2) Dublin III Regulation. The resulting denial of agency is in stark contrast with the opening approach adopted by the CJEU in the *Ghezelbash* and *Karim* cases and subsequent case law.[192] With *X*, the principle of mutual trust triumphed over the protection of asylum seekers' fundamental rights: even if the safety presumption is rebutted, only in a limited number of cases it will lead to a suspension of transfers.

5 Agency and Solidarity in the CJEU Case Law: The Judicial Passivist Context

The *Ministero dell'Interno* and *X* cases are symptomatic of the unreliability of the CJEU to solve the systemic failures plaguing the Dublin system, and to fill the agency gap within it. The CJEU refrained from taking innovative stances on a politically sensitive area such as EU asylum law, with a form of "judicial passivism" with repercussions on the way key concepts such as solidarity and agency are interpreted.

The term "judicial passivism" was designed by Goldner Lang to define the approach of the CJEU case law in EU migration and asylum law.[193] Such an approach is understood as a sub-group of the activism that characterised the Court actions in areas such as citizenship and the internal market. By either renouncing to interpret sensitive issues by claiming to lack jurisdiction (narrow judicial passivism) or avoiding adopting a teleological approach (broad judicial passivism), the Court signals to the other EU institutions the impossibility of proceeding differently without legislative reforms.[194] Such an approach is quite fitting when looking at solidarity and

[192] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409.
[193] Iris Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in T. Ćapeta, I. Goldner Lang & T. Perišin, *The Changing European Union: A Critical View on the Role of Law and Courts* [2020] Hart Publishing.
[194] Ibid.

agency: the Court always refrained from directly addressing the issues, preferring to tackle them only when explicitly required to and most of the time incidentally.

On solidarity, the Court's reluctance to interpret the principle became evident in the case law following the events of the 2015 "migration crisis" which interlocks with the functioning of the Dublin system. Asked about the prescriptiveness of Dublin rules in an unprecedented critical situation, in the *A.S.* and *Jafari* cases the Court adopted a very formalistic approach.[195] The cases concerned the application of the irregular entry criterion in Art. 13 Dublin III Regulation to situations where a Member State tolerated the entry and transit of asylum seekers while facing an unusually large number of arrivals. Such a model of "authorised" secondary movements was among the informal measures adopted by Member States along the Balkan route to manage the migration flow of asylum seekers who arrived in Greece hoping to move forward within the EU. The Court however took a strong stance in defence of the standard application of the Dublin system. It stood behind the literal interpretation of Art. 13 Dublin III Regulation, deeming any border crossing not fulfilling the entry conditions as "irregular", irrespective of whether its occurrence was tolerated and happening in a situation of mass influx.[196] The Court only marginally touched upon the concept of solidarity between Member States facing a critical situation. No derogations to the Dublin rules are allowed, in any situation, as the EU has already complementary instruments at its disposal to showcase solidarity: the early warning mechanism, the temporary protection directive and the emergency measures legal basis in Art. 78(3) TFEU.[197] The principle of

[195] Case C-646/16, *Proceedings brought by Khadija Jafari and Zainab Jafari*, EU:C:2017:586; Case C-490/16, *AS v Republic of Slovenia*, EU:C:2017:585. The *AS* case is also relevant for specifying that also the Art. 13 Dublin III Regulation – the irregular entry criterion – can be subject of remedies pursuant Article 27 (para 35).
[196] Case C-646/16, *Proceedings brought by Khadija Jafari and Zainab Jafari*, EU:C:2017:586, paras 54 and 74.
[197] Ibid., paras 94-98. While unlikely in the 2015 context, one could argue that the EU was effectively already equipped with the legal tools to face a sudden influx of arrivals. What

solidarity and fair sharing of responsibility was incidentally quoted in *Jafari* as the principle behind the discretionary clause (Art. 17 Dublin III Regulation): it is up to the Member State to derogate, in a spirit of voluntary solidarity, from Dublin rules and take up responsibility for applications whose examination should not be their prerogative under Chapter III of Dublin III Regulation.[198] Interestingly, the Court mentioned solidarity only as a motive behind the voluntary activation of secondary law provisions, instead of using it as an interpretative tool.

The passivist approach of the Court was confirmed in the case law on the relocation decisions adopted in 2015 to support frontline Member States (Italy and Greece) facing a mass influx of people through the Mediterranean routes.[199] The relocation case law consists of two legal actions surrounding the refusal of some Member States to take part in the mandatory relocation mechanism introduced by Decision 2015/1523/EU and Decision 2015/1601/EU.[200] In the annulment procedure of *Slovakia and Hungary v Council*, the CJEU dismissed the numerous pleas challenging the legality of Decision 2015/1523/EU legal basis, its procedural iter and its compliance with the principles of proportionality and necessity.[201] In *Commission v Poland, Hungary and the Czech Republic*, the Court dismissed the Member States' claims relying on Art. 72 TFEU and on the ineffectiveness of the relocation mechanisms to non-implement relocations, deeming their conduct against EU law.[202] Both cases were strictly related to the

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was lacking was the political will to use them. See, for comparison, see the Ukrainian temporary protection scheme: Chapter 7.2.

[198] Ibid., para 100.

[199] See Chapter 1.2.3.3.

[200] Council Decision 2015/1523/EU establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239 – 146, providing for the relocation of 40 000 asylum seekers from Greece and Italy; Council Decision 2015/1601/EU establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248 – 80, providing for the relocation of 120 000 asylum seekers from Greece and Italy.

[201] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631.

[202] Joined Cases C-715/17, C-718/17, C-719/17, *European Commission v Republic of Poland and Others*, EU:C:2020:257.

operationalisation of the principle of solidarity and fair sharing of responsibility, as highlighted by the Advocates General. In their opinions, they looked at the constitutional foundations of the principle and the central role of solidarity within the EU integration project.[203]

Concerning the annulment procedure, Advocate General Bot deemed solidarity as "a founding and existential value of the Union", which was concretised in a specific and binding manner by the relocation decision.[204] Consequently, the non-application of relocation was deemed a breach of Art. 80 TFEU.[205] In her opinion on the infringement procedure, Advocate General Sharpston considered Polish, Hungarian and Czech non-implementation of the relocation decisions to jeopardise the principles of the rule of law, the duty of sincere cooperation and solidarity.[206] In particular, she referred to the case law of the Court in other fields to stress that when the principle of solidarity entails burden-sharing: Member States cannot rely on self-centeredness and cost-benefit analysis to escape their responsibilities.[207]

In both its judgments, the CJEU refrained from any constitutional reasoning surrounding solidarity but essentially agreed with the analysis of the Advocates General: solidarity was referred to only in passing. In the annulment case, the CJEU underlined that the relocation decision was adopted to "give effect to the principle of solidarity and fair sharing of responsibility".[208] Solidarity is conceptualised as a burden-sharing mechanism through which Member States take up the burden for the benefit of one or more Member States and divide it among them.[209] Such a

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[203] Dziedzic (n 74)., p. 172.
[204] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, Opinion of Advocate General Bot, EU:C:2017:618, paras 18 and 23.
[205] Ibid., para 254.
[206] Joined Cases C-715/17, C-718/17, C-719/17, *European Commission v Republic of Poland and Other,* Opinion of Advocate General Sharpston, EU:C:2019:917.
[207] Ibid., paras 251-254.
[208] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, para 252.
[209] Ibid., para 291.

solidaristic attitude is not voluntary, but rather imposes legally binding effects, as all Member States are bound to participate.[210] In the infringement case, the CJEU restated the binding effect of solidaristic burden-sharing, which cannot be undermined by the Member States' "unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning, of the relocation mechanism established".[211]

The relocation case law received extensive attention in the literature, with widespread consensus on the missed opportunity for the CJEU to finally shed light on the general legal nature and content of the principle of solidarity and fair sharing of responsibility.[212] The CJEU indeed did not provide a comprehensive definition of solidarity, limiting its reasoning to the situation at stake concerning temporally and quantitatively limited emergency solidarity. The constitutional status of Art. 80 TFUE remains unclear, even though the Court considered the principle of solidarity and fair sharing of responsibility not merely abstract but rather capable of justifying the adoption of binding obligations for Member States.[213] Outside of the relocation decisions context, the prescriptiveness of Art. 80 TFUE has still to be tested.

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[210] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, para 293.
[211] Joined Cases C-715/17, C-718/17, C-719/17, *European Commission v Republic of Poland and Others*, EU:C:2020:257, paras 80 and 180-181.
[212] Bruno De Witte and Evangelia Lilian Tsourdi, 'Confrontation on Relocation–The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic And' (2018) 55 Common market law review; Evangelia (Lilian) Tsourdi, 'Relocation Blues – Refugee Protection Backsliding, Division of Competences, and the Purpose of Infringement Proceedings: Commission v. Poland, Hungary and the Czech Republic', (2021) 58 Common Market Law Review 1819; Steve Peers, 'A Pyrrhic Victory? The ECJ Upholds the EU Law on Relocation of Asylum-Seekers' (*EU Law Analysis*, 8 September 2017); Henri Labayle, 'Solidarity Is Not a Value: Provisional Relocation of Asylum-Seekers Confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v. Council)' (*EU Immigration and Asylum Law and Policy*, 11 September 2017); Daniela Obradovic, 'Cases C-643 and C-645/15: Enforcing Solidarity in EU Migration Policy' [2017] European Law blog; Jonas Bornemann, 'Coming to Terms with Relocation: The Infringement Case against Poland, Hungary and the Czech Republic' (*European Law Blog*, 14 April 2020).
[213] De Witte and Tsourdi (n 212).

Looking at agency, the Court never endorsed the recognition of agency as part of the CEAS. Quite the contrary. In *X. and X.* on humanitarian visas, the CJEU explicitly stated that the interpretation of EU law allowing asylum seekers to "lodge and obtain international protection in the Member State of their choice […] would undermine the general structure of the system established by Regulation No 604/2013".[214] The Court was asked to assess whether Member States had an obligation to issue a short-term visa with limited territorial validity (Art. 25(1)(a)) Visa Code)[215] on humanitarian grounds when there is a risk of infringement of Art. 4 and/or Art. 18 Charter. In his Opinion, Advocate General Mengozzi vehemently endorsed the applicability of the Charter to the situation at stake and the positive obligation of Member States to issue humanitarian visas to uphold "the values of respect for human dignity ...and respect for human rights" and respect "the principle of solidarity and fair sharing of responsibility ...between the Member States".[216] Mengozzi linked the concepts of agency and solidarity to promote a holistic vision of solidarity where the respect of asylum seekers' agency –here the possibility to apply and obtain a humanitarian visa in a Member State consulate abroad – is instrumental for the CEAS to comply with its founding values and with its solidaristic commitment.

The CJEU rejected the argument and declined to address the issue entirely, stating that humanitarian visas fall outside the scope of EU law. Contrary to Mengozzi's opinion, the conclusion was based precisely on the incompatibility between the Dublin system and allowing asylum seekers to choose their country of asylum through humanitarian visas. The clash between agency and the functioning of the CEAS was confirmed also in the relocation case law, where agency and solidarity were presented as

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[214] Case C-638/16 PPU, *X and X v État belge*, EU:C:2017:173, para 48.
[215] Regulation 810/2009/EC establishing a Community Code on Visas (Visa Code) [2009] OJ L 243-1.
[216] Case C-638/16 PPU, *X and X v État belge*, Opinion Advocate General Mengozzi, EU:C:2017:93, paras 6 and 174.

conflicting concepts: in *Slovakia and Hungary v Council*, the Court presented the criteria of the relocation mechanism to be in line with the Dublin III criteria, insofar as "the system established by the contested decision is based – like the system established by the Dublin III Regulation – on objective criteria rather than on a preference expressed by an applicant for international protection".[217] The irrelevance of the asylum seekers' consent within the Relocation Decision was instrumental for the mechanism to comply with secondary law allocation criteria and avoid the accusation of arbitrariness.[218] Therefore, the solidarity provisions introduced were purely horizontal, with no involvement of the asylum seeker in the process and exclusively devoted to "take pressure off the Greek and Italian asylum systems by actually relocating, within a short time frame, a significant number of applicants to other Member States".[219]

The Court's harsh opposition to the subjective right to choose the country of asylum coexists with the more open *Ghezelbash* case, delivered one year before the *X and X* and *Slovakia and Hungary v Council* cases, on the involvement of asylum seekers in the process of determining the Member State responsible.[220] While the procedural rights case law increased the venues for asylum seekers to challenge Dublin decisions not complying with the Dublin III Regulation, access to remedy was framed as a necessary tool to preserve rather than change the system. Through remedies, asylum seekers did not obtain the subjective right to claim which Member State is responsible for assessing their asylum claim but rather became part of the monitoring tools to ensure the correct implementation of the rules. This interpretation is supported by the numerous instances in which the CJEU emphasised that asylum seekers cannot compel Member States to assume

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[217] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, para 332.
[218] De Witte and Tsourdi (n 212).
[219] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:63, para 337.
[220] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para 51.

responsibility under the discretionary clause, as its activation remains optional under EU law.[221]

6 Conclusion

The CJEU intervention on the automatism of Dublin transfers has played a key role in limiting the most dysfunctional effects of the Dublin system. The Court progressively intervened to extend the protection afforded by EU law to asylum seekers, with important consequences concerning solidarity and agency. With its Dublin case law, the CJEU introduced a judicial form of horizontal solidarity between Member States. By halting transfers towards Member States with systemic deficiencies or living conditions in breach of Art. 4 Charter, the Court indirectly implemented an allocation mechanism: the non-transferability of asylum seekers de facto decreases the number of asylum claims that Member States with systemic deficiencies must process, hence alleviating the overall pressure on them. Transferring Member States accept to (or are legally forced to) allocate among them the quota of asylum seekers that exited countries with such flaws.[222]

Even though prompted by the duty to uphold ECtHR standards and interpreted in accordance with the principle of mutual trust, the Dublin case law retrospectively legitimises certain intra-EU secondary movements. These movements originate from irregularity, but they may be deemed legitimate ex-post when justified by the risk of fundamental rights violations: if applicants entered or applied for asylum in a Member State where they risk suffering breaches of Art. 4 Charter, subsequent asylum

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[221] See, inter alia: Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, para 96; Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127, para 88; Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934, para 150.

[222] Dziedzic (n 74)., p. 210.

claims lodged in another Member State preclude the initiation of Dublin transfers. The CJEU case law does not award asylum seekers a subjective right to oblige a Member State to take-up responsibility for their asylum claim. However, it shields them from a Dublin transfer to their first country of arrival or responsible Member State whose asylum system is below Art. 4 Charter standards.

The same reasoning applies to particularly vulnerable categories of asylum seekers, whose transfer must meet a very high threshold to be allowed, hence empowering them with some control over the choice of their country of asylum.[223] Lastly, the progressive enhancement of asylum seekers' procedural rights increases their involvement in the decision-making on the allocation of responsibility for their asylum claims.[224]

While welcome, the improvements introduced by the CJEU case law in operationalising asylum seekers' agency within the Dublin system are symptomatic of the overall passivist judicial approach in addressing EU migration and asylum policies. The Court has consistently followed a strict statutory approach in interpreting the Dublin system, guided by an administrative mindset. Its reasoning primarily centres on the wording, overall structure, objectives, and context of secondary legislation, rather than adopting a constitutionally-driven perspective.[225] In repealing its strict *Abdullahi* case law in favour of expanded access of asylum seekers to remedies, the Court stressed such a conclusion was necessary due to the changes brought by the Dublin III Regulation.[226] Similarly, the CJEU rarely

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[223] C-648/11, *The Queen, on the application of MA and Others v Secretary of State for the Home Department*, EU:C:2013:367. In some cases, vulnerability can oblige Member States to take up responsibility, and not to continue the assessment of Dublin III criteria.
[224] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409
[225] Daniel Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) 44 European law review 138.
[226] See, inter alia: Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para 46 and Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127, paras 61-62.

grounded its expansive interpretation of procedural rights on explicit references to Art. 47 Charter.[227] Instead, it linked Art. 47 Charter to an explicitly framed individual right enshrined in secondary law, which is Art. 27 Dublin III Regulation in the context of Dublin transfers.

The statutory interpretation approach adopted by the CJEU is compliant with the principle of separation of powers, as the judiciary must follow the legislation when interpreting the law. At the same time, the CJEU has the vital role of safeguarding the general principles and values of the Union, including the respect of fundamental rights, from any provision or state practice which might breach them. In balancing between these two different and at times opposing tasks, the Court has been very careful in presenting its most innovative case law as driven by exogenous factors, being the EU legislators or the ECtHR case law. The "systemic deficiencies" doctrine emerged as a direct and necessary response to the ECtHR's *M.S.S.* judgment, compelling the Luxembourg Court to establish an exception to the safety presumption underpinning the Dublin system to align with ECHR human rights standards. The *Tarakhel* case, though never explicitly cited in the CJEU's jurisprudence, served as a precursor to the Court's rulings on invoking individual circumstances to halt a Dublin transfer, whether on grounds of the applicant's vulnerability or procedural irregularities.

The CJEU statutory approach makes its interpretations neither constant nor definitive: the Court waited for the Dublin III Reform to implement the *Tarakhel* doctrine in the field of procedural rights, and it filled the gap between the *M.S.S.* and *N.S.* jurisprudences only with the *Jawo* case. Even then, the ability of asylum seekers to invoke breaches of Art. 4 Charter has remained more limited in scope compared to the prescriptive nature of the

[227] For a systemic analysis of the role of Article 47 of the Charter in the procedural rights caselaw in the field of migration and asylum, see A. Słowik, 'Multiple Sources of Right to an Effective Remedy in EU Migration and Asylum Law: Towards Common Standards on Judicial Protection?', 31 *Maastricht Journal of European and Comparative Law* (2017).

ECtHR's condemnation of violations of Art. 3 of the ECHR: the *Ministero dell'Interno* and *X* cases demonstrated that situations such as indirect refoulement, pushback and generalised detention in the transferred Member State, ruled by the ECtHR as Article 3 ECHR violations, are not sufficient for a Dublin decision to be annulled.

Consequently, the Dublin case law is quite variable. In particular, the coexistence of multiple objectives within the Dublin III Regulation has been interpreted differently across the years. Initially, the protection-driven features of the Dublin III Regulation were juxtaposed with the administrative features of the system devoted to automatism and rapidity. In its recent case law, the CJEU stressed that only very exceptional situations can protect asylum seekers from Dublin transfers, with the system's mutual trust-driven automatism remaining its core prerogative.[228] Ultimately, with the recent *Ministero dell'Interno* and *X* cases, the Court presented the fight against secondary movements as the primary objective of the Dublin system. In addition, the Court is referential to the direction set by the legislators through secondary law, giving little autonomous significance to primary law provisions such as solidarity (Art. 80 TFUE) and the right to an effective remedy (Art. 47 Charter). The recently adopted New Pact on Migration and Asylum reforms extensively intervened in the functioning of the Dublin system, albeit maintaining its hierarchy of criteria virtually unchanged.[229] If the CJEU retain its statutory interpretation approach, such legislative interventions will lead to a subsequent change in case law.

In conclusion, the Dublin case law confirms the lack of constitutional imagination of the CJEU in EU asylum law.[230] Most importantly, it corroborates that the protection of fundamental rights within the Dublin

[228] Moreno-Lax (n 95).
[229] See Chapter 4.
[230] Thym (n 225).

system is subjected to the dogmatic upholding of the principle of mutual trust. The special significance of mutual trust within the EU legislative framework for the CJEU has been clear since Opinion 2/13 on the accession of the EU to the ECHR,[231] as well as its repercussions for fundamental rights in the EU.[232] In the context of the Dublin case law, the CJEU has been adamant in presenting mutual trust as the underlying tenet of the system, whose preservation is crucial for the CEAS not only to function but to exist. While some fundamental rights benchmarks have been designed to ensure the compliance of the system with the Charter and the ECHR, the Dublin system remains an allocation mechanism where mutual trust enables quasi-automatic, objective, and rapid decision-making.

Against this context, asylum seekers' agency is envisaged by the Court merely as a tool to better operationalise the Dublin system: in no circumstance are asylum seekers equipped with a subjective right to decide where to apply for asylum. Instead, they are involved in the decision-making insofar as their actions are instrumental to ensure the correct application of Dublin rules, hence mutual trust itself.[233] Any other form of agency recognition is considered an obstacle to the automatism of Dublin procedures and hence the application of mutual trust. Consequently, the CJEU cannot be the forum for independent and effective agency recognition.

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[231] Case Opinion 2/13*, Opinion of the Court - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.
[232] Eleanor Spaventa, 'A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 Maastricht Journal of European and Comparative Law 35.
[233] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie,* EU:C:2016:409, para 55.

Part II
The New Pact on Migration and Asylum

The New Pact on Migration and Asylum, adopted in May 2024, aims to establish a durable European framework that operates in a spirit of solidarity, offering asylum seekers certainty, clarity, and decent living conditions. The reforms significantly reshaped the legal framework governing the EU asylum policy. However, the new provisions fail to address the inherent imbalances underlying the Dublin system or introduce agency-enhancing measures to support the effective enforcement of the CEAS.

The next chapters address the New Pact provisions impacting solidarity and agency at all stages of the asylum procedure. Chapter 4 contextualises the negotiation process of the New Pact and outlines the main features of the Asylum and Migration Management Regulation replacing the Dublin system. The New Framework maintains virtually unchanged the hierarchy of criteria allocating responsibilities among Member States. At the same time, it introduces a permanent solidarity framework coupled with a more robust approach to combating secondary movements.

Chapter 5 targets the Screening Regulation, Asylum Procedures Regulation and the Return Border Procedure Regulation. These legal texts govern asylum-related procedures that either precede (Screening Regulation) or follow (Asylum Procedures Regulation and the Return Border Procedure Regulation) the responsibility-allocation mechanism of the Asylum and Migration Management Regulation. The analysis focuses on the new provisions enabling Member States to apply objective and automatic criteria for redirecting asylum seekers to substandard procedures, sanctioning onward movements, and expediting returns. Furthermore, the procedures introduced play a central role in the crisis control mechanism

created anew by the Crisis and Force Majeure Regulation, topic of Chapter 6. The Regulation prescribes a set of exceptional measures, including enhanced access to the Asylum and Migration Management Regulation solidarity mechanism and derogations from the rules governing asylum procedures, to assist Member States under pressure in managing migration-related emergencies.

The analysis of the New Pact on Migration and Asylum is instrumental in grounding the normative claim that, without factoring asylum seekers' agency in the process, the reformed EU asylum management is set for failure. Such a claim is developed in the last part of the thesis via the analysis of two case studies exemplifying the spectrum of EU emergency migration management. On one side, the instrumentalisation approach sponsoring an agency-denial solidarity model restricting asylum seekers' access to the EU territory and asylum procedures. On the other side, the agency-enhancing Ukrainian temporary protection scheme introduced a free-choice model to redistribute beneficiaries of temporary protection among Member States.

The New Pact codifies the instrumentalisation approach under the Crisis and Force Majeure Regulation. At the same time, it acknowledges the added value of the Temporary Protection Directive as a key tool in EU migration management, thus repealing the proposal for its withdrawal. It is argued that, despite the agency-denying direction pursued by the New Pact, an agency-enhancing alternative is both legally and normatively feasible.

Chapter 4 - The New Pact on Migration and Asylum: Solidarity and Agency Implications of the Asylum and Migration Management Regulation

The EU asylum policy outlined in the previous chapters showcases a sharp disentanglement between theory and practice. Primary law identifies solidarity, together with fair sharing of responsibility, as a guiding principle governing the actions of the Union (Art. 80 TFEU). However, the absence of clear guidelines regarding the scope and enforceability of solidarity under Art. 80 TFEU has impeded its practical implementation, a shortcoming that became evident in the wake of the 2015 "migration crisis". The CJEU intervened on several occasions to fill in the gaps between legislation and state practices on solidarity and agency, oftentimes extending the protection afforded to asylum seekers and increasing their involvement in asylum procedures. Nonetheless, the Court case law has followed a statutory approach which failed short of addressing the design flaws of the system, instead reflecting the Court's readiness to align with the trajectory established by EU legislators in secondary law.

As EU leaders failed to effectively tackle migration-related challenges using the instruments available under EU law, the only viable solution to overcoming the systemic failures of the CEAS was through legislative changes. However, for a long time, the EU failed to deliver systematic reforms.[1] In 2020, the newly inaugurated Von der Leyen Commission announced its intention to introduce a comprehensive reform – a New Pact on Migration and Asylum – tackling migration in a "human and humane

[1] Foteini Asderaki and Eleftheria Markozani, 'The Securitization of Migration and the 2015 Refugee Crisis: From Words to Actions' in Aristotle Tziampiris and Foteini Asderaki (eds), *The New Eastern Mediterranean Transformed: Emerging Issues and New Actors* (Springer International Publishing 2021).

way".[2] The New Pact was ultimately published on 23 September 2020, with the promise to replace the Dublin system with a new European migration governance system,[3] where "all Member States should contribute to solidarity on a constant basis".[4]

1 The New Pact on Migration and Asylum: Negotiation History, and Selected Issues

The New Pact on Migration and Asylum reforms EU migration and asylum management with a global set of reforms. The original Commission's proposal was composed of five new legislative texts: a Screening Regulation; an Asylum Procedures Regulation; an amended proposal revising the Eurodac Regulation; an Asylum and Migration Management Regulation; and a new Crisis and Force Majeure Regulation. The legal texts were accompanied by a set of soft-law recommendations[5]. In addition, negotiations on proposals tabled in 2016 and 2018 but never agreed upon restarted as part of the New Pact: The EU Asylum Agency Regulation; the Reception Conditions Directive; the Qualification Directive; and the Union Resettlement Framework.[6]

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[2] The New Pact was already present among the priorities of the next Commission outlined by Von der Leyen when candidate for president of the Commission: Ursula von der Leyeb, 'A Union that strives for more. My agenda for Europe: political guidelines for the next European Commission 2019-2024' (2019), https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1-11e9-9c4e-01aa75ed71a1, p.15. The intention to present migration reforms was restated during the first State of the Union in 2020: Commission, 'State of the Union Address by President von der Leyen at the European Parliament Plenary' (16 September 2020), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.

[3] Infomigrants, 'EU chief vows to replace Dublin rule for asylum seekers' (18 Semptember 2020), available here: https://www.infomigrants.net/en/post/27380/eu-chief-vows-to-replace-dublin-rule-for-asylum-seekers

[4] Communication on a New Pact on Migration and Asylum [2020] COM/2020/609, p. 2.

[5] The original texts of the Commission's proposals are available here: https://commission.europa.eu/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en

[6] The details of the reform proposals of 2016 and 2018 which were added to the New Pact can be found here: Commission, 'New Pact on Migration and Asylum - Building on the progress made since 2016: Questions and Answers' (23 September 2020): https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1723.

The package received a lukewarm reception from Member States,[7] and scholars,[8] who saw in the realpolitik approach adopted by the Commission very few innovative elements justifying the announcement of a "fresh start" in EU migration management. Nonetheless, the publication of the New Pact set in motion the reform process of the EU migration and asylum policy.

Given the magnitude and sensitivity of the topics discussed, and the everchanging migratory patterns at the EU external borders, negotiations soon reached a stalemate. In September 2022, the EU legislators agreed on a roadmap planning regular meetings and envisaging the end of the legislative process in February 2024.[9] Nonetheless, until late 2023 there were no significant advancements. While the European Parliament resolutely backed the necessity to adopt a "package approach",[10] Member States in the Council struggled to reach an agreement on key files, most

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[7] The compromise result was seen as unsatisfactory by both Mediterranean countries – advocating for more solidarity – and the Visegrad group – refusing any responsibility-sharing mechanism entailing solidarity. See: La Moncloa, 'New Pact on Migration and Asylum: comments by Greece, Italy, Malta and Spain', (2020) https://www.lamoncloa.gob.es/presidente/actividades/Documents/2020/251120-Non%20paper%20Pacto%20Migratorio.pdf; and Visegrad Group, 'Joint Position of Poland, Hungary, Slovakia, Czech Republic, Estonia and Slovenia through the New Pact on Migration and Asylum' (10 December 2020) https://www.visegradgroup.eu/new-pact-on-migration.

[8] See, *inter alia*: Francesco Maiani, 'A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact' (*EU migration law blog*, 20 October 2020); Steve Peers, 'First Analysis of the EU's New Asylum Proposals' (*EU Law Analysis*, 25 September 2020); Catherine Woollard, 'Editorial: The Pact on Migration and Asylum: It's Never Enough, Never, Never' (*ECRE*, 25 September 2020); Alessia Di Pascale, 'Il nuovo Patto per l'immigrazione e asilo: scontentare tutti per accontentare tutti' (*Eurojus*, 29 September 2020); Daniel Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy' (*EU Immigration and Asylum Law and Policy*, 28 September 2020); Leila Hadj Abdou & Andrea Pettrachin, 'Plus Ça Change, plus c'est La Même Chose: The Puzzling "status Quo Tendency" in EU Migration Policy' (*MPC Blog*, 13 December 2022).

[9] European Parliament, Joint Roadmap of the European Parliament and Rotating Presidencies of the Council on the organisation, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New European Pact on migration and asylum (2020) https://www.europarl.europa.eu/resources/library/media/20220907RES39903/20220907RES39903.pdf.

[10] Catherine Woollard, 'Editorial: EU Asylum Reform: Parliament Agrees Its Positions; Council Enters Wild Terrain' (*ECRE*, 28 May 2023).

notably regarding solidarity and responsibility.[11] Only in June 2023, the Council adopted a negotiating position on the key texts replacing the Dublin system and reforming asylum procedures.[12]

In the second half of 2023, negotiations proceeded swiftly, under the threat of the soon-ending mandate of the European Parliament and Commission and subsequent EU elections in June 2024. During trialogues, the European Parliament conceded to most of the Council requests, leading to a political agreement on the whole New Pact in December 2023.[13] Despite the calls from several NGOs to avoid adopting a set of pejorative proposals compared to the already deficient current framework,[14] the European Parliament greenlighted the reforms on 10 April 2024.[15] On 14 May 2024, the Council officially adopted all the proposals forming the New Pact on Migration and Asylum.[16]

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[11] Catherine Woollard, 'Editorial: All Pact-Ed up and Ready to Go: EU Asylum Law Reforms' (*ECRE*, 16 February 2024); Philippe De Bruycker, 'Genealogy of and Futurology on the Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy' (*EU Immigration and Asylum Law and Policy*, 6 May 2024).

[12] Council of the EU, 'Migration policy: Council reaches agreement on key asylum and migration laws' (8 June 2023) https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/.

[13] Council of the EU, 'The Council and the European Parliament reach breakthrough in reform of EU asylum and migration system' (20 December 2023) https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/. Helena Hahn, 'Political Agreement on the New Pact – a Cause Célèbre?' (*EPC*, 21 December 2023).

[14] Statewatch, 'Migration Pact "will engender a proliferation of human rights violations" and must be rejected' (9 April 2024) https://www.statewatch.org/news/2024/april/migration-pact-will-engender-a-proliferation-of-human-rights-violations-and-must-be-rejected/#:~:text=The%20Pact%20represents%20a%20step,or%20biometric%20identification%20systems%20will. 161 organisations urged MEPs to vote against the new measures.

[15] European Parliament, 'MEPs approve the new Migration and Asylum Pact' (10 April 2024) https://www.europarl.europa.eu/news/en/press-room/20240408IPR20290/meps-approve-the-new-migration-and-asylum-pact.

[16] Council of the EU, 'The Council adopts the EU's pact on migration and asylum' (14 May 2024] Press release, available here: https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/.

In total, 10 legal acts have been adopted:[17] the Qualification Regulation;[18] the Asylum Procedure Regulation (APR);[19] the Return Border Procedure Regulation;[20] the Resettlement and Humanitarian Readmission Regulation;[21] the Asylum and Migration Management Regulation (AMMR);[22] the Screening Regulation;[23] the Screening Amending Regulation;[24] the Eurodac Regulation;[25] the Crisis and Force Majeure Regulation (CFMR);[26] and the Reception Conditions Directive.[27] In addition, the European Union Agency for Asylum (EUAA) Regulation

[17] The links to the adopted texts are grouped here: https://eur-lex.europa.eu/oj/daily-view/L-series/default.html?&ojDate=22052024.
[18] Regulation 2024/1347/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council [2024] OJ L, 2024/1347.
[19] Regulation 2024/1348/EU stablishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L, 2024/1348.
[20] Regulation 2024/1349/EU of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148 [2024] OJ L, 2024/1349.
[21] Regulation 2024/1350/EU establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147 [2024] OJ L, 2024/1350.
[22] Regulation 2024/1351/EU on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L, 2024/1351.
[23] Regulation 2024/1356/EU of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2024] OJ L, 2024/1356.
[24] Regulation 2024/1352/EU of the European Parliament and of the Council of 14 May 2024 amending Regulations (EU) 2019/816 and (EU) 2019/818 for the purpose of introducing the screening of third-country nationals at the external borders [2024] OJ L, 2024/1352.
[25] Regulation 2024/1358/EU on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council [2024] OJ L, 2024/1358.
[26] Regulation 2024/1359/EU of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L, 2024/1359.
[27] Directive 2024/1346/EU laying down standards for the reception of applicants for international protection [2024] OJ L, 2024/1346.

was already adopted in 2021.[28] Lastly, the Revised Schengen Borders Code (Revised SBC),[29] which was not formally part of the New Pact but whose provisions are strictly linked to the procedures envisaged in it, was adopted in June 2024.

To navigate the great number and variety of provisions introduced, the Commission published in June 2024 a Common Implementation Plan with guidelines for national authorities on how to structure their National Implementation Plans.[30] The adopted reforms will enter into force at the end of the implementing period in mid-2026.[31]

The adopted texts greatly vary in the type of measures adopted and aims tackled. Nonetheless, one general trend can be outlined. The reformed CEAS is much more communitarised thanks to an increased harmonisation process: 11 of the 12 legal texts listed above are Regulations, oftentimes recasting former Directives. Regulations provide the EU with coordination mechanisms and monitoring procedures enabling the emergence of an EU governance inexistent until now. At the same time, Member States' procedural autonomy is significantly reduced, especially when it comes to asylum procedures.[32]

Counterbalancing the legal harmonisation performed, the reforms leave great operational discretion in the hands of Member States, especially in the operationalisation of the AMMR solidarity mechanism

[28] Regulation 2021/2303/EU on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L 468/1.
[29] Regulation 2024/1717/EU of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2024] OJ L, 2024/1717.
[30] Communication on the Common Implementation Plan for the Pact on Migration and Asylum [2024] COM(2024) 251 final.
[31] Except the Resettlement and Humanitarian Admission Framework Regulation that became applicable already on 11 June 2024, and the revised SBC already applicable upon entry into force.
[32] De Bruycker (n 11).

and the CFM Regulation crisis response mechanisms.[33] The tension between EU harmonisation and national discretion will shape the implementation of the New Pact and will be addressed throughout this and the next chapters in relation to solidarity and agency.

To outline the whole New Pact on Migration and Asylum cohesively is a Sisyphean task given the multitude of legal texts and their intercorrelations. However, the reforms have vital consequences on how solidarity and agency are conceptualised under EU law. The next paragraphs outline the AMMR provisions that impact the operationalisation of solidarity in standard migration management: the AMMR Regulation introduced for the first time a permanent solidarity mechanism at EU level. In addition, the Regulation intervenes in the sphere of asylum seekers' rights, especially at the procedural level, impacting their possibility to influence the choice of the country of asylum.

2 The Asylum and Migration Management Regulation: Solidarity Provisions

The AMMR repeals the Dublin III Regulation introducing a much longer and more complex Regulation. As with the repealed Regulation, the AMMR provides the criteria for identifying the responsible Member State to analyse asylum claims lodged in the EU. Additionally, the AMMR establishes a common framework for the management of asylum and migration, including a permanent solidarity mechanism – the first of its kind under EU law – designed to implement a burden-sharing model as a standard tool for migration management.

[33] The AMMR solidarity mechanism is addressed in the next paragraphs, while the CFM Regulation is analysed in Chapter 6. Alberto-Horst Neidhardt, 'Navigating the New Pact on Migration and Asylum in the Shadow of Non-Europe' (EPC 2024).

The AMMR makes numerous references to Art. 80 TFEU, presented as the basis and premise of the EU migration management at large. The AMMR is indeed designed to "uphold and elaborate[e] on the principle of solidarity and fair sharing of responsibility" (Recitals 1 and 3). The Regulation lists the areas in which Member States should cooperate in a spirit of solidarity and responsibility (Art. 6). While most of the areas of intervention refer to the responsibility side of Art. 80 TFEU, the Regulation's contribution to the operationalisation of solidarity is encapsulated in the solidarity mechanism, which is a set of measures "provid[ing] effective support to Member States under migratory pressure and ensur[ing] swift access to fair and efficient procedures for granting international protection" (Recital 22 and Art. 6(2)(e)).

The solidarity mechanism is structured as a yearly migration management cycle where Member States engage, under the initiative of the Commission and within the Council forum, in inter-State coordination to share the burden of migration management. The cycle starts every mid-October with the adoption by the Commission of the European Annual Asylum and Migration Report, which provides a strategic situational picture and forward-looking projections of the migratory trends for the coming year (Art. 9). Together with the report, the Commission publishes an implementing decision identifying Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation (Art. 11). Based on these documents, the Commission presents the embryo of the "Solidarity Pool" with a proposal which will be negotiated in the Council. The pool consists of a mix of measures necessary "to address the migratory situation […] in a balanced and effective manner" (Art. 12).

Member States are obliged to make pledges, but they are free to choose among different types of solidaristic actions which are considered of "equal value": relocations of asylum seekers, or beneficiaries of international protection when bilaterally agreed; financial contributions to Member States in the area of "migration, reception, asylum, pre-departure

reintegration, border management and operational support" or to third countries for actions that "may have a direct impact on the flows at the Member States' external borders or may improve the asylum, reception and migration systems of the third country concerned"; or alternative solidarity measures, "focusing on operational support, capacity building, services, staff support, facilities and technical equipment" (Art. 56).

To support Member States in the negotiation, the Commission provides an indicator of each Member State's expected fair share through a reference key based on their population size (50% weighting) and total GDP (50% weighting) (Arts. 12(2) and 66). The only condition to be fulfilled in the Solidarity Pool is to reach through pledges a minimum cap of 30 000 relocations and 600€ million financial contributions per year (Art. 12(2)). Before the end of each calendar year, the Solidarity Pool is established via a Council Implementing Decision, indicating the specific pledges for each Member State and the type of solidarity measures pledged (Art. 57).

A Member State identified by the Commission's implementing decision as "under pressure" (Article 11) can access the Solidarity Pool by notifying the Commission and selecting the type of solidarity measure it requires from the pledges negotiated by the Member States (Art. 58). Member States can self-assess their situation as being under pressure. In this case, they can access the Solidarity Pool only if authorised by the Commission (Art. 59). The solidarity mechanism is equipped with different tools to facilitate the coordination of solidarity contributions and the matching between Member States' needs and pledges.[34] In particular, the Regulation provides for responsibility offsets as an alternative to the standard relocation procedure to ensure the effective fulfilment of the relocation needs of the Member States under pressure (Art. 63). Responsibility offsets consist of a transfer

[34] Some of the measures aimed at facilitating the match between needs and pledges in the Solidarity Pool are: the institution of the EU Solidarity Coordinator, responsible for coordinating the technical implementation of the solidarity mechanism (Art. 15), and the establishment of High Level and Technical-level forums within the Council (Arts. 13 and 14).

of responsibility for asylum seekers from the benefitting Member State, designated as responsible under the AMMR criteria, to the contributing Member State, where the applicant is physically present. They amount to a relocation sur place: the contributing Member State accepts to forego the application of the take-charge or take-back procedure for an applicant who should be transferred to the benefitting Member State, taking up responsibility outside the AMMR criteria and solely based on its presence on its territory.

Responsibility offsets are conceived as a "secondary level solidarity measure [which] will constitute an additional reason for shifting of responsibility for certain applicants among Member States" (Recital 33). They become mandatory when relocation pledges do not meet the 30 000 minimum threshold in the Solidarity Pool, or an individual Member State's pledges are below 60% of its fair share as determined in the reference key.[35] Access to pledges and responsibility offsets for Member States under pressure is conditional upon the well-functioning of their system in operationalising the AMMR responsibility-allocation mechanism: in case of recognised "systemic shortcomings", contributing Member States are not required to implement pledges or apply responsibility offsets (Art. 60(3)).

3 The AMMR Solidarity Pool as an (In)efficient solidarity mechanism

The Solidarity Pool is designed as a permanent mechanism to support Member States in addressing the "increasing phenomenon of mixed arrivals of persons in need of international protection and those who are not" (Recital 6). The solidarity model foreseen is an unprecedented effort by the

[35] Responsibility offsets are instead an option available, upon agreement of the contributing Member State, when relocation pledges in either the total pledges in the Solidarity Pool or the individual pledges of a Member State are equal or above 50% of the amount indicated in the Commission Proposal (Art. 63(1) and (2)).

EU institution to operationalise the principle of solidarity and fair sharing of responsibility. Instead of relying on ad hoc and voluntary arrangements agreed with difficulties and oftentimes loosely implemented, the EU is now equipped with a predictable – at least on paper – set of measures tailorable to the situational picture of migration flows.

At first glance, the AMMR solidarity mechanism fulfils the conditions to operationalise the principle of solidarity as interpreted by the CJEU in its relocation case law: it creates a system to which Member States can have access upon verified necessity and where all Member States are bound to contribute to dividing the burden.[36] At the same time, it presents several flaws in its conceptualisation, design and implementation which hinders its ability to both efficiently operationalise Art. 80 TFEU and ensure the protection of asylum seekers' fundamental rights.

First, the solidarity mechanism is the only solidaristic measure designed in the AMMR, which instead devotes much more focus to the responsibility side of Art. 80 TFEU.[37] The Solidarity mechanism is expected to singlehandedly solve the imbalances of the AMMR responsibility allocation system. However, this system largely replicates the Dublin rules, inheriting its main shortcomings, which contributed to the emergence of systemic failures under the Dublin III Regime.[38] The changes introduced – as the new diploma and other qualifications criterion analysed further below – are likely to have limited impact in redistributing responsibility shared between Member States. Furthermore, the new text introduces greater rigidity into

[36] Joined Cases C-715/17, C-718/17, C-719/17, *European Commission v Republic of Poland and Others* [2020] ECLI:EU:C:2020: 257, paras. 80 and 181.
[37] As pointed out above, out of the six indents detailing how cooperation between Member States should observe Art. 80, five concern the responsibility of each Member State in managing migration flows and asylum applications lodged in their territory (Art. 6).
[38] Most importantly, the infamous "first-entry" rule is maintained at Art. 21. The first entry rule provides that when "an applicant has irregularly crossed the border into a Member State [...], the first Member State thus entered shall be responsible for examining the application for international protection". Chiara Favilli, 'La Solidarietà Flessibile e l'inflessibile Centralità Del Sistema Dublino' (2021) 15 Diritti umani e diritto internazionale 85.

the system, imposing more binding responsibilities on frontline Member States, which undermines the relief the solidarity mechanism could offer to countries facing migratory pressure.[39]

Second, the solidarity mechanism does not challenge the rigidity of the AMMR but maintains an emergency-driven logic.[40] The Solidarity Pool is indeed framed as "a corrective mechanism to the functioning of the ordinary rules on the attribution of responsibility".[41] Instead of operationalising Art. 80 TFEU as a structural tool to prevent asymmetrical burdens between Member States, the AMMR remains anchored in the emergency approach to solidarity that characterised the ineffective response to the 2015 "migration crisis".[42]

Third, the operationalisation of solidarity through the AMMR is limited by the concurrent mandatory and flexible nature of the solidarity mechanism.[43] Moving away from the relocation-driven approach which guided the 2016-2017 relocation decisions, solidarity contributions under the Solidarity Pool are of equal value. The minimum cap for relocation (30 000 per year) is far from effectively providing relief to frontline Member States from standard arrivals at their external borders, which have been on average over 187 000 per year since 2016.[44] Given the option to choose, Member States are likely to pledge a patchwork of alternative contributions rather than committing to relocations, thereby undermining the

[39] The increased responsibility rules targeting frontline Member States are addressed in paragraph 4.1 of the present Chapter.
[40] The different purposes of solidarity (preventive, rebalancing and emergency) are detailed in Chapter 1.2.2.
[41] European Parliament, The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment (12 August 2021), p. 88.
[42] Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law 667; Maiani (n 8).
[43] Favilli (n 38).
[44] Council of the European Union, Yearly irregular arrivals and fatalities (2014-2024) [Data up to July 2024] https://www.consilium.europa.eu/en/infographics/yearly-irregular-arrivals-and-fatalities/.

predictability of the system.[45] Regarding relocations, the solidarity mechanism establishes a system for matching pledges with needs, without addressing the actual implementation of the pledges, which remains within the competencies of Member States. There is no sanctioning mechanism for Member States not executing their pledges. Ultimately, the success of the solidarity response remains dependent on the willingness of Member States to address the identified needs through the effective implementation of the pledges.

The flexible pledging system could be used to tailor interventions loosely related to the asylum and reception systems of the benefitting Member States and with little to no added value to the well-being of asylum seekers. This is particularly evident when looking at the variety of funding activities permitted in Arts. 56(2)(b) and (3). Funding pledges can support actions also in the fields of border management and return procedures and benefit not only Member States but third countries as well. The idea of showing solidarity by providing financial support is neither new nor problematic per se.[46] Offering financial support to Member States under pressure could enable them to determine how best to address a crisis situation with greater autonomy and, ideally, more precision. Nonetheless, the absence of concrete implementation guidelines and a hierarchy of preferred contributions might prompt Member States to prioritise border management activities over the improvement of their asylum systems, pursuing a securitisation approach to stop arrivals rather than manage them.

Even more problematic is the possibility of directing solidarity funding to third countries, with opaque conditionality on their compliance with

[45] Daniela Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge' (*ADiM Blog*, 31 December 2023).
[46] Leonhard Den Hertog, 'EU Budgetary Responses to the "Refugee Crisis": Reconfiguring the Funding Landscape' (2016) 93 CEPS. See Chapter 1.2.3.2.

fundamental rights.[47] Providing funding support to countries along migratory routes is welcomed if it provides support in their efforts to host people. However, the list of promoted financial contributions is neither exhaustive nor limited to the sole asylum and reception fields. It can therefore be expected for funding to third countries to strengthen the responsibility-shifting of migration management to third countries.[48] Solidarity via funding third countries also questions the scope of solidarity: contributions should indeed help Member States to fulfil their obligations under the AMMR, not escape them by externalising responsibilities in stopping migratory flows towards the Union.

Fourth and lastly, the operationalisation of solidarity within the AMMR strongly relies on hyper-bureaucratic procedures, whose effectiveness is hard to assess. Notable examples in the past, such as the Dublin system and the relocation decisions, showed that complex and cumbersome procedures are difficult to put into practice.[49] The inter-state nature of the Solidarity Pool is problematic: its success hinges on the political will of Member States to demonstrate solidarity annually, in a domain where solidaristic sentiments are notably scarce and non-compliance is the default approach adopted by some.[50]

Altogether, the AMMR solidarity mechanism presents several flaws in its legal design and leaves many questions open on its actual operationalisation. Given the significant discretion granted to Member States in selecting the provisions most advantageous from a national (and

[47] At Recital 18 AMMR there is a generic reference to the necessity of all actions funded by financial contribution to respect fundamental rights and to comply with the Charter.
[48] Andreina De Leo and Eleonora Milazzo, '"Responsibility-Sharing or Shifting? Implications of the New Pact for Future EU Cooperation with Third Countries' (Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre 2024).
[49] Jorrit Rijpma, Maarten Den Heijer and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607.
[50] Maciej Duszczyk, Karolina Podgórska and Dominika Pszczółkowska, 'From Mandatory to Voluntary. Impact of V4 on the EU Relocation Scheme' (2020) 21 European Politics and Society 470.

political) perspective, there is a risk that the mechanism may prove ineffective in addressing the common migratory challenges faced by the EU.

4 The AMMR agency denial provisions

The AMMR maintains unchanged the overall structure of the Dublin system, including the refusal to actively involve asylum seekers in the responsibility-allocation mechanism. As with the Dublin III Regulation, the AMMR is based on "objective, fair criteria" which has the focal aim of "mak[ing] it possible to determine rapidly the Member State responsible".[51] Furthermore, several provisions explicitly state that asylum seekers under the Regulation have no right to choose their country of asylum.[52] The most explicit reference is contained in the Reception Conditions Directive, where it is stated that "applicants do not have the right to choose the Member State of application. An applicant is to apply for international protection in accordance with Regulation (EU) 2024/1351".[53]

The reformed responsibility-allocation mechanism is purely an interstate process, as underlined by the deletion of the protection granted to applicants as one of its goals.[54] Member States remain bound to respect fundamental rights in the implementation of the Regulation.[55] However, the objective of "guarantee[ing] swift and effective access to fair and efficient procedures for granting international protection" is coupled with the condition of "not to compromise the objective of the rapid processing of applications for international protection".[56] Fairness is no longer envisaged as a tool to enhance the effectiveness of the responsibility-allocation

[51] Recital 37, AMMR.
[52] See, inter alia, Recital 26, Art. 19(1)(c), Art. 67(3).
[53] Directive 2024/1346/EU laying down standards for the reception of applicants for international protection (recast) [2024] OJ L 2024/1346, Recital 14. Regulation 2024/1351 is the AMMR.
[54] The Dublin III Regulation listed the improvement of the "protection granted to applicants" among its objectives. (Recital 9, Dublin III Regulation).
[55] AMMR, Recital 87.
[56] Ibid.

mechanism, but rather as a desirable aim conditional upon its compliance with the overall rapidity of the system.

The denial of agency and the marginal focus on asylum seekers' protection is put into practice in two main domains: one, the fight against secondary movements; two, the reduction of asylum seekers' procedural rights to limit their ability to challenge decisions preceding the analysis of their asylum claim.

4.1 The Fight Against Secondary Movements

Compared to the Dublin III Regulation, the AMMR devotes much more attention to the fight against "secondary movements".[57] The AMMR comprehensive migration management approach has indeed two objectives: one, to ensure "consistency between asylum and migration management policies". Two, "to address […] unauthorised movements between the Member States" (Art. 3(1)).

Any asylum seekers' movement while under the responsibility-allocation procedures is considered a "secondary movement": the AMMR indeed extends the definition of absconding to include not only the act of leaving the territory without permission but also asylum seekers' failure to notify absence from an accommodation service or to present themselves to the competent authorities when so required (Art. 2(17)). Secondary movements are targeted by a set of provisions aimed at ensuring the compliance of both asylum seekers and the Member States to the rules established.

[57] Typically referred to as "secondary movements", the onward mobility of asylum seekers within the Union is termed "unauthorised movements" in the AMMR, emphasising the need to combat them. The fight against secondary movements is listed as one of the two objectives of the comprehensive approach to asylum and migration management (Art. 3(1)(b)) and cited multiple times in the AMMR. See, *inter alia*: Recital 4; recital 58; recital 59; Art. 4(f); and Art 6(f). In the latter provision, the prevention of unauthorised movements between Member State is one of the areas where Member States shall cooperate to implement the principle of solidarity and responsibility.

Regarding Member States' obligations, responsibility rules have been tightened to compel them to monitor onward movements and expedite the return of individuals moving irregularly: take-back procedures are expanded in their personal scope, applying not only to asylum seekers or persons whose application has been withdrawn or rejected but to beneficiaries of international protection as well.[58] On top of being subjected to take-back procedures, refugees engaging in secondary movements are sanctioned with the restart of the calculation of years for becoming eligible for long-term residence status.[59] This way, the "golden cage of protection" restricting the movement of refugees within the EU is further reinforced, with rules mandating the swift return of anyone attempting to move or resettle within the EU after their status has been recognised.[60]

Furthermore, take-back procedures are simplified to increase the number of transfers implemented and favour those Member States normally targeted by secondary movements. Take-backs become "notifications" instead of "requests", and the deadlines to submit them are no longer prescriptive: the failure to notify within the time limit "shall not affect the obligation of the Member State responsible to take back the person concerned" (Art. 41(1)).[61] On the contrary, the deadline to request a take

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[58] Art. 36(1)(c) AMMR. Beneficiaries of humanitarian status awarded under a national resettlement scheme are also subjected to a take-back when applicable.

[59] Regulation 2024/1347/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council [2024] OJ L, 2024/1347, Annex I(1)(e). The long-term resident status is awarded according to the Long-Term Residents Directive: Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2024] OJ L 16/44.

[60] Before the AMMR, the transfer of irregularly present beneficiaries of international protection was governed by the Return Directive. Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98. On the agency-restricting "golden case of protection" see Chapter 2.2.3.

[61] Despite being a notification, the receiving Member State can object to the transfer upon the same conditions governing current take-back requests (Arts. 41(3) and 46(2) AMMR). See: Francesco Maiani, 'Responsibility-Determination under the New Asylum and Migration Management Regulation: Plus Ça Change...' (*EU Immigration and Asylum Law and Policy*, 18 June 2024).

charge is shortened from three to two months (Art. 38(1)). Furthermore, the deadline to carry out a transfer can be significantly extended when the person concerned absconds or resists in any way the transfer.[62] The cessation of responsibility for the responsible Member State under a take-back notification is met when the person concerned has left the territory of the responsible Member State for at least nine months, instead of the current three (Art. 37(4)).

Lastly, the responsibilities of Member States of first entry are enhanced, here again, to discourage any onward movement of asylum seekers upon their arrival in the EU. The first-entry criterion is not only maintained but expanded: the period of responsibility for asylum seekers crossing irregularly the border is increased to 20 months from the current 12. The criterion explicitly applies also to people disembarked following a search and rescue operation, for which the responsibility period is decreased to twelve months (Art. 33). The shift of responsibilities upon Member States of first arrival confirms the lack of solidarity as a core feature of the AMMR responsibility-allocation mechanism. Frontline Member States retain responsibility for longer periods and an expanded pool of people. At the same time, solidaristic relief is channelled through the new solidarity mechanism, whose operationalisation is left to intra-state cooperation which does not have a great chance of success.

Besides targeting frontline Member States, secondary movement provisions address asylum seekers with a punitive approach. Secondary movements stem from various factors, often unrelated to the content of the applicable law or the asylum seekers' understanding of it. Instead, such movements are influenced by economic opportunities or the presence of ethnic and family networks in other Member States.[63] However, AMMR

[62] In case of absconding, the six months' time-limit can be extended up to three years (Art. 46(2) AMMR).
[63] Daniel Thym, 'Secondary Movements: Improving Compliance and Building Trust among the Member States?' in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the*

responsibility rules do not engage with asylum seekers to ensure their compliance but rather introduce a set of punitive and passivizing provisions aimed at discouraging any onward movement, regardless of the reason behind them.

First, asylum seekers are now expressively obliged to apply for asylum in the Member State of first entry (Art. 17(1)).[64] They are then required not to move until a decision on which Member State is responsible for the assessment of their claim has been identified and to comply with the eventual transfer procedures (Art. 17(4)).[65]

Second, the AMMR introduces "appropriate and proportionate procedural consequences" attached to non-compliance to secondary movement rules (Recital 58). If an applicant is found in a Member State other than the one in which they are required to be present, their reception conditions can be withdrawn (Art. 18(1)).[66] There are some safeguards limiting the negative impact of such a harsh condition sanctioning secondary movements: Member States are still required to guarantee a "standard of living in accordance with Union law, including the Charter, and international obligations" (Art. 18(1)) and to commit proportional sanctions taking into account individual circumstances (Art. 18(4)).[67] Further punishing any attempt of onward movements, the AMMR lowers the threshold to detain asylum seekers in case of absconding (Art. 44).[68]

Commission Proposals for a New Pact on Migration and Asylum (Nomos Verlagsgesellschaft mbH 2022).

[64] Under the Dublin framework, the obligation targeted only Member States. There are some exceptions to this rule under Art. 17(2). See: Steve Peers, 'The New EU Asylum Laws, Part 6: The New Dublin Rules on Responsibility for Asylum-Seekers' (*EU Law Analysis*, 27 April 2024) 6.

[65] Throughout the procedures, asylum seekers are also required to cooperate in providing evidence and biometric data.

[66] The withdrawal of reception conditions is also provided for in the Reception Conditions Directive, Arts. 21 and 23.

[67] Victims of trafficking in human beings are excluded from this rule (Art. 18(3), AMMR).

[68] Detention is available in case of "risk of absconding", and no longer of "*significant* risk of absconding". There is also a new ground for detention "where the protection of national security or public order so requires".

The AMMR's punitive approach is similarly reflected in other stages of the asylum process, as outlined in the Screening Regulation and APR, which will be examined in greater detail in the next chapter. Sanctions against onward movements disproportionately target a vulnerable group – asylum seekers – and serve as punishment either for an intention not to comply (in the case of risk of absconding) or for non-compliance with asylum-related decisions. As designed in the AMMR, the punitive measures can police compliance with a decision which might not yet be definitive: benefits can be reduced or withdrawn for applicants from the moment the transfer decision is "notified" (Art. 18(1)). The notification of the decision however does not make it final, as it can be appealed and annulled.[69] Imposing sanctions for non-compliance with non-definitive administrative decisions, such as the withdrawal of reception conditions, is excessively harsh and undermines the principle of legal certainty. Despite the "standard of living" and proportionality clauses,[70] the AMMR introduces an automatism which allows Member States to withdraw reception conditions upon the sole condition of the movement of the asylum seeker concerned. Such an automatism is incompatible with the absolute right to dignity (Art. 1 Charter) and in contradiction with the CJEU case law in *Cimade and Gisti*.[71] The punitive approach therefore raises fundamental rights compliance doubts which will most likely be addressed in litigation once the AMMR is implemented, adding up to the considerable administrative complexity of the (not so) new responsibility allocation mechanism.[72]

[69] Maiani (n 61).
[70] Interestingly, any reference to individual and proportional assessments connected to the withdrawal of reception conditions is lost in the Reception Conditions Directive. There, the withdrawal of reception conditions is presented as automatic when an applicant is present in a Member State other than the responsible one (Art. 21, Reception Conditions Directive).
[71] Case C-179/11, *CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, EU:C:2012:594, paras 56-57.
[72] Maiani (n 61).

4.2 The Limitation of Procedural Rights

Alongside the obligations and sanctions aimed at curbing secondary movements, the procedures within the AMMR's responsibility-allocation mechanism significantly restrict asylum seekers' procedural rights, thereby limiting their ability to challenge the application of responsibility-allocation rules through judicial redress.

During the responsibility-allocation procedure, the personal interview is obligatory only in take-charge procedures: interviews in take-back procedures are no longer mandatory (Art. 22(1), AMMR). The right to information is expanded (Art. 19). However, the provision of information is framed as a tool to ensure that applicants are aware of their duties and can therefore be sanctioned in case of non-compliance.[73] Most importantly, the scope of judicial remedies to challenge a transfer decision is restricted: under Art. 43, remedies are accessible only in three scenarios: one, to assess breaches of Art. 4 of the Charter; two, to challenge a decision when subsequent circumstances arise that are crucial for the proper application of the responsibility-allocation mechanism; three, to ensure the correct application of family-related criteria. Access to remedies is further limited in its effectiveness, with a time limit of between one and three weeks to present an appeal (Art. 43(2), AMMR).[74] In addition, the appeal loses its automatic suspensive effect, and it is up to the applicant to request it (Art. 43(3), AMMR).[75]

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[73] According to Art. 18(1), non-compliant attitudes can be sanctioned only insofar "the applicant has been informed of his or her obligations and the consequences of non-compliance therewith".

[74] The Dublin III Regulation did not provide for a time limit, requesting instead to Member States to identify a "reasonable period of time within which the person concerned may exercise his or her right to an effective remedy" (Art. 27(2), Dublin III Regulation).

[75] The Dublin III Regulation provided for the automatic suspensive effect of an appeal against a transfer decision, or at the very least the suspension of the transfer to allow the applicant to request to suspend the implementation of the transfer decision pending the outcome of their appeal or review (Art. 27(c), Dublin III Regulation).

The narrowed procedural rights provisions are a sharp setback from the progressive enlargement of remedies accessibility which characterised the Dublin III Regulation as interpreted by the CJEU. Under the Dublin III regime, asylum seekers are subjects of the EU norms establishing the Dublin system. Consequently, they have rights arising from Member States' obligations dictated by EU law, such as providing information, a personal interview and access to remedies. The CJEU confirmed the wide-ranging procedural rights enjoyed by asylum seekers under Dublin procedures, stressing that *any* decision revolving around Dublin transfers can be challenged without restrictions on the arguments that may be advanced.[76]

The new framework instead questions the legal position of asylum seekers in the Dublin system, signalling a return to their conceptualisation as beneficiaries of a minimum set of rights rather than subjects of EU law rights.[77] Under the AMMR regime, asylum seekers are beneficiaries of a minimum set of rights. As such, their right to an effective remedy is significantly curtailed. The restrictive new procedural rights framework is likely to be availed by the Court's statutory interpretation of Dublin provisions.[78] The protection-oriented approach adopted by the CJEU does not stem from an autonomous right to an effective remedy under Art. 47 of the Charter. Instead, it is Art. 27 Dublin III Regulation that makes procedural rights available to applicants under Dublin procedures. In its absence, access to remedies cannot be guaranteed.

It is therefore the content of the secondary law provision on access to remedies that defines the content of the right to an effective remedy

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[76] Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934, paras 100 and 107.
[77] Silvia Morgades-Gil, 'The Right to Benefit from an Effective Remedy against Decisions Implying the Return of Asylum-Seekers to European Safe Countries' (2017) 19 European Journal of Migration and Law 255.
[78] See Chapter 3.6.

under the Dublin system. Differently from Art. 27 Dublin III Regulation, Art. 43 AMMR introduces an exhaustive list of situations liable to trigger access to remedies for asylum seekers. Such a curtailment sensibly weakens the position of asylum seekers as subjects of EU norms. The Regulation maintains – albeit in a restrictive form – the procedural rights of the Dublin III Regulation. However, States' obligations are no longer protected by the ability to challenge decisions made in breach of those obligations.

The misalignment between States' obligations and non-compliance consequences creates a situation of legal uncertainty impacting negatively on asylum seekers subject to transfer decisions. For example, Member States are still obliged to provide applicants under Dublin procedures with clear and understandable information and with the possibility to explain their position through an interview. However, if applicants' right to information and to be heard is breached, there is no remedy availability to ensure redress. Under the Dublin III regime, a transfer decision taken misapplying the responsibility-allocation criteria or in breach of the prescribed timelines and related procedural rights could be challenged by applicants.[79] The AMMR maintains prescriptive rules concerning the criteria and timelines of the responsibility-allocation mechanism. However, Art. 43 does not classify their non-compliance among the situations liable to trigger access to remedies.

[79] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409; Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410; Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, ECLI:EU:C:2017:587; Case C-201/16, *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl* , EU:C:2017:805; Joined Cases C-245/21 and C-248/21, *Bundesrepublik Deutschland v MA and Others*, EU:C:2022:709; Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934.

4.3 Some Agency-enhancing Provisions

The body of provisions examined above paints a bleak picture of agency recognition in the responsibility-allocation mechanism as reformed in the AMMR. Nonetheless, there are some novelties introduced by the AMMR which empower asylum seekers to retain some degree of control over the decision-making surrounding the choice of their country of asylum.

The AMMR responsibility-allocation mechanism introduces some changes which increase the possibilities for asylum seekers to have their asylum claim processed in a country different from the one of first arrival. The new diploma criterion identifies as responsible the Member State where the applicant has received a diploma or qualification from an educational establishment in the past six years (Art. 30).[80] The criterion acknowledges the "meaningful links" that can be formed between a Member State and an applicant through education (Recital 55). As such, it is a welcome novelty. Nonetheless, the practical impact of the diploma criterion is expected to be minimal, given that the number of asylum seekers meeting the criterion is likely to be quite restricted. Applicants must have obtained a diploma "after a period of at least one academic year of study on the territory of a Member State" and "excluding online training or other forms of distance learning" (Art. 2(15)).

A similar reasoning applies to the improvement of the family reunification criteria. The criterion now applies not only to families already formed in the country of origin but also to those formed before the arrival in the EU (Recital 52). Furthermore, the family members' eligible status for the criterion to apply is no longer limited to asylum seekers or beneficiaries of international protection, but also long-term residents and naturalised beneficiaries of international protection are included (Art. 26(1) and (2)).

[80] What constitutes a diploma or qualification, and educational establishment is defined at Art 2(n) and (o), AMMR.

Lastly, the burden of proof to demonstrate a family connection is lowered compared to the Dublin III Regulation (Recital 54). The novelties are a positive step to increase the relevance of the family-related criterion under the AMMR infrastructure. Under the Dublin III Regime, the share of Dublin transfers pertaining to family reunifications was minoritarian compared to the other criteria.[81] The AMMR addendums are however rather limited and still refuse to broaden the personal scope of family members: the proposal of the Commission, expanding the definition of family member to include siblings, was not agreed in the final text.[82] The expected impact of the modified family-reunification criterion will most likely not alter the current imbalance between the responsibility allocation criteria. Nonetheless, it increases the sensitivity of EU legislation to the reality of migration flows: migratory journeys can take multiple years and families can be formed along the way while, at the same time, the status of family members already present in the host Member State can change.

The new family reunification and diploma criteria do not entail an active power of the asylum seekers to choose the country of asylum under the AMMR. Nonetheless, they allow them to rely on links formed in the past – such as travelling for study-related reasons or forming a family during their journey – to influence the responsibility-allocation mechanism. The real impact ultimately depends on the application of the criteria by Member States: a weak implementation might replicate the limited variety of criteria triggered under the Dublin III Regulation, depriving the new provisions of any added value.

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[81] Looking at 2022 statistics, only 5% of the transfers made was in application of the family reunification criterion. For detailed data, see Eurostat databases: Eurostat (migr_asyappctza), (migr_dubti) and (migr_dubto). Ulrike Brandl, 'Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?', *Reforming the Common European Asylum System* (Brill Nijhoff 2016).

[82] Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] [2020] COM/2020/610 final, Art. 2(g)(v).

Looking at the solidarity mechanism, the relocation criterion within the Solidarity Pool acknowledges the possibility for individual circumstances to play a (limited) role in the procedure: when identifying the relocation Member State, the benefitting Member State "shall take into account […] the existence of meaningful links such as those based on family or cultural considerations, between the person concerned and the Member State of relocation". To do so, the person to be relocated must be given "the opportunity to inform about the existence of meaningful links with specific Member States" (Art. 67(3)). The concept of meaningful links recognises the importance of relocating asylum seekers to countries where there are good prospects of integration. However, such a criterion is not binding: the evaluation of the existence of meaningful links and their role in the choice of the country of relocation is left to the discretion of Member States.[83] Furthermore, the involvement of the asylum seekers is explicitly limited to the provision of information, which "does not imply a right to choose a specific Member State of relocation." Lastly, The AMMR does not require asylum seekers' consent to execute the transfer, nor does it provide them with remedies to challenge the relocation decision: Art. 67(10) AMMR states that "where the person to be relocated is an applicant, he or she shall comply with the relocation decision".[84]

The Solidarity Pool also introduces an alternative to relocation – responsibility offsets – which is not only a concrete solidarity feature to provide support to frontline Member States and overcome the bureaucratic hurdles of relocations, but it is also an *ex-post* agency recognition of the asylum seekers who get "offset". By assuming responsibility for asylum seekers under the responsibility of another Member State, the contributing Member State refrains from penalising their onward movement, acting in a spirit of solidarity. Consequently,

[83] Art. 67.4 AMMR specifies that the consent of the person subject to relocation is requested only for beneficiaries of international protection and not for asylums seekers.
[84] Consent is instead requested when the person subject to relocation is a beneficiary of international protection (Art. 67(4) AMMR).

responsibility offsets are the main agency-enhancing provision of the AMMR framework. However, such an agency recognition effect is not looked at positively by the Regulation. Recital 33 indeed specifies that "A system of guarantees should be established, to avoid to the extent possible, incentives for irregular migration into the Union, unauthorised movements of third-country nationals and stateless persons between Member States". Responsibility offsets acknowledge the inevitability of onward movements within the future framework, which mirrors the current Dublin system. Under extreme circumstances, such movements can be capitalised as a solidarity resource to operationalise relocations without bureaucratic hurdles and to offer immediate relief to the Member State under pressure. The utility of responsibility offsets as an emergency solidarity measure is reiterated in the CFM Regulation, as outlined in Chapters 6.6 and 6.7.

Lastly, the AMMR makes a major change to the "systemic deficiencies" doctrine governing the rebuttal of the safety presumption under the Dublin III Regulation.[85] The reference to systemic deficiencies as a condition for the suspension of transfers is deleted (Art. 16(3)). A more general prohibition of transfers is introduced, in case "substantial grounds for believing that the applicant, because of the transfer to that Member State, would face a real risk of violation of applicant's fundamental rights that amounts to inhuman or degrading treatment within the meaning of Article 4 of the Charter". The AMMR eventually adopts the Court's interpretation in *C.K.* and *Jawo* judgments, which prescribed the non-transferability of applicants for any risk of Art. 4 Charter violation, regardless of its source.[86]

[85] See Chapter 2.2 and Chapter 3.1.
[86] See Chapter 3.3 and 3.4 for details on *C.K.* and *Jawo* cases and related case law. Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127; Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218.

The new mutual trust rebuttal clause is a welcome development, especially considering the very restrictive interpretation of systemic deficiencies delivered by the Court in *Ministero dell'Interno*.[87] At the same time, the AMMR does not introduce any new fundamental rights-based exception to mutual trust, limiting the rebuttal to violations within the meaning of Art. 4 Charter. It will be up to judicial interpretation which of the many potential rights violations connected to Dublin procedures, from undignified reception conditions to indirect refoulement risks, falls under the scope of Art. 4 Charter and are liable for halting a transfer.

As discussed in the previous Chapter, the CJEU has adopted a very narrow understanding of what constitutes a substantial risk of violation of Art. 4 Charter. The inclusion in Article 16(3) AMMR of other fundamental rights grounds to suspend mutual trust, such as Art. 1 (human dignity) or Art. 19(2) Charter (non-refoulement), would have allowed for increased protection despite the restrictive CJEU stance. Nonetheless, the new Article 16(3) AMMR paves the way for national courts to adopt an extensive interpretation of the scope of Art. 4 Charter considering the ECtHR case law. In the past, the CJEU has consistently acted as the guardian of the compliance of EU legislation with fundamental rights enshrined in primary law, ensuring alignment with ECtHR jurisprudence. Now, national courts will take up this role, even if at the expense of the cohesive application of EU law across Member States.

The AMMR does introduce some positive elements to increase solidarity and agency in the CEAS. The features outlined above are however far from balancing the agency denial provisions permeating the AMMR, which altogether are likely to greatly limit the ability of asylum seekers to choose their country of asylum.

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[87] See Chapter 3.4.. Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934.

5 Conclusion

After years of unsuccessful proposals, the EU agreed on a comprehensive reform of its EU asylum policy. The effective impact of the adopted texts will become clear only at the end of the implementation period in mid-2026. Even with the implementation period still pending, it is clear the AMMR and its responsibility and solidarity allocation mechanisms have wide-ranging solidarity and agency implications.

The AMMR has a twofold rationale: on one side, the responsibility allocation rules substantially replicate the existing Dublin system with limited changes. On the other side, the imbalances of the allocation mechanism are addressed through harsher rhetoric and sanctions against secondary movements and the introduction ex novo of a permanent solidarity mechanism to operationalise Art. 80 TFEU.

The AMMR criteria inherit the geographical bias which is behind the systemic failure of the Dublin system, with the maintenance of the "first entry" rule penalising frontline Member States and the limited impact – albeit welcome addition – of the new diploma criterion and the modified rules on family reunification. The deletion of the "systemic deficiencies" doctrine as the only ground to challenge the mutual trust premiss governing the responsibility-allocation mechanism expands the possibilities for challenging transfers in breach of Art. 4 Charter. This way, the protection of asylum seekers from the dysfunctional application of the AMMR is enhanced. Nonetheless, the new safety-rebuttal rule remains dependent on the often-restrictive interpretation of what constitutes an inhumane and degrading treatment.

Striving to increase the efficiency and rapidity of the responsibility allocation mechanism, the AMMR substantially restrict asylum seekers' procedural rights: access to remedies is restricted, as transfer decisions may be contested only on a limited set of grounds, deviating from the

broader scope permitted under the current framework and established case law. This way, asylum seekers' agency in influencing the decision-making surrounding their country of asylum is sacrificed at the altar of rapidity and automatism.

The new provisions targeting secondary movements also aim at improving the performativity of the responsibility-allocation mechanism: The AMMR not only places significantly greater emphasis on combating onward movements, but it also introduces provisions that extend the responsibility of frontline Member States and impose sanctions on non-compliant behaviours by asylum seekers. The effective impact of the punitive approach is debatable, especially given the lack of incentives for asylum seekers to willingly respect the rules. The AMMR relies on national authorities to police and punish secondary movements instead of addressing the root causes prompting asylum seekers to engage in onward movements, like the disparities among national reception and asylum systems and the existence of "meaningful links" with one Member State.[88]

Finally, the new solidarity mechanism establishes a permanent procedure to address the imbalances in migration pressure among Member States, entrenched rather than resolved by the AMMR's responsibility criteria. The codification of solidarity in the EU asylum policy is undeniably significant progress towards the operationalisation of Art. 80 TFEU. At the same time, the mechanism introduced remains vitiated by a limited vision of solidarity as an emergency feature of the EU asylum policy, rather than a standard component. Furthermore, the flexible system of equally valuable solidarity pledges includes measures in the field of border management which can overshadow positive actions to increase reception conditions and other areas beneficial not only for Member States but for asylum seekers as well.

[88] Daniel Thym, 'Secondary Movements: Lack of Progress as the Flipside of Meagre Solidarity' (*EU Immigration and Asylum Law and Policy*, 3 October 2024).

The AMMR shares two features with several of the New Pact reforms addressed in the next chapters: the complexity of the new framework and the misalignment between the codified rules and their likely implementation. The new AMMR framework is much more complex than the current Dublin system and relies on the willingness of Member States to comply with their obligations and implement the new rules cohesively. However, given the systematic cherry-picking by Member States in the application of existing rules, there is little evidence to suggest that the AMMR provisions will yield a different outcome. The AMMR tightens responsibility rules penalising prominently frontline Member States while failing to provide incentives to gain their willing compliance. The effectiveness of the solidarity mechanism hinges on Member States not only committing to a reliable combination of contributions but also fulfilling those pledges in practice: past examples caution about the likelihood of Member States engaging proactively in this field.

The lack of proper instruments to ensure the effective implementation of AMMR rules further exposes the implementation weaknesses of the new framework. The AMMR tightens the rules and bureaucracy behind the responsibility and solidarity mechanisms. However, it makes little progress in ensuring their compliance, especially regarding asylum seekers' rights when involved in transfer procedures: throughout the text, there are many references to the necessity to apply the rules in light of the principle of proportionality and respect for fundamental rights. However, such references risk remaining merely on paper if the Commission is not willing to police their respect. The Commission is however notably reluctant to start infringement procedures against national migration management practices or legislation in clear breach of fundamental rights, especially under emergencies.

Chapter 5 - Agency Denial Provisions in the Screening Regulation and Asylum Procedures Regulation: the "Seamless Border Procedure" and the Fight Against Secondary Movements

The Asylum and Migration Management Regulation (AMMR) is not the only legal text impacting asylum seekers' agency in choosing where to apply for asylum in the EU.[1] Agency is also affected by the Screening Regulation, the Asylum Procedures Regulation, and the related Border Procedure Regulation, which create a framework of agency denial provisions which confine asylum seekers at the border and limit their onward movements.

Together, the legal texts are designed to establish "a seamless link between all stages of the migration process, from arrival to processing of requests for international protection until, where applicable, return".[2] In doing so, they establish a three-stage border process that enables – and in some instances compels – Member States to restrict asylum seekers' freedom of movement through legal or *de facto* detention measures at external borders during the processing of their asylum claims.

Grouping together the screening, asylum and return procedures is not inherently negative, as it acknowledges the interlinks between the different procedures and authorities involved and can speed up the decision-making on protection recognition. Nonetheless, the reforms adopt an approach based on a

[1] Regulation 2024/1351/EU on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L, 2024/1351.
[2] Proposal for a Regulation introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2020] COM/2020/612 final, Explanatory Memorandum 1.4.4.

"fiction of non-entry" and on the limitation of procedural rights.[3] Such an approach is problematic from a fundamental rights and agency perspective. Through the creation of "anomalous zones" of border enforcement, asylum seekers are stripped not only of the possibility to choose where to apply for asylum in the EU but also of the exercise of freedom of movement in the territory of the Member State they are present in.[4]

Alongside the procedures forming the "seamless border procedure", the Chapter touches upon the other special asylum procedures prescribed in the Asylum Procedures Regulation. On one side, the expanded use of safe country notions further strengthens the external dimension of the "protection elsewhere" policy on the EU by depriving asylum seekers of the choice of where to seek a level of protection they deem appropriate. On the other side, the new rules on withdrawn and subsequent applications combine to structure a punitive approach targeting secondary movements and hindering asylum seekers' access to protection. Lastly, the lack of suspensive effect to challenge decisions taken in special asylum procedures is framed as the last piece of the puzzle of provisions purposed to speedily process the return of all applicants superficially deemed as "untrustworthy".

1 Screening Regulation

The "seamless border procedure" starts with the Screening Regulation, which introduces mandatory identity, health and security checks for everyone crossing irregularly the EU external borders.[5] The screening imposes additional

[3] Evangelia Tsourdi, 'The New Screening and Border Procedures: Towards a Seamless Migration Process?' (EPC 2024).
[4] Giuseppe Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" For Migration Management' in Sergio Carrera and Anthony Geddes (eds), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees* (European University Institute 2021).
[5] Regulation 2024/1356/EU introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2024] OJ L, 2024/1356. The Screening applies also to "third-country nationals illegally staying […] where [they] have crossed an external border to enter the territory of the

responsibilities for Member States of first entry, reinforcing the burden-shifting approach adopted by the AMMR. Member States of first entry are obligated to conduct screenings before the responsibility-allocation procedure, thereby extending the duration for which they are required to host asylum seekers. If during the screening procedures there are "reasonable grounds to consider that the applicant poses a threat to internal security", the Member State carrying out the check becomes responsible in derogation of the AMMR criteria.[6]

Throughout the screening, which must be completed within seven days (Art. 8), asylum seekers do not enjoy freedom of movement inside the territory of the Member State. They can ask for asylum but are not authorised to enter the territory of the EU, despite being already physically in it. This legal "fiction of non-entry" entails the confinement of people subjected to screening at the border:[7] Member States must ensure that third-country nationals under screening "remain available […] for the duration of the screening, to prevent any risk of absconding, potential threats to internal security resulting from such absconding or potential threats to public health resulting from such absconding" (Art. 6, Screening Regulation).[8]

The combination of the non-authorisation of entry and the obligation for Member States to ensure that asylum seekers remain available during the screening process is likely, as a rule, to result in their deprivation of liberty. In this regard, the Screening Regulation mentions detention only in the recitals, considering it a "measure of last resort" to be applied "if other less coercive alternative measures cannot be applied effectively" and to comply with the standards of the Reception Conditions Directive (Recital 11, Screening

Member States in an unauthorised manner and have not already been subjected to the screening in a Member State" (Art. 7, Screening Regulation).

[6] Such responsibility allocation applies also when the security check is performed as part of the registration of an asylum application (Art. 16(4) AMMR).

[7] The screening should be "generally situated at or in proximity to the external borders". Nonetheless, the Regulation provides for the alternative to process screenings "in other locations within its territory" (Art. 8(1), Screening Regulation).

[8] More information on the legal fiction of non-entry here: Kelly Soderstrom, 'Commentary: An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation' (ECRE 2022).

Regulation).[9] There are no provisions regulating detention during the screening in the operational part of the Regulation.

Alternative to detention for third-country nationals are already available under most national legislations: they include reporting obligations, the requirement to reside at a designated place, the obligation to surrender the passport or to communicate a residence address to the authorities, and tagging.[10] However, most of these options might be impractical in the context of screening procedures, performed at the border and in dedicated facilities: the screening indeed will apply to everyone irregularly crossing an external border, making it difficult to identify individual non-detention venues to ensure that applicants are both accommodated and prevented to leave the border area. It is therefore difficult to imagine alternatives to detention to be systematically adopted during screening procedures.

The risk of widespread *de facto* detention is not a novelty in border procedures preceding access to asylum. The Screening Regulation indeed is explicitly inspired from and replicates the existing practice of the hotspot approach implemented in Italy and Greece in the aftermath of the "2015 migration crisis".[11] Under the hotspot approach, Italy and Greece designed different strategies to restrict asylum seekers' movement beyond formal detention.[12] In Greece, some of these strategies have been challenged and found to amount to illegal de facto detention by national courts.[13] Regarding Italy, the ECtHR has intervened on multiple occasions, finding that the reception

[9] Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96.
[10] EMN, 'Detention and alternatives to detention in international protection and return procedures' (EMN, May 2022).
[11] Communication COM(2020) 612 final on a proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2020], Explanatory Memorandum, p. 39.
[12] Martina Tazzioli and Glenda Garelli, 'Containment beyond Detention: The Hotspot System and Disrupted Migration Movements across Europe' (2020) 38 Environment and Planning D: Society and Space 1009.
[13] In Greece, the *de facto* detention on the Samos hotspot was ruled unlawful due to the imposition of an exit ban from the centres and the absence of appropriate detention decision. Administrative Court of Syros, Decision No AP 36, Judgment of 17 December 2021.

conditions in hotspots amounted to unlawful detention, violating Arts. 3 and 5 ECHR.[14]

The practices in countries implementing the hotspot approach provide valuable insights for identifying and addressing instances of *de facto* detention during procedures preceding access to asylum. In addition, in the *FMS and Others* case, the CJEU clearly defined the circumstances under which movement restrictions in transit zones amount to detention.[15] Any national practice imposing "on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed, within which that national's movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever, appears to be a deprivation of liberty, characterised by "detention" within the meaning of" the Return and Reception Conditions Directives.[16] When it qualifies as detention, deprivation of liberty is lawful only insomuch it is necessary and proportionate, it is ordered in a formal decision and entails judicial review and procedural guarantees.[17]

The CJEU judgment on transit zones, together with national and ECtHR case law on hotspots, is *mutatis mutandis* applicable to screening procedures. This corpus of judgments can shield asylum seekers from *de facto* detention measures during screening procedures: if imposed without an administrative

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[14] ECtHR, *Khlaifia and Others v Italy*, Judgment of 15 December 2016, Application no. 16483/12; EctHR, *J.A. and Others v Italy*, Judgment of 30 March 2023, Application no. 21329/18; ECtHR, *M.A. v Italy*, Judgment of 19 October 2023, Application no. 13110/18; ECtHR, *A.S. v Italy*, Judgment of 19 October 2023, Application no. 20860/20; ECtHR, *A.B. v Italy*, Judgment of 19 October 2023, Application no. 13755/18. Eugénie Delval, 'ECtHR, 19 October 2023, A.B. v. Italy, A.S. v. Italy, M.A. v. Italy, Appl. Nos. 13755/18, 20860/20, 13110/18: The Hotspot Approach in Lampedusa under the Spotlight of the ECHR: Unlawful Detention as Well as Inhuman and Degrading Treatment' [2023] Cahiers de l'EDEM 12; Maurizio Veglio, 'Il trattenimento negli hotspot' (*Questione Giustizia*, 18 July 2024).

[15] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:367.

[16] Ibid., para 231. Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98, Chapter IV; Reception Conditions Directive, Art. 2(h).

[17] Ibid., paras. 256-265. Boldizsár Nagy, 'A – Pyrrhic? – Victory Concerning Detention in Transit Zones and Procedural Rights: FMS & FNZ and the Legislation Adopted by Hungary in Its Wake' (*EU Immigration and Asylum Law and Policy*, 15 June 2020).

decision and in contrast with the conditions of *FMS and Others*, *de facto* detention measures can be challenged as unlawful detention. However, the silence of the Screening Regulation on detention indicates the EU institutions' refusal to acknowledge that screening will most likely result in systematic detention. Consequently, it fails to introduce common detention standards and safeguards. The Screening Regulation delegates the determination of detention modalities to Member States, undermining harmonisation and shifting the burden to national courts, as well as the CJEU and ECtHR, to ensure that reception conditions during screening comply with CEAS measures, the Charter, and the ECHR.

Asylum seekers' agency is impacted also by the limitation of their power to influence the screening procedure. At the end of the screening, a "screening form" is compiled and transferred to the relevant authorities: asylum or return authorities depending on whether an asylum claim is lodged or not. (Art. 18, Screening Regulation). The screening form is not a formal administrative decision and cannot be challenged under the Regulation. However, the screening form can profoundly affect the protection prospects of the applicant: based on the information on the form, asylum authorities can decide whether to refer them to the standard or border procedure. As outlined in the next paragraph, the distinction between these procedures cannot be dismissed as merely formal, as fast-track procedures are characterised by reduced safeguards and perpetuate the "fiction of non-entry". Consequently, the screening procedure directly affects the subsequent asylum process, determining both the level of safeguards and the depth of the asylum claim assessment to which the applicant will be subject.[18] Despite the practical consequences ensuing from the screening, asylum seekers are deprived of any possibility of challenging the information contained in the form in an effective and consequential way. The form is made available to the person concerned which can indicate whether the information

[18] Lyra Jakuleviciene, 'EU Screening Regulation: Closing Gaps in Border Control While Opening New Protection Challenges?' (*EU Immigration and Asylum Law and Policy*, 28 June 2024); Steve Peers, 'The New Screening Regulation – Part 5 of the Analysis of New EU Asylum Laws' (*EU Law Analysis*, 26 April 2024); Tsourdi (n 3).

contained is correct (Art. 17(3), Screening Regulation). However, no provision for redaction is included, rendering the possibility of identifying errors insufficient to guarantee their correction.

The Screening Regulation requires Member States to set up a non-judicial monitoring of fundamental rights (Art. 10, Screening Regulation). The monitoring is required to be independent, and its set-up is left in the hands of the Member States: the Fundamental Rights Agency (FRA) is tasked to issue general guidance and can be requested by Member States to support them in developing their independent monitoring mechanism. However, the Agency is not entrusted with a binding monitoring mandate.[19] This means that soon 27 national monitoring mechanisms will be created *ex novo*. The FRA – whose funds and capabilities are not comparable to the ones of the other EU Agencies operating in the field of asylum – will play a crucial role in ensuring their independence and effectiveness.

Well-organised and independent monitoring mechanisms might be beneficial for addressing systemic malpractices of national screening procedures.[20] However, the scope of the mechanism is limited to allegations of fundamental rights violations in relation to the screening. Such thematic limitation to the scope of the mechanism might weaken its effectiveness, especially considering the interlinks of the screening with the other elements of the "seamless border procedure" and the possible overlaps between them.[21] Most importantly, the monitoring mechanism does not provide an effective remedy to the persons claiming a violation of their fundamental rights: while ensuring that substantiated allegations are "dealt with effectively and without undue delay", the only power of the mechanism is to trigger investigations and monitor their progress (Art. 10(2)(b), Screening Regulation). There is no provision detailing the result of such investigations and how asylum seekers can

[19] Tamás Molnár, 'Monitoring Fundamental Rights Compliance in the Context of Screening and the Asylum Border Procedure: Putting Bricks Back into the EU House of Rule of Law?' (*EU Immigration and Asylum Law and Policy*, 19 September 2024).
[20] ibid.
[21] Tsourdi (n 3).

be involved in the process and how wrongdoings be amended.[22] Therefore, the fundamental rights monitoring mechanism cannot replace judicial processes, as its impact on filling the judicial protection gap is limited.

Within this context, the Screening Regulation institutionalises and makes mandatory the hotspot practice without resolving its key shortcomings related to detention and access to remedies.[23] The Screening Regulation is therefore a textbook example of the standardisation of crisis management mechanisms under EU law: what was originally designed as a tool to tackle disproportionate migratory pressure at the border is now framed as a permanent mechanism "to address the challenge of mixed arrivals of irregular migrants and persons in need of international protection" (Recital 3, Screening Regulation).[24]

The first stage of the "seamless border procedure" weakens asylum seekers' agency by equalising them to all other migrants irregularly entering the EU and grouping them under the common category of third-country nationals who do not fulfil entry conditions.[25] Asylum seekers can lodge their applications without enjoying the preferential status reserved to them by international and EU law.[26] Furthermore, the screening applies irrespective of the personal circumstances of the third-country national, being them vulnerable or minors. In the pre-New Pact framework, these categories are systematically excluded from procedures that might impact their well-being, especially when they entail detention. Under the Screening Regulation, vulnerable applicants must be granted timely and adequate support throughout the procedure but the possibility to exclude them or to preventively authorise them to enter the

[22] For an overview of the monitoring mechanism in the Screening Regulation and APR and recommendations on its use, see: FRA, 'Monitoring Fundamental Rights during Screening and the Asylum Border Procedure – A Guide on National Independent Mechanisms' (FRA 2024).
[23] Maarten Den Heijer, 'The Pitfalls of Border Procedures' (2022) 59 Common Market Law Review 641.
[24] Campesi (n 4). Violeta Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border' (2023) 34 Queen Mary Law Research Paper.
[25] As prescribed at Art. 6 of the Schengen Borders Code. Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU' (2024) 2024 9 European Papers - A Journal on Law and Integration 179.
[26] Heijer (n 23).

territory is not provided (Art. 12, Screening Regulation).[27] The Screening Regulation therefore introduces a legal limbo where asylum seekers can be confined in border areas, subjected to non-justiciable decisions and delayed access to asylum procedures, creating the agencyless figure of a "hollow asylum seeker".[28]

At the end of the screening, people on the move are redirected to either asylum or return procedures, depending on whether they lodged an asylum application or not (Art. 18, Screening Regulation). The registration of the asylum application, which cannot be done before the end of the screening (Art. 27(7), Asylum Procedures Regulation), does not automatically entail the authorisation to enter the territory of the Member State nor the relocation away from the border area: many asylum seekers will be redirected to border procedures, as modified in the Asylum Procedures Regulation, which is the second stage of the "seamless border procedure".

2 Asylum Procedure Regulation

The Asylum Procedures Regulation (hereafter, APR) is intended to "streamline, simplify and harmonise the procedural arrangements of the Member States by establishing a common procedure for international protection in the Union" (Recital 1, APR).[29] The enhanced harmonisation is justified by the necessity to decrease the disparities between national asylum systems which are "important drivers of secondary movements", and ensure that "all applicants are equally treated wherever they apply for international protection in the Union." (Recital 3, APR). Like the AMMR, the APR primarily aims to combat onward movements through provisions that expand the responsibilities assigned to frontline Member States and impose restrictions on the mobility of asylum

[27] The same reasoning applies to minors (Art. 13).
[28] Minos Mouzourakis, 'More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status' (2020) 26 European Law Journal 171.
[29] Regulation 2024/1348/EU establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L, 2024/1348.

seekers – not only across internal borders but also within the territory of Member States.

To reach its goal, the APR introduces rather complicated procedures which are used as a tool of migration management at the expense of asylum seekers' rights.[30] The APR agency-impacting provisions revolve around three main domains: the obligation for Member States to process some asylum applications and return procedures at the border; the introduction of accelerated and admissibility procedures based on expanded safe country notions; and harshened rules to sanction applicants who lodged asylum claims after engaging on secondary movements and to speed up the return of asylum seekers deemed untrustworthy.

2.1 Asylum and Return Border Procedures

Border procedures are an exceptional alternative to the standard procedure for processing asylum claims. The main difference between the two procedures is in the (physical and legal) place where the applicant is kept whilst their application is analysed. During standard procedures, the asylum seeker is physically and legally authorised to enter the territory of the Member State assessing their claim. In border procedures, the applicant is physically on the Member State's territory but confined at the border, as their authorisation to enter the territory is conditional upon the successful completion of the assessment of the asylum claim. The divergence between procedures is rather substantial: border procedures derogate from the standard rights and protection awarded to asylum seekers, especially concerning their entry and movement in the Member State's territory and their procedural rights.

Asylum border procedures are not a novelty under EU law, as they were introduced with the first Asylum Procedures Regulation in 2005 (hereafter, 2005

[30] Vincent Chetail and Mariana Ferolla Vallandro do Valle, 'The Asylum Procedure Regulation and the Erosion of Refugee's Rights' (*EU Immigration and Asylum Law and Policy*, 23 May 2024).

APD) and maintained in the 2013 recast (hereafter, 2013 APD).[31] Under the APDs framework, border procedures are optional and subjected to a restrictive deadline of 4 weeks, after which the applicant must be granted entry to the territory of the Member State and their application, if not finalised, processed according to the standard procedure.[32]

Both the 2005 and 2013 Asylum Procedures Directives left great discretion in the hands of Member States to design their own border procedures.[33] Without guidance and with no common understanding of what constitutes not only a border procedure but what counts as a border, the implementation of border procedures at the national level is very heterogeneous. Comparing different sources, Heijer lists 16 Member States where border procedures are either legally or *de facto* operational.[34] National practices vary when it comes to the

[31] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326-13, Art. 35. Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180-60, Art. 43.

[32] In case of "arrivals involving a large number" of applicants at the border, border procedures could be extended "for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone" (Art. 43(3), 2013 APD).

[33] There is no limitation on the personal scope and no specific rules governing detention and its alternatives. The 2013 Directive limits the use of border procedures to decisions on admissibility and to decisions on merit that can be processed in accelerated procedures, namely in cases of subsequent or manifestly unfounded claims, as well as in cases concerning applicants coming from a safe country of origin (Arts. 31(8), 33, 43, 2013 Asylum Procedures Regulation). Heijer (n 23).

[34] The Member States are: Austria, Belgium, Cyprus, Czech Republic, France, Germany, Greece, Italy, Malta, Netherlands, Portugal, Romania, Slovenia, Spain, Croatia, Latvia. The reports used to come up with the total number are: The Asylum Information Database (AIDA), accessible here: https://asylumineurope.org/; ECRE, 'Reception, detention and restriction of movement at EU external borders' (ECRE, July 2021) ; EASO, 'Border procedures for asylum applications in EU+ countries' (EASO, 2020). ibid.

location where procedures are processed,[35] their personal and material scope,[36] the use of detention,[37] and timings.[38]

Under the 2013 APD regime, the impact of border procedures on asylum seekers' agency is determined by how national legislations implement them. The situation is instead very different under the APR, which greatly harmonises the rules governing border procedures. The APR does so with the purpose to "quickly assess in principle at the external borders whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, in a manner that fully respects the principle of non-refoulement, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection" (Recital 58, APR). The Regulation, therefore, harmonises the rules on border procedures to make them a permanent component of the "seamless border procedure" starting with the screening and ending with the return of people not awarded protection.

Art. 43 APR provides an exhaustive list of scenarios where border procedures can or must be performed. First and foremost, border procedures

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[35] Most Member States (Austria, Belgium, Czech Republic, France, Germany, Greece, Italy, Netherlands, Romania, Slovenia and Spain) perform border procedures at international airports, where carriers are obliged to return any third-country national refused entry to the territory and hence their operationalisation is rather smooth. The rules on returns at the airport are governed by the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders]2000] OJ L 239-19, Art. 26(1)(a); and Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement [2001] O.J. L 187-45, Art. 2. Few Member States apply border procedures at their actual external borders, most notably Italy, Greece, and Malta. ibid.

[36] Some Member States perform full examinations of asylum applications (Italy, Greece, Hungary and Portugal), others partial (France, Germany and Spain). On the personal scope of the procedures, there are no reliable data to make an assessment. European Parliament, 'Asylum Procedures at the Border: European Implementation Assessment.' (Publications Office 2020), p. 13.

[37] Most if not all Member States recurring to border procedures detain applicants throughout the procedure. However, national legislations diverge on the qualification of detention, at times labelled as restriction of freedom of movement and equipped with limited guarantees. ibid., p. 16. For more information on the practices of actual and *de facto* detention across Member States, see: PICUM, 'Immigration Detention Nand de Facto Detention: What Does the Law Say?' (2022).

[38] The time limit for a decision in a border procedure varies from 2 days (e.g. Germany) to a maximum of 28 days, which may include the appeal (e.g. Belgium and Greece). EASO, Border Procedures for Asylum Applications in EU+ Countries (2020) p. 12.

apply only to asylum seekers whose application was made at an external border crossing point or in a transit zone; or apprehended following an unauthorised border crossing; or disembarked in the context of a search and rescue operation; or relocated in compliance with the AMMR solidarity mechanism. Secondly, applicants in these categories can be redirected to a border procedure only insofar as the screening procedure is completed with no authorisation to enter the Member States' territory, and they do not fulfil the entry conditions set out in the Schengen Borders Code.[39]

If these conditions are met, border procedures are accessible optionally or mandatorily according to their scope. Member States might apply border procedures for assessing the admissibility of any asylum claim and the merits of applications which fulfil the conditions for the accelerated procedure to apply.[40] The application of the border procedures becomes mandatory in three accelerated procedures scenarios: when the applicant provided misleading statements or showed bad faith; for reasons of national security or public order; and when the applicant comes from countries with low recognition rates (below 20%, according to the latest available yearly Union-wide average Eurostat data). The 20% recognition rate rule can be disapplied when there is a "significant change" in the third country concerned and "the proportion of 20 % or lower cannot be considered to be representative for [asylum seekers'] protection needs" (Art. 42(1)(j), APR).

There are no personal exceptions to border procedures. However, there are specific safeguards aimed at minors and their family members, as well as vulnerable applicants. Unaccompanied minors can be subjected to border procedures only when they pose a danger to national security or public order (Art. 53(1), APR). When the border procedure applies to minors and their family members, the examination of their application is given priority (Art. 44(3), APR).

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[39] Regulation 2016/399/EU on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77-1.
[40] Admissibility procedures are governed by Art. 38 APR. Accelerated procedures by Art. 42 APR. The content of these procedures is detailed in Chapter 5.2.3.

Border procedures can apply to vulnerable applicants with special procedural and reception needs only insofar as they can receive the necessary support (Art. 53(2)(b) and (c), APR).[41] Generally speaking, border procedures must cease when the enabling conditions are no longer applicable; when medical reasons, including mental health, arise; and when the applicant is detained but detention conditions as provided by the Reception Conditions Directive are not met (Art. 53(2)(a), (d) and (e) APR). Lastly, Member States retain full discretion to stop a border procedure and redirect the applicant to the standard assessment when they consider the application to involve "issues of fact or law that are too complex" (Art. 43(2), APR).[42]

To compensate for the introduction of mandatory borer procedures, demanding an additional effort from frontline Member States, the APR introduces the concept of "adequate capacity" (Arts. 46, 47, APR). The term refers to the number of persons who must be subjected to border procedures at any given moment (Art. 3(11), APR). The adequate capacity at Union level is set at 30 000, which is divided among Member States according to a formula considering the number of irregular border crossings and disembarkations, and the refusals of entry issued in the previous 3 years (Art. 47(4), APR).[43] The adequate capacity is not a threshold, but a quantity which Member States must be able to manage at any given point in time, functioning on an inflow/outflow basis. Once a Member State reaches its adequate capacity, it is no longer required to

[41] "Applicant in need of special procedural guarantees" means an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Regulation is limited due to individual circumstances, such as specific vulnerabilities (Art. 2(14), APR). "Applicant in need of special reception needs" is an applicant falling into a category which is more likely to have special reception needs. The categories are listed at Art. 24 of the Reception Conditions Directive.

[42] The redirection of too complex cases to standard procedures is provided for accelerated procedures, hence it applies also to accelerated procedures when performed at the border.

[43] The Commission calculates national adequate capacities with an implementing act. The first implementing act on adequate capacity was published on 5 August 2024, setting the capacity that Member States must ensure to have by the time the APR enters into application, on 12 June 2026. The Member States with the highest number for adequate capacity are Italy (8 016) and Hungary (7 716), who alone amounts to over 50% of the total EU adequate capacity. Commission Implementing Decision 2024/2150/EU laying down rules for the application of Regulation (EU) 2024/1348 of the European Parliament and of the Council, as regards the adequate capacity of Member States and the maximum number of applications to be examined by a Member State in the border procedure per year [2024] OJ L, 2024/2150.

mandatorily apply border procedures (Art. 47(2), APR). As soon as the number of applicants under border procedures returns below the maximum adequate capacity, the Member State must resume applying border procedures.[44] Alongside adequate capacity, the APR sets a maximum threshold of border procedures to be performed on a yearly basis:[45] once the threshold is reached, the Member State is relieved from the obligation to apply border procedures in all cases but to procedures related to risks connected to national security and public order (Art. 50, APR).

Border procedures derogate from standard procedures in two main domains: time limits and locations where to process the applications. Border procedures require applications to be lodged within 5 days from registration,[46] and to be completed within 12 weeks from registration or within 16 weeks if following a relocation (Art. 51, APR).[47] This period covers both the administrative procedures, namely the determination of the Member State responsible and the examination of admissibility and merits of the claim, and the judicial procedures, including the first level of appeal against the rejection of a claim during which the applicant still enjoys the right to remain.[48] If the Member State fails to comply with the deadline, the asylum seeker must be granted entry to the territory and the border procedure ceases to apply (Art. 51(2), APR).[49]

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[44] The APR sets out a detailed procedure and list of consequences when adequate capacity is reached (Arts. 48, 49, APR).

[45] As for adequate capacity, the maximum number of applications a Member State is required to examine yearly is calculated considering the number or irregular border crossings and disembarkations, and the refusal of entry issued in the previous 3 years (Art. 47(1), APR). The Commission Implementing Decision 2024/2150/EU contains also the national annual maximum numbers of border applications.

[46] In standard procedures there is a deadline of 21 days to lodge an application (Art. 28, APR).

[47] The standard duration for an examination procedure is 2 months for admissibility and 6 months for merits (Art. 35, APR).

[48] The APR introduces a differentiation among level of appeals against the rejection of an application claim: during the first level of appeal, an applicant retains the right to remain on the territory pending the examination of the appeal. In border procedures, such a right to remain does not amount to an authorisation to enter the territory: whilst physically inside the EU and protected from deportation, the applicant is still not legally granted entry on the territory of the Member State. Subsequent levels of appeal instead do not produce automatic suspensive effect (Art. 68, APR).

[49] The entry in the territory can be denied only if the applicant is subject to a return border procedure, which addressed below.

Throughout border procedures asylum seekers are not authorised entry in the territory of the Member States (Art. 43(2), APR). The APR therefore continues to apply the "fiction of non-entry" introduced in the Screening Regulation. To implement the fiction, the APR specifies that Member States must require "the applicants to reside at or in proximity to the external border or transit zones as a general rule or in other designated locations within its territory" (Art. 54(1), APR). The APR allows Member States to set up facilities where to accommodate asylum seekers and perform border facilities elsewhere in the territory if not possible at the border, specifying that any movement to reach the facilities – as well as to reach relevant authorities, courts or tribunals involved in the procedures, or to receive medical treatment – do not amount to an authorisation to enter the Member State's territory (Art. 54(5), APR). Recital 69 specifies that border procedures can be applied without recourse to detention. Nonetheless, Member States are explicitly enabled to use detention in border procedures in accordance with the conditions provided by the Reception Conditions Directive, which provides for any deprivation of liberty to comply with the principles of necessity and proportionality, and it entails an individual assessment.[50]

If they lead to the rejection of the application, APR border procedures are followed by a specific return border procedure governed by the parallel Return Border Procedure Regulation.[51] The Regulation is detached from the APR as its geographical scope includes also Denmark (which must decide whether to opt in or not) and the Schengen associated countries, excluded from the APR (Recitals 20, 21, 22, 23, 24, Return Border Procedure Regulation).

The return border procedure is the third and last component of the "seamless border procedure" implemented by the New Pact reforms. The

[50] As state above, the non-compliance of detention with the Reception Conditions Directive's conditions is a ground of cessation of the application of a border procedure (Art. 53(2((e), APR). Minors can be detained, as a measure of last resource.
[51] Regulation 2024/1349/EU of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148 [2024] OJ L, 2024/1349.

connection between asylum and return procedures at the border is enabled by a novelty applicable to all procedures: when rejecting an application, Member States must simultaneously issue a return decision in compliance with the Return Directive (Art. 37, APR).[52] This way, the asylum and return procedures are assimilated to ensure the swift return of people not qualifying for protection.

When performed at the border, return procedures can last up to 12 weeks. If the third-country national cannot be returned within the time limit, the standard return procedure applies (Art. 4(4), APR).[53] Third-country nationals subjected to return border procedures are, as during the screening and the border asylum procedure, not authorised to enter the Member States's territory and forced to reside at the border or in its proximity: consequently, the "fiction of non-entry" continues to apply. Of the three components of the "seamless border procedure", the Return Border Procedure Regulation contains the most detailed rules on detention (Art. 5, Return Border Procedure Regulation).[54] As under the Screening and APR, detention should be a measure of last resort if it proves necessary following an individual assessment. There is also a continuation clause providing for asylum seekers detained under border procedures to remain in detention to prevent their entry into the territory and preparing their return. Detention is available also for asylum seekers who were not detained during the asylum border procedure when there is a risk of absconding.

Border procedures represent a major novelty in shaping the future EU asylum policy: altogether, the "seamless border procedure" introduced by the Screening Regulation, APR and Return Border Procedure Regulation can last up

[52] The return decision can be issued as part of the rejection decision or as a separate act, under the condition that it is issued at the same time and together with the rejection decision.
[53] The standard return procedure is detailed here: Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348-98.
[54] The Screening Regulation and APR do not regulate detention in the main text, referring to it only in the preamble and connecting its application to the Reception Conditions Directive.

to almost 6 months.[55] By shortening time limits and prescribing their application at the border, the New Pact aims at closing the gaps between these procedures, hence "integrating processes which are currently separate".[56] These changes are explicitly purposed to increase the efficiency of the EU asylum and return system. However, they have a clear impact on asylum seekers' agency, as they are performed in a "fiction of non-entry" prescribing their confinement at the border. Such impact is increased by the CFM Regulation which, as analysed in the next Chapter, provides for the enhanced use of border policies in situations of crisis.

2.2 "Protection Elsewhere" Policies: Accelerated and Admissibility Procedures

The Second Chapter of the thesis touched upon "protection elsewhere" policies, which disentangle the right to seek from the right to enjoy asylum and their compliance with the right to asylum. The Dublin and AMMR systems are based on an internal "protection elsewhere" approach forcing asylum seekers to ask for protection in an EU Member State selected not according to their desires, but to "fair and objective" criteria, first and foremost the country of first-entry rule.[57] The CEAS developed an external "protection elsewhere" policy as well, deflecting Member States' responsibility towards third countries considered more appropriate venues to assess asylum seekers' claims or give them protection. Safe countries are categorised as: "first country of asylum", indicating a third country where the applicant has already been awarded protection, "safe country of origin", namely a country which can be generally considered safe for their nationals, and "safe third country", which is a generally safe non-EU country where asylum seekers can seek and enjoy protection.

[55] The Screening time is 1 week, while the asylum and return border procedures last a maximum of 12 weeks each. Asylum border procedures can last up to 16 months when following a relocation.
[56] Communication on a New Pact on Migration and Asylum [2020] COM(2020) 609 final.
[57] Sílvia Morgades-Gil, 'The "Internal" Dimension of the Safe Country Concept: The Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts' (2020) 22 European journal of migration and law 82. See Chapter 2.1.2.

As border procedures, safe country notions were already codified in the CEAS by the 2005 Directive and maintained, albeit with some modifications, in the 2013 recast.[58] Under the current framework, Member States may declare an asylum application inadmissible if filed by an applicant coming from a first country of asylum or a safe third country (Art. 33(2)(b) and (c), 2013 APD). When the applicant comes from a safe country of origin, Member States may examine their application with an accelerated procedure (Art. 31(8)(b), 2013 APD).[59] Member States can decide to introduce national lists of safe countries of origin (Art. 37, 2013 APD). Safe country notions can be rebutted by asylum seekers if they challenge their application to their individual circumstances.[60]

The introduction of safe country notions in the EU legal framework did not lead to the hoped harmonisation of national "protection elsewhere" policies: According to the EUAA, 22 Member States adopted safe country of origin lists with noticeable discrepancies in the countries included and in the use of territorial or personal exceptions to their application.[61] Far less cohesive are national practices concerning safe third countries: only 6 Member States apply

[58] First country of asylum is defined at Art. 26 of the 2005 APD and at Art. 35 of the 2013 APD. Safe country of origin is defined at Art. 31 and Annex II of the 2005 APD and at Arts. 36-37 and Annex I of the 2013 APD. Safe third country is defined at Art. 27 of the 2005 APD and at 38 of the 2013 APD. Both the 2005 and 2013 APDs included among safe countries the notion of European safe third country, repealed in the APR (Art. 36, 2005 APD; Art. 39, 2013 APD). For an appraisal of the safe country notions as defined and used in the 2005 framework see: Agnès Hurwitz, 'Safe Third Country Practices, Readmission, and Extraterritorial Processing' in Agnès Hurwitz (ed), *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009); Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 European journal of Migration and Law 35; Nadine El-Enany, 'The Safe Country Concept in European Union Asylum Law: In Safe Hands' (2006) 2 Cambridge Student Law Review 1.

[59] The accelerated procedure may also be conducted at the border according to Art. 43, 2013 APD.

[60] Art. 35, 2013 APD, for first country of asylum; Art. 36, 2013 APD, for safe country of origin; Art. 38(2)(c), 2013 APD, for safe third country; and Art. 39(3), 2013 APD, for European safe third country.

[61] Recently, the classification of a third country as safe country of origin with the inclusion of territorial exceptions was ruled out as non-compliant with the 2013 APD by the CJEU in the *CV* case. Case C-406/22, *CV v. Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky*, EU:C:2024:841. There are several pending preliminary rulings addressing the personal exception and its compliance with the notion of safe country of origin. See, *inter alia*: Case C-388/24, *Oguta*, C/2024/5213, Request for a preliminary ruling. Steve Peers, ''Safe Countries of Origin' in Asylum Law: The CJEU First Interprets the Concept' (*EU Law Analysis*, 14 October 2024).

the notion of safe third country through a national list, while 10 Member States use the notion on a case-by-case basis.[62] The APR aims to increase the level of harmonisation and the "level of convergence on the qualification of third-country nationals […] as beneficiaries of international protection" (Recital 79, APR). In doing so, the Regulation modifies not only the definition of "safe countries", but also the consequences attached to their application.

A first country of asylum is defined as a third country where the applicant either enjoys protection in accordance with the Geneva Convention or effective protection.[63] The country must ensure protection from risks to life or from serious harm and respect the principle of non-refoulement (Art. 58, APR). A safe third country can be designated as such if it ensures non-nationals protection from persecution,[64] serious harm and refoulement and if it can grant asylum seekers effective protection (Art. 59(1), APR). A third country can be classified as safe also with exceptions for specific parts of its territory or clearly identifiable categories of persons (Art. 59(2), APR).[65] The APR maintains the rebuttal and connection criteria to safeguard the application of the safe third country notion to individual cases: First, applicants must be allowed to provide elements "justifying why the concept of safe third country is not applicable to" them (Art. 59(5)(a), APR), Second, there must be a "connection between the applicant and the third country in question on the basis of which it would be reasonable for him or her to go to that country" (Art. 59(5)(b), APR).

A first country of asylum or a safe third country is considered as safe if the applicant either had already or could have had access to protection. Under the 2013 APD, third countries must grant Geneva Convention protection to qualify

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[62] EUAA, "Applying the Concept of Safe Countries in the Asylum Procedure (Decembre 2022). The report also stresses the almost insignificant application of the European safe third country notion.

[63] The definition is more detailed than the one provided in the 2013 APD (Art. 35), with the addition of the requirement for the third country to ensure protection from risks to life and of serious harm.

[64] Persecution as defined in the Geneva Convention, hence for race, religion, nationality, membership of a particular social group or political opinion reasons.

[65] Differently from the 2013 APD, who does not explicitly refer to the possibility to exclude parts of the territory or categories of people from the application of the safe third country notion.

as safe third countries.[66] Instead, the APR introduces under EU law the concept of "effective protection" applicable to both first countries of asylum and safe third countries (Art. 57, APR). Effective protection can be ensured not only by the ratification and respect of the Geneva Convention but also by meeting a set of minimum criteria: to allow asylum seekers to remain on its territory and to ensure access to means of subsistence, healthcare and education. Protection is effective if it remains available until a durable solution is found.

The safe country of origin notion is limitedly impacted by APR amendments. The APR maintains as conditions the "application of the law within a democratic system and the general political circumstances" and the absence of persecution and no real risk of serious harm.[67] As with "safe third country", under the APR it is possible to exempt parts of a country or certain groups of people from the designation. The notion of safe country of origin applies only to nationals of that country,[68] who do not belong to the categories of persons who might be exempted from the application of the notion, and who do not have reasons justifying the non-application of the safe country of origin notion to their individual case.

In addition to the changes to the definitions of safe country notions, the APR introduces EU lists for both safe countries of origin and safe third countries (Arts. 60 and 62). The Commission is entrusted to review regularly the countries included in the list and to suspend and remove third countries from either the EU lists "in the event of significant changes in the situation" which make them no longer fulfilling the designation conditions (Art. 63, APR).[69] National lists are still allowed and can contain third countries other than the ones prescribed in

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[66] To qualify as first country of asylum, it is sufficient for the third country to grant the applicant "sufficient protection […], including benefiting from the principle of *non-refoulement*" (Art. 35, 2013 APD).

[67] The 2013 APD and the APR share the criteria to be considered to assess the security of a country of origin: the relevant laws, respect of human rights based on a set of international conventions, non-refoulement and availability of effective remedies in that country (Annex II, 2013 APR, Art. 61(4), APR).

[68] Or stateless persons formerly habitually resident in that country.

[69] Art. 63 details the procedure of first suspending and then removing third countries from EU lists.

the EU lists (Art. 64, APR). However, if the Commission suspend/remove a third country from an EU list, Member States cannot include it in their national lists. If a Member State considers a third country to fulfil again the designation criteria, it can include it back in its lists only insofar as the Commission does not object. The veto of the Commission can last up to two years.

Once a third country is qualified as safe, the safe country notion can be used to channel an applicant who is either its national or connected to it to special asylum procedures. Like under the 2013 APD, the first country of asylum and safe third country notions can trigger the admissibility procedures, which remain optional for Member States (Art. 38(a) and (b), APR).[70] Admissibility procedures allow Member States to reject an application without analysing its merits. The procedure can last up to 2 months and can be appealed by the applicant.[71]

Like the 2013 APD, coming from a safe country of origin is among the conditions for accelerated procedures to apply (Art. 42)(1)(e), APR).[72] Under the APR, however, the application of accelerated procedures when one of the conditions is fulfilled is mandatory. Member States can be relieved of the obligation when the asylum claim is "too complex" (Art. 42(2), APR). Accelerated procedures must be concluded within 3 months, with no exceptions (Art. 35(3), APR). In conclusion, both the admissibility and accelerated procedures triggered

[70] The other grounds liable of triggering the admissibility procedure are: another Member State has already granted the applicant protection; the applicant has been relocated by the order of an international criminal court; the applicant filed the application a week after a return decision was issued, under certain circumstances. An application must be rules as inadmissible if there is a subsequent application with no new relevant elements (Art. 38(2), APR). On subsequent applications, see the paragraph below.

[71] The examination period can be extended by two additional months if there is a disproportionate number of applications lodged, if the issue involved is complex or if there are delays caused by the failure of the applicant to comply their obligations (Art. 35(2), APR). If the application is ruled inadmissible in application of the first country of asylum notion, the appeal has no automatic suspensive effect, as it will be addressed below (Art. 68(3)(b), APR).

[72] The list of 10 situations which activate accelerate procedures is variegated, and includes: lodging an application raising non relevant issues; raising inconsistent or contradictory arguments; misleading authorities; lodging an application only to delay the removal from the Member States; being a danger to the national security or public order; lodging a subsequent application which is not inadmissible; irregular entry or stay in the territory and delayed making of the application; coming from a Member State whose nationals' recognition rate is below 20%.

by a safe country notion can be optionally performed in a border procedure (Art. 44(1)(a) and (b), APR).

APR admissibility and accelerated procedures are aimed at speeding up the assessment of asylum applications under the presumption that applicants channelled through them have objectively little chances of qualifying for protection. As border procedures, safe country notions extend the application of special asylum procedures and limit asylum seekers' agency, giving precedence to the general safety of a third country and its connection with the asylum seeker over their individual fear of persecution.

2.3 Implicit Withdrawal, Subsequent Applications and Suspensive Effect of Appeals

In addition to border policies and safe country notions limiting asylum seekers' legal access and permanence in the responsible Member State, the APR special asylum procedures impact asylum seekers' ability to move and remain in the EU. The rules on withdrawn and subsequent applications address the fight against secondary movements, outlined above as one of the key objectives of the APR.

The APR expands the scope of implicitly withdrawn applications, namely applications which can be reasonably considered to be withdrawn or abandoned by the applicant.[73] When lodging a subsequent application in another Member State, the first application must be ruled as implicitly withdrawn and therefore not examined on its merits (Art. 39(1)(c), APR). The APR includes also other grounds for considering an application implicitly withdrawn: when the applicant has not lodged its application according to the relevant procedure (Art. 28 APR); and when they do not uphold their obligations regarding the cooperation with relevant authorities, the provision of an address, the participation to the

[73] As opposed to explicit withdrawals, namely the action in witing by the applicant to withdraw their application as regulated at Art. 40 APR.

interview and the compliance with reporting duties when applicable (Art. 41(1), APR).

Alongside implicit withdrawal procedures, the APR modifies the rules on subsequent applications. When an applicant lodges a subsequent application, Member States must obligatorily start an admissibility procedure (Art. 38(2), APR).[74] The APR greatly extends the material scope of subsequent applications by defining them as "a further application for international protection made in *any* Member State after a final decision has been taken on a previous application, including cases in which the application has been rejected as explicitly or implicitly withdrawn" (Art. 3(19), APR, *emphasis* added.). Under the 2013 APD, only further applications lodged in the same Member State are counted as subsequent applications (Art. 40(1), 2013 APD). The inclusion of applications lodged in any Member State as a previous application is justified by the "mutual trust and presumption of compliance with fundamental rights" on which the CEAS is based: if a Member State has already assessed an asylum claim, other national authorities must refrain from analyse it again on merits (Recital 45, APR).

By including applications lodged in any Member State under the scope of subsequent applications, the APR specifies that the Member State who must review the repeated application is the one responsible under AMMR rules (Art. 55(2), APR). In cases of secondary movement, the second Member State transfers the applicant to the first Member State, which is required to conduct a preliminary examination to determine the existence of new elements that "significantly increase the likelihood of the applicant qualifying" for international protection. If no such elements are found, national authorities must declare the application inadmissible (Article 55(7), APR). Conversely, if new elements are identified, the application must be examined on its merits under an accelerated procedure (Articles 55(6) and 42(1)(g), APR).

[74] Under the 2013 APD, the application of the admissibility procedure to subsequent applications was optional (Art. 33(1)(d)).

The last agency-impacting APR provision outlined here is the (lack of) suspensive effect of appeals in the context of the special procedures outlined above. Under the new framework, the suspensive effect of appeals against asylum and return decisions is indeed limited:[75] When appealing a return decision under standard procedures, the effects of such decisions are automatically suspended, granting the applicant the right to remain (Art. 68(1), APR).[76] Appeals against a decision taken in an accelerated procedure or border procedure, or against an inadmissibility decision, an implicitly withdrawn or an unfounded subsequent application, have instead no automatic suspensive effect (Art. 68(3), APR).[77] The lack of suspensive effect must comply with the principle of non-refoulement and can be reviewed by a court or tribunal that can allow the applicant to remain (Art. 68(3) and (4), APR).[78]

3 The Agency Implications of the APR

The APR is a complex and multilayered text. Border procedures, safe country notions, special procedures and suspensive effect of appeals are grouped under the common element of impacting asylum seekers' agency. Border procedures and safe country notions operate on similar premises: the exclusion from the EU legal space of asylum seekers less likely to deserve protection according to arbitrary criteria. The other special asylum procedures instead oppose any onward movements through a set of punitive provisions. Altogether, the APR exploits asylum procedures as migration management tools to restrict asylum seekers' movements and to introduce a high degree of automatism in the assessment of protection needs.

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[75] If the return decision is issued together with the asylum decision, it must be appealed jointly. When it is issued separately, it can be appealed in separate judicial proceedings (Art. 67(1), APR).
[76] The right to remain is limited to the first level of appeal, after which the applicant can lodge – if provided under national law – a further appeal without retaining the right to remain (Art. 68(7), APR).
[77] When the applicant subjected to border or inadmissibility procedures is an unaccompanied minor, the appeal retains the automatic suspensive effect.
[78] The applicant must be given at least 5 days to request to be allowed to remain pending the outcome of the appeal (Art. 68(4)(a), APR).

3.1 Border Procedures

Border procedures inherently pose challenges to asylum seekers, both in accessing the asylum process and in fairly assessing their protection needs. The confinement at the border denies them the possibility to legally enter and move into the Member States' territory. Furthermore, the derogations to standards procedures weaken applicants' influence over the decision-making process in accessing "a uniform status of asylum" or of "subsidiary protection" (Art. 78(2)(a) and (b), TFEU).[79] Under the 2013 APD framework, the negative effects of border procedures were in part limited by their optionality and the strict time limits imposed. At the same time, national border procedures did not follow a common model, leading to a patchwork of non-uniform and unpredictable practices. Given the reliance on national implementation, border procedures became a grey area of the EU asylum *acquis*: illegal practices of detention and pushbacks at the border became standard in many Member States, with the noticeable examples of the inhumane Greek hotspots and Hungarian "transit zones".[80]

Under the 2013 APD framework, asylum seekers' access to asylum procedures is impacted by three variables detached from their individual

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[79] Heijer (n 23).

[80] In Greece, border procedures are used as a part of the hotspot approach and in the context of the EU-Turkey Statement. See: Aggelos Ilias and others, *Border Management and Migration Controls in Greece* (2019); Anna Papoutsi and others, 'The EC Hotspot Approach in Greece: Creating Liminal EU Territory' (2019) 45 Journal of Ethnic and Migration Studies 2200; Angeliki Dimitriadi, 'Governing Migrant (Im) Mobility in Greece after the EU-Turkey Statement', *Challenging Mobilities in and to the EU during Times of Crises: The Case of Greece* (Springer International Publishing Cham 2022). In Hungary, the "transit zones" created in the aftermath of the 2015 "migration crisis" to process asylum claims were deemed non-compliant with the 2013 APD and amounting to unlawful detention by the CJEU in the in Joint Cases C-924/19 and C-925/19 and then repealed under Hungarian law. Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:367. See: Eleonora Celoria, 'Stranieri trattenuti alle frontiere esterne dell'Unione: il quadro di garanzie individuato dalla Corte di giustizia e le sfide del Nuovo patto sulle migrazioni e l'asilo' (2021) 2020 5 European Papers - A Journal on Law and Integration 1385; Erika Colombo, 'Trattenimento Nelle Zone Di Transito e Inammissibilità Delle Domande Di Asilo. La Corte Di Giustizia e Le Procedure Di Frontiera' [2020] Diritto, Immigrazione e Cittadinanza; Luisa Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (europeo) e dei diritti (fondamentali)' (*ADiM Blog*, 30 May 2020).

characteristics: whether the Member State adopted border procedures, the type of border procedures designed, and their compliance in practice with the EU legal framework. The APR touches upon the first two variables via a harmonisation process making border procedures (in some cases) obligatory and introducing more prescriptive rules on their functioning. As for the alignment of state practices with the new rules, only the practical outcomes of future implementation will reveal whether they yield more satisfactory results.

3.1.1 The 20% Recognition Rate Criterion

The most impactful criterion for determining the mandatory application of border procedures – the 20% recognition rate – is both extremely arbitrary and vast in the scope of application.[81] There is no indication suggesting why this percentage was chosen. With no impact assessment accompanying the APR, the only reasoning provided is outlined in the Explanatory Memorandum attached to the Commission proposal tabled in 2020. According to the Commission, the 20% recognition rate criterion is justified "by the significant increase in the number of applications made by applicants coming from countries with a low recognition rate, lower than 20%, and hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded".[82] It appears evident that 20% has been chosen as the threshold below which the believability of applicants coming from that country is questioned, even though there is no reference on why 20% and not more or less.

The arbitrariness of the 20% recognition rate is aggravated by how it is calculated. The APR refers to decisions issued by authorities providing international protection, thereby excluding from the count of successful applications those granted under national schemes (humanitarian protection). However, the number of humanitarian protection decisions is far from irrelevant, being over one-quarter of first-instance positive decisions taken on average in

[81] The other two scenarios providing for the mandatory application of border procedures are: misleading the authorities and being a danger to the national security or public.
[82] Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2020] COM/2020/611 final, Explanatory Memorandum.

the past 5 years.[83] Including positive decisions granting humanitarian status, fifteen countries in 2023 would surpass the 20% recognition rate threshold, thereby exempting their nationals from the application of border procedures.[84]

Furthermore, the 20% rate is measured solely based on first-instance decisions. The influence of final decisions over recognition rates is partly acknowledged by Art. 42(1)(j) APR. The provision allows Member States not to apply the criterion if the percentage is not representative of the applicant protection needs "taking into account, inter alia, the significant differences between first instance and final decisions". However, such a provision is merely an option and does not mandate the systematic inclusion of final decisions, nor their consideration, under the criterion.

Evaluating the protection needs of applicants according to first-instance decisions alone is notoriously misleading, as numerous rejections are overturned after all remedies are exhausted:[85] Between 2019 and 2023, an average of 46,000 positive decisions delivered at the final instance were added to the annual average of 204,000 first-instance positive decisions.[86] Positive last-instance decisions therefore represent a significant portion of the protection statuses awarded, making the 20% recognition rate criterion even more arbitrary and systematically underestimating protection recognition trends in the EU.

Alongside its inherent arbitrariness, the 20% recognition rate criterion raises significant legal concerns related to its effet utile, the compatibility of its automatic application with the principle of proportionality, and the right to an effective remedy.

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[83] Precisely 26,5% of first-instance positive decisions (2019-2023). Data retrieved on [migr_asydcfsta], Eurostat.
[84] Among these countries there are Senegal, the Gambia and Nigeria. See: ECRE, 'ECRE Comments Paper: Regulation Establishing a Common Procedure for International Protection in the EU' (2024), p. 57.
[85] PG Van Wolleghem and HG Sicakkan, 'Why Do Recognition Rates for Asylum Seekers Differ so Dramatically across the EU' (*LSE Blogs*, 23 November 2022).
[86] Data retrieved on [migr_asydcfsta], Eurostat.

The 20% recognition rate criterion is based on an assessment of the safety of the applicant's country of origin rather than their individual circumstances. As such, its rationale mirrors the safe country of origin notion applicable to accelerated procedures.[87] The two criteria share a common objective: they are designed to facilitate "swift and fair procedures for all applicants […] while ensuring that the presence of individuals who do not qualify for international protection within the Union is not unnecessarily extended". (Recital 56, APR).[88] Furthermore, their triggering has very similar consequences: the application of accelerated and border procedures, which is optional in the case of safe country of origin (Arts. 42-44, APR), and mandatory for the 20% recognition rate criterion (Art. 45, APR). The primary distinction between the two criteria lies in their activation: the 20% recognition rate criterion applies automatically once the threshold is met. In doing so, it circumvents the procedural framework governing the application of the safe country of origin concept and it is not equipped with clear rules on activation, methodology and rebuttal.[89]

It is precisely the procedural framework which enables the applicability of the safe country of origin notion, as explained in the *A* case.[90] There, the Court dismissed a Swedish procedure involving the immediate expulsion of individuals with manifestly unfounded claims under the safe country of origin notion, as Swedish legislation had not adopted rules implementing the concept under national law. The existence of a framework surrounding the use of the safe country of origin notion is vital as it "establish[es] a special examination scheme based on a presumption of adequate protection in the country of origin, which *can be rebutted* by the applicant where he submits overriding reasons relating to his particular situation".[91] In concrete terms, only the full set of safeguards accompanying the safe country of origin procedures allows for the use of the

[87] The use of safe country notions under the APR is addressed below at paragraph 3.2.
[88] More specifically, the safe country of origin notion is deemed an "essential tool to support the swift examination of applications that are likely to be unfounded" (Recital 79, APR).
[89] Mouzourakis (n 28).
[90] Case C-404/17, *A v Migrationsverket*, EU:C:2018:588.
[91] Ibid., para 25 (*emphasis* added).

rebuttable presumption of safety in classifying asylum claims as unfounded.[92] Mutatis mutandis, the 20% recognition rate criterion fails the *A* test: by applying the criterion, Member States impose border procedures without a rebuttal provision, thereby disregarding the individual circumstances of the asylum seeker concerned.

Against this background, the 20% recognition rate criterion is deprived of its effet utile—an uncodified interpretative principle frequently employed by the CJEU in its case law to assess the effectiveness of an EU provision in achieving its intended objectives.[93] Without procedural safeguards, the 20% recognition rate not only duplicates an existing provision but also fails to ensure the achievement of its intended goal: to provide swift and *fair* procedures for all applicants.

The automatic application of border procedures upon reaching the 20% recognition rate threshold also raises concerns regarding compliance with the principle of proportionality. Border procedures are mandatory under the APR. The decision on whether or not to apply the criterion however ultimately rests with the Member State, which can dismiss its application when "a significant change has occurred in the third country concerned" or when "the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered representative of their protection needs" (Art. 42(1)(j), APR). Such a decision is under the complete discretion of national authorities: applicants are not in any way involved in the decision. The resulting lack of an individual assessment to evaluate the application of the 20% recognition rate criterion is a unicum: the other two criteria to access mandatory border procedures, misleading the authorities and being a danger to the national security or public order, cannot be applied systematically, as they necessitate case-specific consideration.

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[92] Ibid., para 31.

[93] Jan Blockx, 'Effet Utile Reasoning by the Court of Justice of the European Union Is Mostly Indirect: Evidence and Consequences' (2022) 14 European Journal of Legal Studies 141. Most notably, the CJEU recurred to effet utile to establish the vertical direct effect of directive in *Van Duyn*. Case 41/74, *Yvonne van Duyn v Home Office*, EU:C:1974:133.

The automatism of the 20% recognition rate criterion clashes with the principle of proportionality, according to which EU measures must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved.[94] In its caselaw, the CJEU oftentimes performs a proportionality test to balance between individual rights and public objectives.[95] Here, the public objective supported by the automatism of the 20% recognition rate criterion is the implementation of swift asylum procedures that efficiently identify applicants' protection needs while preventing the exploitation of the system. Such objective conflicts with the requirement for individual assessments in asylum cases, which are essential for ensuring that applicants are not subjected to arbitrary decisions based solely on country of origin information or statistics. By applying this automatism without a proper individual assessment, the system risks undermining applicants' access to the fair examination of their protection needs. This lack of tailored scrutiny could be seen as disproportionate because it fails to account for the nuances of individual cases and may lead to unjust outcomes.

The impact of the automatism of the 20% recognition rate criterion is further amplified by the lack of any remedy to challenge the application of border procedures, despite their significant implications for both the rights and procedural safeguards afforded to applicants, as well as their prospects for success in the process.[96] The APR requires Member States to establish mechanisms for monitoring fundamental rights in relation to border procedures (Art. 44(4), APR). Such a mechanism must comply with the criteria set out in the Screening Regulation. Consequently, the same concerns regarding its non-judicial nature, and thus its limited effectiveness in addressing wrongdoings, also apply under the APR regime.[97] The absence of an individual assessment

[94] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158.
[95] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439.
[96] See below paragraph 3.1.4.
[97] Further limitations attached to the monitoring mechanism are its independence and procedural autonomy, being established by the same authorities it is tasked to monitor, and thematic coverage, limited to border procedures. FRA (n 22).

regarding the application of the 20% recognition rate criterion, coupled with the inability to challenge its application to a specific case, directly conflicts with the right to an effective remedy as enshrined in Art. 47 Charter. The CJEU indeed stated that "judicial protection enjoyed by applicants for international protection should [not] be sacrificed to the requirement of expedition in the processing of their application".[98] Consequently, the effectiveness of the assignation to border procedures according to the 20% recognition rate criterion cannot prevail over the judicial protection of applicants.

In conclusion, the 20% recognition rate criterion has no added value for the overall APR framework due to its inherent inefficiencies and flawed legal design. The automatism underpinning this criterion narrowly defines the effectiveness of the asylum system within a sectoral context, detaching it from the fundamental requirement of guaranteeing fair access to asylum procedures for all applicants. Furthermore, the criterion imposes unreasonable restrictions on asylum seekers' rights within border procedures, particularly by constraining their ability to contest the applicability of such procedures to their individual circumstances. As a result, the 20% recognition rate criterion should be annulled on account of its legal deficiencies.

Alongside the legality concerns, the 20% recognition rate criterion retains important feasibility issues over its practical implementation. The impact of the 20% threshold on the number of people redirected to border procedures is indeed consistent. In 2023, this criterion would have determined the application of border procedures to almost 400 000 applicants out of 1 130 125 asylum claims: 35,4% of the total.[99] Adding the other special procedures – especially the now mandatory accelerated procedures – the percentage of applications processed outside the standard procedure would likely be around 50%. Such high percentages – albeit still hypothetical – question the relationship between

[98] Joined Cases C-322/19 and C-385/19, *KS and Others v The International Protection Appeals Tribunal and Others*, EU:C:2021:11, para. 88 and cited caselaw.
[99] ECRE (n 84), p. 57. Among the countries falling below the 20% rate are: Nigeria, Pakistan, Tunisia, Colombia, Egypt, Peru, Morocco, Bangladesh, and Georgia.

standard and special procedures, signalling the dangerous takeover of extraordinary and derogation-based procedures as standard migration management tools. At the same time, protection needs assessments in special procedures still require individual evaluations by national authorities, which must render asylum decisions within shorter deadlines while complying with standard procedural steps, such as conducting individual interviews with applicants.

Under the current framework, national authorities are already under considerable strain, struggling to process all the asylum claims lodged: as of October 2024, the backlog of cases awaiting a first instance decision continued to increase, reaching 994,000.[100] Without substantial funding and capacity investments, it is unlikely that national authorities will be able to meet the shorter deadlines successfully. Consequently, a significant number of border procedures may conclude without a first-instance decision, defaulting to standard procedures and nullifying the practical utility of applying the border procedure in the first place.

The APR introduces measures intended to alleviate the burden on national authorities arising from the expanded mandatory application of border procedures. However, as outlined in the following section, these measures are unlikely to address the feasibility gap effectively, whilst risking further undermining asylum seekers' agencies.

3.1.2 Arbitrary Application of Border Procedures: Adequate Capacity and Relocation

Similarly to the AMMR, the APR increases Member States' responsibilities when processing asylum claims. Such a model once again challenges the concept of inter-state solidarity promoted in the New Pact, as the APR compels Member States already under migration pressure to invest in additional facilities and staff at the border, while processing asylum claims within stricter deadlines. Following a rebalancing solidarity rationale, the APR introduces the concept of adequate

[100] EUAA, 'Latest Asylum Trends' (17 December 2024), https://euaa.europa.eu/latest-asylum-trends-asylum#:~:text=1.,number%20so%20far%20this%20year..

capacity to compensate for the imbalanced burden imposed on frontline Member States.

Adequate capacity allows Member States to disapply border procedures if the number of applications exceeds what is calculated to be their fair share. At the same time, adequate capacity is instrumental to upholding mutual trust: Member States' preparedness is ensured not by a self-assessment, but according to a precise formula calculated by the Commission. This way, new "systemic deficiencies" like the ones that blocked Dublin transfers in the past are less likely to emerge.

The formula used to calculate adequate capacity is complex yet adherent to the reality of migratory flows targeting Member States.[101] Nonetheless, the complexity of the entire adequate capacity mechanism undermines the predictability of the system, making it difficult to foresee its actual implementation and weakening the harmonisation efforts underpinning the APR. Furthermore, both the targets of 30 000 adequate and 120 000 maximum capacities EU-wide quota are arbitrary and not justified by objective criteria: being introduced only at the last phases of the negotiations, there are no explanations for their choice neither in the original Commission Explanatory Memorandum nor in the text of the APR.

The complexity and arbitrariness of adequate capacity impact asylum seekers' agency: the application of standard or border procedures is once again a numerical target which they have no way to know, influence or challenge. The application of border procedures to asylum applicants will ultimately depend on whether adequate capacity is reached or not when they enter the Member State territory.[102] Differently from the 20% recognition rate, the adequate capacity mechanism is not equipped with any monitoring system, making oversight over its correct application impossible.

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[101] Tsourdi (n 3).

[102] It must be reminded that border procedures can be used by Member States also when the adequate capacity is reached: adequate capacity gives Member States the possibility not to apply border procedures, not obliges them to stop using them.

Relocation of asylum seekers under the AMMR solidarity mechanism is also arbitrarily operationalised through border procedures: if the relocated applicant does not meet the entry conditions and falls within the categories subject to border procedures, the Member State of relocation may decide (though it is not obligated) to process the application via a border procedure (Art. 43(1)(d), APR).

Such an option is quite paradoxical and amplifies the transformation of borders as "anomalous zones": there is no connection between the irregular border crossing and the application of the border procedure following a relocation, as the applicant will be confined in a border area they never crossed. Furthermore, the application of the border procedure after relocation can be extended from 12 to 16 weeks, leading to prolonged confinement of relocated asylum seekers (Art. 51(2), APR). The application of border procedures after relocations is another example of the denial of asylum seekers' agency and the clash between solidarity and agency under the New Pact: the application of solidarity measures happens regardless of the intentions of the asylum seekers and can lead to their prolonged confinement in border areas unrelated to their movements.

3.1.3 Confinement at the Border

In continuation with the screening, border procedures apply in the context of a "fiction of non-entry": applicants are not authorised to enter the territory of the Member States until their application is processed and protection awarded.[103] Under the APR, the fiction of non-entry is taken to its extreme, both in terms of duration and geographical scope: it can last up to 12 weeks and be implemented not only at the border but also "in proximity to the external border […] or in other designated locations within its territory" (Art. 54(1), APR).[104] Furthermore, any movement inside the territory whilst under the border procedure, being for health reasons or to attend legal proceedings, does not count as an authorisation

[103] The non-completion of the procedure within the deadlines also entails the authorisation of entry in the territory.
[104] The timings can be further extended in situation of crisis, as addressed in the next Chapter.

of entry. The APR therefore de-links entrance into the territory from its legal and geographical meaning: the border is tailored to the status of "asylum seekers subject to border procedure" and applies in defiance of reality and agency.

As under the screening, the fiction of non-entry does not happen in a legal vacuum: alongside all basic procedural guarantees concerning asylum procedures, the Reception Conditions Directive applies.[105] However, the fiction *de facto* entails substandard treatment justified by a preliminary assessment labelling asylum seekers as unwanted and untrustworthy.[106] Most importantly, the fiction is instrumental in allowing detention at the border: non-authorisation to entry is indeed added to the list of conditions enabling the detention of asylum seekers (Art. 10(d), Reception Conditions Directive). Furthermore, the fiction of non-entry might be useful to ensure the compliance of border procedures with the ECHR, which lists the "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country" among the allowed restrictions of the Right to liberty and security (Art. 5(1)(f), ECHR).

The APR does not equate border procedures to detention. However, it prescribes Member States to keep asylum seekers "at the border" – even if the concept of border is stretched to include facilities inside the territory – throughout the procedure. It is specified that border procedures "can be applied without recourse to detention". Nonetheless, "Member States should […] be able to apply the grounds for detention during the border procedure" (Recital 69, APR).[107]

The main text of the APR, like the Screening Regulation, remains silent on the modalities of detention during asylum procedures. However, Recital 69 specifies that, when detention is applied, it must comply with the safeguards outlined in the Reception Conditions Directive: it must be based on an individual

[105] Directive 2024/1346/EU laying down standards for the reception of applicants for international protection [2024] OJ L, 2024/134.
[106] Moreno-Lax (n 25).
[107] As a rule, minors should not be detained. Detention can be used only in exceptional circumstances and after it is assessed to be in the best interest of the child (Recital 69, APR).

assessment and be proportional and necessary. Detention orders under the Reception Conditions Directive are subject to judicial review, either *ex officio* or upon the request of the applicants, ensuring oversight of their lawfulness, particularly concerning the availability of less restrictive alternatives.

The ambiguity of the APR provisions concerning the locations where border procedures may be conducted remains problematic, as it could legitimise the use of *de facto* detention, a practice already documented under the current framework.[108] *De facto* detention can arise when containment is characterised as a restriction of movement but, in practice, constitutes detention. Restriction of movement is allowed under the Reception Conditions Directive as an alternative to detention requiring an applicant "to reside only in a specific place that is adapted for housing applicants, for reasons of public order or to effectively prevent the applicant from absconding, where there is a risk of absconding" (Art. 9(1), Reception Conditions Directive). If restriction of movement is used as the legal basis to disguise *de-facto* detention, it negatively impacts asylum seekers' fundamental rights, especially the right to an effective remedy, being equipped with fewer procedural guarantees: it can be imposed as a generic rule, without an individual assessment and cannot be challenged by the applicants (Art. 9(5), Reception Conditions Directive).

The use of restriction of movement as an alternative to detention is challenging to regulate, as it is difficult to monitor whether the reception conditions implemented effectively amount to detention: Case law from both the ECtHR and CJEU has established that it is the specific circumstances that determine whether a measure constitutes detention or a restriction of movement, with particular regard to its type, duration, effects, and implementation.[109] It is therefore necessary to perform an individual

[108] European Parliament, 'Reception Conditions Across the EU' (November 2023).
[109] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:367. ECtHR, *R.R. and Others v.* Hungary, Judgment of 2 March 2021, Application no. 36037/17; ECtHR, *H.M. and Others v. Hungary*, Judgment of 2 June 2022, Application no. 38967/17; ECtHR, *Austin and Others v. the United Kingdom*, Judgment of 15 March 2012, Applications Nos. 39692/09, 40713/09 and 41008/09.

examination of each detention or restriction of movement decision to conclude whether it amounts to deprivation of movement or not. However, Member States applying forms of de-facto detention regimes will be reluctant to perform systematic individual assessments to qualify the containment measure, and the APR is not equipped with efficient monitoring mechanisms to fill the oversight gap.[110]

In conclusion, the "fiction of non-entry" blurs the line between different forms of confinement, limiting asylum seekers' agency not only in their movements but also in challenging their application.[111] Procedural guarantees are essential to push national authorities to distinguish between restriction of movement and deprivation of liberty, as well as to uphold the detention conditions prescribed by the Reception Conditions Directive. As detailed in the next paragraph, however, access to procedural guarantees is greatly limited under border procedures.

3.1.4 Limited Procedural Guarantees

Border procedures impact asylum seekers' agency via strict time limits and limited access to remedies. The strict timelines prescribed – 5 days to lodge an application and to request the suspensive effect of an appeal against a rejection decision – may impede asylum seekers' access to asylum procedures and the gathering of information and documents to sustain the claim.[112] Furthermore, the strict timelines put under pressure also the determining national authorities, which might overlook non-evident protection needs for the sake of efficiency.[113]

The strict time limits are particularly troubling for vulnerable applicants, whose assessment of protection needs requires heightened care. Differently

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[110] The Fundamental Rights Monitoring Mechanism's effectiveness has been already questioned above. In addition, the UNHCR can access to applicants "in reception centres, in detention, at the border and in transit zones" (Art. 6(1)(a), APR). However, the UNHCR has no authority in sanctioning non-compliant practices nor to offer remedy to applicants unlawfully detained.

[111] Ulrike Brandl, 'Mix and Match. Detention, "De-Facto Detention" or Just Restrictions of Freedom of Movement in the New Pact' (*EU Immigration and Asylum Law and Policy*, 14 October 2024).

[112] Moreno-Lax (n 25).

[113] Theodora Gazi, 'The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?' (2021) 2021 6 European Papers - A Journal on Law and Integration 167.

from the 2013 APD, vulnerable applicants are not exempted from border procedures but can be under their scope if they receive the necessary support (Recital 61, APR). The inclusion of vulnerable applicants is problematic: many aspects of the procedures are destined to magnify their vulnerability, impacting their ability to plead their case in a safe environment.[114] The protection provided by Article 53 APR is significant, yet it cannot be compared to the absolute exclusion of vulnerable applicants from the scope of border procedures established in 2013. Vulnerable applicants now face the burden of proof to establish, first, their need for special reception conditions or procedural guarantees, and second, that the support they require is unavailable within the framework of border procedures.

The ability to influence the vulnerability assessment is crucial, particularly given that no remedy is available to challenge the decision to apply a border procedure. Pragmatically, if a border decision is applied in contrast with any of its conditions – including vulnerability – the applicant cannot bring an individual legal challenge. Only systematic malpractices can be addressed via the monitoring mechanism.

Limited access to remedies affects also the result of the border procedure itself: Rejection decisions are indeed followed by a return border procedure, which is inadequately equipped with procedural guarantees. Return border procedures can be challenged, albeit within a restrictive timeline and without an automatic suspensive effect. As outlined below, the lack of an automatic suspensive effect diminishes the possibility for asylum seekers to successfully challenge asylum rejections.

The return border procedure maintains the "fiction of non-entry", concluding the "seamless border procedure" started with the screening: during the cumulative six months of the screening, asylum and return procedures, asylum seekers are not authorised to enter the Member State territory and are

[114] Tsourdi (n 3).

subject to continuous containment. The containment at the border will be performed either through detention, hence subjected to some procedural and judicial oversight, or through *de-facto* detention, equipped with much more limited safeguards. In any case, applicants cannot exercise freedom of movement.

Such a prolonged containment unveils the shift of purpose of asylum-related procedures: from individualised processes aimed at assessing protection needs to migration management tools focused on the fight against secondary movements and ultimately return of rejected applicants. APR border procedures function under the dogma of automatism, instrumental to fasten the assessment of asylum claims. Automatism is detrimental to asylum seekers' agency and protection needs, whose assessment is subjected to substandard procedures based on arbitrary criteria. APR border procedures are ultimately a replication of the reality of hotspots as concretised in Greece: anomalous zones of prolonged containment.[115]

The institutionalisation of the Greek hotspot approach is paradoxical having in mind the goal of the New Pact as professed by Commission President Von der Leyen upon its publication: "No more Morias".[116] Under the new APR border procedure regime, asylum seekers will be systematically deprived of any agency at several levels: they cannot challenge the application of border procedures, during which they are not permitted to move as they are not authorised to enter the territory. Moreover, they are subjected to substandard guarantees and procedural safeguards that hinder their ability to influence the asylum assessment process.

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[115] Moreno-Lax (n 25); Campesi (n 4). On Greek hotspots, see: Heijer (n 23); Dimitriadi (n 80); Ilias and others (n 80); Papoutsi and others (n 80); Nikos Kourachanis, 'Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015–2017)' (2018) 19 Journal of International Migration and Integration 1153; ECRE, 'The Implementation of the Hotspots in Italy and Greece' (ECRE 2016).; HIAS, *Refugees in Legal Limbo: Another Overlook Causality of Externalising Asylum at Any Coast* (HIAS, June 2021).

[116] Commission, 'Press statement by President von der Leyen on the New Pact on Migration and Asylum' (23 September 2020), https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1727.

3.2 Safe Country Notions

Similarly to border procedures, the APR does not introduce *ex novo* safe country notions in the EU legal framework. These notions are intrinsically ambiguous, being carved out from the grey areas of the Geneva Convention not explicitly forbidding their use.[117] Via protection elsewhere policies, EU institutions lower asylum seekers' protection and limit their agency in accessing asylum procedures.[118] Under the APR, both the definition and use of safe country notions in the context of special asylum procedures are expanded.

The scope of application of the first country of asylum and safe third country is expanded by the codification of the concept of "effective protection" in Art. 57. The APR equals the fulfilment of minimum criteria to the ratification and respect of the Geneva Convention for a third country as effective protection.[119] The threshold for a third country to be considered safe is considerably lowered and the status of the Geneva Convention as the compass of international migration law is undermined. Through APR effective protection, asylum seekers might be returned to third countries where they enjoy or can request substandard protection lower than the one prescribed in the Convention. If implemented, such returns could be in contrast with the right to asylum prescribed in Art. 18 Charter, which guarantees asylum "with due respect for the rules of the Geneva Convention".

Focusing specifically on the safe third country notion, the APR retains the requirement for a connection between the applicant and the country, as well as the possibility to rebut the presumption of safety based on individual circumstances.[120] However, the conceptualisation of the connection criterion

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[117] The development of protection elsewhere policies was addressed in Chapter 2.1.2.
[118] Iris Goldner Lang and Boldizsár Nagy, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (2021) 17 European Constitutional Law Review 442.
[119] Such criteria are: the right to remain; access to means of subsistence, healthcare and education; and the access to effective protection until a durable solution is reached (Art. 57, APR).
[120] The examples of connection at Recital 48 – "The connection between the applicant and the safe third country could be considered established in particular where members of the applicant's

might not be definitive. Art. 77 empowers the Commission to review and propose targeted amendments to the safe third country notion by 12 June 2025. This is the result of a compromise within the Council during the negotiations.

The availability of targeted amendments focusing exclusively on the safe third country notion is problematic for governance and law-making for several reasons. First, there is a lack of clear criteria for the review. Considering that the APR will not become effective until 2026, it remains uncertain which new factors the Commission may consider when deciding to amend the "safe third country" concept. Furthermore, Art. 77 does not provide any guidelines on the scope of the possible review. Second, the rationale behind the provision is to empower Member States within the Council to lobby for further expanding the scope of the application of the notion: Denmark, which will be the rotating president of the Council in June 2025, already announced the wish to ask for the removal of the connection criterion.[121] Such a change is so far only hypothetical. However, it embodies the constant attempts at eroding the guarantees posed against the indiscriminate use of safe country notions as barriers to access to protection which deny any agency to asylum seekers: without the connection criterion, plans like the now repealed UK-Rwanda scheme might be implemented in the EU.[122] Third, while the amendment process retains its legislative nature, ensuring the joint involvement of the Council and the European Parliament, it remains unclear how it can be effectively operationalised in practice: How can overall cohesion with the text be ensured, and the fragmentation of the APR framework avoided? How can it be assessed if the amendments comply with the

family are present in that country or where the applicant has settled or stayed in that country" – incorporate the 2013 Reception Conditions Directive case law, in particular the exclusion of transit as sufficient condition to establish a connection: Case C-564/18, *Bevándorlási és Menekültügyi Hivatal (Tompa)*, EU:C:2020:218, para. 50; Joined Cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, EU:C:2020:367, paras 155-159; Case C-821/19, *European Commission v Hungary*, EU:C:2021:930, paras 38-39.

[121] ECRE (n 84), p. 86.

[122] Maja Grundler and Elspeth Guild, 'The UK-Rwanda Deal and Its Incompatibility with International Law' (*EU Immigration and Asylum Law and Policy*, 29 April 2022); Andreina De Leo, 'EU-Tunisia like UK-Rwanda? Not Quite. But Would the New Pact Asylum Reforms Change That?' (*EPC*, 2 November 2023).

"targeted" condition or instead introduce major legislative changes? Furthermore, the provision specifies the date by which the Commission may propose amendments, rather than the date by which such amendments must be adopted. What happens if the co-legislators do not reach an agreement on the amendments by mid-2026 when the APR will become fully effective?

Overall, the provision on targeted amendments diminishes legal certainty for all actors involved: Member States are in the process of adapting their safe third country lists to the APR changes. However, such changes might not be definitive if amendments are introduced, frustrating the overall implementation process. The review of the safe third country concept could result in the reclassification of certain third countries as either safe or unsafe for the purpose of asylum procedures. This shift in classification can create uncertainty for both the third countries and the asylum seekers from those regions.

The APR further expands the application of the safe third country and safe country of origin notions by allowing territorial and personal categories exceptions. This novelty makes the application of safe country notions highly unpredictable and foresees great discrepancies among the national lists. The introduction of EU lists is unlikely to bring substantial changes, given the little prescriptiveness of the Commission to influence the still-allowed parallel national lists: Member States will retain great discretion to designate their own safe countries, while EU law allows them to include in the list countries which cannot be considered fully safe. The designation procedure of safe third countries at Union level is completely under the scrutiny of the Commission: no other EU institution is involved, while the EUAA can provide information only upon request of the Commission. Only Member States may propose the inclusion of a third country on the list, which, however, does not bind the Commission in any way. There is a clear lack of democratic scrutiny, as the European Parliament is not involved in any way in the procedure.

Altogether, the introduction of the EU lists represents a missed opportunity to introduce greater transparency and accountability in a field – safe country

notions – that is profoundly influenced by normative and political considerations, which detract from the necessary neutrality and objectivity required when designating a third country as safe. In conclusion, the new definitions of the safe country notions and their lists do not solve the existent uncertainty and unpredictability surrounding their use. They allow for an enhanced restriction of asylum seekers' possibilities to rebut their application by lowering the standard for protection and expanding the number of countries that might fit in either the EU or national lists.

First country of asylum and safe third country notions can be used to trigger admissibility procedures. The retained optional application of the admissibility procedure makes the real impact of the first country of asylum and safe third country notions hard to predict. Such impact will indeed depend first and foremost on whether the Member States will apply the notions, and secondly on the effective possibility for applicants to challenge the presumption of safety of the country or their connection with it.[123]

The safe country of origin notion is a ground for the mandatory application of the accelerated procedure, which partly overlaps with the 20% recognition rate criterion, as discussed above. Differently from border procedures, accelerated procedures outside a border context do not implement a fiction of non-entry. Nonetheless, they restrict procedural safeguards and are guided by the logic that applications processed in an accelerated manner are less grounded than the other ones and therefore can be processed more quickly.[124]

The application of expanded safe country notions in special asylum procedures is purposed to fasten the assessment of asylum claims while maintaining the same quality of decision-making. However, the notions are vague and disputable, and their use puts great discretion in the hands of Member

[123] Jens Vedsted-Hansen, 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (*EU Immigration and Asylum Law and Policy*, 18 December 2020).
[124] Jens Vedsted-Hansen, 'Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?' (Nomos Verlagsgesellschaft mbH & Co KG 2022).

States to prioritise efficiency over quality when processing asylum claims.[125] Safe country notions further diminish asylum seekers' ability to choose their country of asylum.[126] They challenge the reliability of the asylum seeker vis à vis the safety of their country of nationality. Unlike the 20% recognition rate criterion, the safe country of origin concept retains a set of safeguards – albeit reduced from those in the 2013 APD – that oversee its application and limit Member States' discretion. The safe third country notion instead paves the way for the replication of the EU-Turkey externalisation model to other countries bordering Europe.[127] In this context, the ability of applicants to challenge the application of the safe third country notion to their case and to dispute the connection criterion will be crucial in preventing the standardisation of the transfer of protection seekers outside the EU.

3.3 Anti-Secondary Movements Provisions and Suspensive Effect of Appeals

The rules on implicitly withdrawn and subsequent applications, along with the non-suspensive effect of appeals to challenge rejections following special asylum procedures, are intended to disincentivise onward movements and expedite the return of applicants deemed "not trustworthy".

Differently from the 2013 APD, Member States are now obliged to rule an application as implicitly withdrawn when it fulfils the conditions. Member States may suspend the procedure to allow the applicant to justify or rectify omissions. The suspension is however optional and does not fill the protection gap created by the automatism of the procedure. Such automatism is exacerbated by the enlarged list of withdrawal grounds, which follow a punitive approach sanctioning actions that cannot be equated with certainty to the decision to withdraw the

[125] Chetail and Vallandro do Valle (n 30).
[126] Lang and Nagy (n 118).
[127] Steve Peers, 'The New EU Asylum Laws, Part 7: The New Regulation on Asylum Procedures' (*EU Law Analysis*, 28 April 2024). For an overview of the EU-Turkey model, see: Chiara Favilli, 'La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?' (2016) 10 Diritti umani e diritto internazionale 405.

application: the failure to lodge an application within the deadline or to report to the authorities when required may result from factors other than the applicant's intentions, such as administrative errors, illness, or a misinterpretation of the rules.[128] The new procedure therefore twists the concept of agency by assigning to asylum seekers decisions which have a wide-ranging impact on their protection prospects but might not reflect their real intentions. Applicants can appeal the decision, albeit without suspensive effect.[129] Once the decision is final, any new application will be treated as a subsequent application.

The rules on subsequent applications have also a broadened scope and application. To access the analysis on merits, asylum seekers must present new elements which "significantly increase the likelihood" of obtaining international protection.[130] The burden of proof for the subsequent application review is substantially increased: asylum seekers must prove their claim is well-founded with no access to the legal and translation support services ensured in the asylum procedure. Therefore, the chances of meeting this high threshold are quite rare.

Concerning the scope of application, any claim lodged in any Member State—rather than, as under the 2013 APD, solely in the Member State that rejected the first asylum application—is now considered a subsequent application. When a subsequent application is lodged in a Member State other than the one initially responsible, the former must transfer the applicant to the latter, which will then initiate the procedure for the subsequent application.

Transfers based on subsequent applications rest on the assumption that mutual trust between Member States ensures that asylum applications are

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[128] Under the 2013 APD, Member States are required to reopen the case or to allow a new application which is not to be treated as a subsequent application when the person reports again to the authorities (Art. 28(2), 2013 APD). ECRE (n 84), p. 54.
[129] See below.
[130] Under the 2013 APD, the admissibility of a subsequent applications is assessed regarding "whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection" (Art. 40(2), 2013 APD).

analysed according to common criteria and procedures regardless of where they are lodged. Therefore, any type of subsequent application is unnecessary. Such an assumption is however flawed, taking for granted that all national asylum systems are equally functioning. As outlined multiple times in the previous chapters, national asylum systems present major differences.[131] Some national asylum systems might be so flawed for "systemic deficiencies" to arise, leading to breaches of Art. 4 Charter.[132] For this reason, the AMMR is equipped with a clause prohibiting transfers between Member States during the responsibility-allocation process when there are risks of inhumane and degrading treatment in the transferred Member State.[133] In the AMMR framework, therefore, the mutual trust presumption governing the access to asylum procedures is not absolute but rebuttable when incompatible with the absolute rights of Art. 4 of the Charter.

The subsequent application procedure in the APR is very different, as it does not provide for any fundamental rights-based exception for halting a transfer. The transfer to the Member State responsible for adjudicating the subsequent application is not equipped with any procedural safeguard. Upon transfer, the inadmissibility of a subsequent application is automatic unless there are significant new elements. The APR therefore does not codify the CJEU case law on systemic deficiencies and individual risks in the context of subsequent applications. The lack of any grounds for halting the transfer is particularly grave considering its impactful consequences: the inadmissibility of the application, appealable but without suspensive effect.[134]

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[131] See Chapter 2.3

[132] Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* EU:C:2011:865; Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218. For more information on the "systemic deficiencies" case law, see: Chapter 3.1 and Chapter 3.4.

[133] Art. 16(3), AMMR. See Chapter 4.4.3.

[134] Even if the applicant demonstrates significant new elements, the new asylum claim is processed under an accelerated procedure.

The consequences of the quasi-automatic inadmissibility of subsequent applications are intensified when combined with the rules on implicit withdrawal. In case of non-authorised onward movements, the first application is ruled out as implicitly withdrawn and not analysed on merits. Upon the elapse of the appeal period, such a decision is final, qualifying any other asylum claim lodged across the EU as a subsequent application.[135] If the applicant moves to another Member State and lodges a new application there, they will be returned to the first Member State, which, unless the applicant can present new elements, will reject the application as inadmissible. Despite having received two applications by the same applicant, in case of secondary movements the responsible Member State might reject the first as withdrawn and the second as subsequent without looking at the merits once.

The APR takes the fight against secondary movements to its extreme, preventing asylum seekers who engage in onward movements not only from accessing protection in their preferred destination but also from accessing a proper asylum merits procedure. The new rules on subsequent applications force Member States to introduce in their national legislation an additional pre-asylum procedure which will affect a great – yet unpredictable – number of asylum seekers. The new framework refuses to begin the assessment of subsequent applications lodged after a secondary movement before the transfer to the responsible Member State. Such transfers are based exclusively on the rules of mutual trust and responsibility, without regard to whether the transferring Member State can be considered safe. As submitted by Peers, such a level of automatism breaches Article 18 Charter, as it undermines the essence of the right to asylum without providing adequate safeguards and remedies.[136] Given the limited access to remedies outlined below, risks of fundamental rights violation in the context of subsequent applications must be patrolled by other fora, first and foremost the ECtHR.

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[135] While a decision on *explicit* withdrawal is final and non-appealable (Art. 40(3)), implicit withdrawal decisions can be subject to an appeal (Art. 67(1)(c)), albeit without suspensive effect (Art. 57(3)(c)).
[136] Peers, 'EU Law Analysis' (n 127).

The last agency impactful provision addressed in this chapter affects all the scenarios outlined above: the lack of suspensive effect of the appeal against a rejection decision taken in a special asylum procedure.[137] The consequences of the removal of the suspensive effect are wide-ranging, especially considering that all special procedures have expanded definitions and scopes. Even though the provision is "without prejudice to the principle of non-refoulement", the removal of the right to remain while a final asylum decision is still pending jeopardises the effective compliance of the APR with this prohibition of refoulement.[138] First, Member States can decide not to grant a decision on suspensive effect *ex officio*, thereby placing the burden on applicants to prove the risk of refoulement to regain the right to remain pending the procedure.[139] Second, procedural safeguards are limited, especially concerning timeframes: applicants have 5 days (at least) to request to be allowed to remain during the appeal. Unless Member States provide for longer deadlines, the prescribed time limit is severely hindering the ability of applicants to substantiate a request of suspensive effect, while at the same time preparing the appeal: even if the APR provides for free legal assistance and appropriate information on their rights, the period is too short to ensure quality and adequate legal assistance and information.

Furthermore, the lack of suspensive effect for decisions taken in special procedures is not accompanied by any exceptions, other than the (limited) exclusion of unaccompanied minors, who are automatically permitted to remain during appeals against decisions – whether on merit or admissibility – taken in border procedures (Arts. 68(3)(a)(ii) and (b), APR). The wide-ranging application of the lack of suspensive effect of appeals does not recognise the protection needs of vulnerable applicants and their need for appropriate

[137] Only appeals against inadmissibility decisions on the ground of safe third country retains automatic suspensive effect (Art. 68(3)(b), APR).
[138] In particular, there are no details on how to assess the compliance of the non-suspensive feature of the appeal with the principle of non-refoulement.
[139] The APR maintains the possibility for *ex officio* decisions to be provided for in national law (Art. 68(4), APR).

procedural safeguards: they must comply with the same unrealistic deadlines as non-vulnerable applicants, with even fewer chances of success.

The effects of the lack of suspensive effect on the appeal are intensified in the case of subsequent applications, where the right to remain is conditioned by an additional requirement: to demonstrate that the appeal has not been filed "merely in order to delay or frustrate the enforcement of a return decision" (Art. 68(6), APR). Applicants lodging subsequent applications are targeted by a sequence of punitive provisions seriously undermining their ability to claim protection and effectively challenge rejection decisions. They must provide significant new elements to have their subsequent claim analysed on merits, albeit under an accelerated procedure. Then, they must demonstrate that their appeal request needs suspensive effect and is not instrumental in delaying their return.

The provision of an additional pre-judicial procedure to assess the suspensive effect of an appeal also impacts negatively the decision-making of national courts: judges must make decisions under tight deadlines and without a detailed examination of the protection needs of the claimant, which will be adjudicated during the appeal. If the suspensive effect is not granted, such protection needs may be recognised only after the return is carried out, potentially in breach of undetected refoulement risks.[140]

If not provided with sufficient time or vulnerability-based exceptions, asylum seekers' agency in challenging a rejection decision is severely limited, potentially amounting to a violation of their right to an effective remedy.[141] It will be up to the CJEU to assess the compliance of Art. 68 APR with Art. 47 Charter in light of the ECtHR case law.[142]

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[140] Tsourdi (n 3).
[141] Vedsted-Hansen (n 124).
[142] The CJEU ruled that the 2013 APD remedies must be consistent with Art. 47 Charter. C-239/14, *Tall*, EU:C:2015:824. For a list of CJEU and ECtHR case law addressing the need for the right to remain to be extended to the asylum appeal procedure, see: ECRE (n 84), p. 97.

4 Conclusion

The present Chapter addressed the agency implications of selected Screening Regulation, APR and Return Border Procedure Regulation provisions. Such implications can be clustered around three main topics: the creation of a "seamless border procedure" where the screening, asylum and return procedures are performed; the expansion of safe country notions to increase the external dimension of the "protection elsewhere" policies of the EU; and the additive approach to sanction secondary movements and fasten the return of rejected applicants.

The "seamless border procedure" transforms the EU's external borders into a non-territory, serving as a legal filter to categorise asylum seekers based on their likelihood of being granted protection, according to increasingly automatic and arbitrary criteria that are detached from their individual circumstances.[143] The de-territorialisation of the border is enabled by the "fiction of non-entry", where asylum seekers physically present on the territory of the EU can remain in a legal limbo of non-authorisation of entry for a total of 6 months. Whilst equipped with legal safeguards, the "fiction of non-entry" facilitates the systematic recourse to actual or *de-facto* detention in structures scattered at the border or in selected locations within the territory. Asylum seekers caught in border procedures are awarded limited procedural rights and are bound by strict deadlines, with no or very limited vulnerability exceptions. The non-judicial monitoring mechanisms provided by the Screening Regulation and APR do not qualify as an appropriate venue for obtaining effective remedies.

All special asylum procedures are characterised by a high degree of automatism, to the detriment of asylum seekers' fundamental rights and agency. The legality of the 20% recognition rate criterion is challenged on the grounds of its effet utile and proportionality. Concurrently, safe country notions are

[143] Jean-Pierre Cassarino and Luisa Marin, 'The Pact on Migration and Asylum: Turning the European Territory into a Non-Territory?' (2022) 24 European Journal of Migration and Law 1.

expanded both in definition and scope. Member States are enabled to discharge applications coming from applicants who enjoy or might enjoy protection in third countries who are not parties to the Geneva Convention. The expanded safe third country notion now triggers the mandatory application of accelerated procedures.

Lastly, the provisions on implicit withdrawal and subsequent applications represent an extreme manifestation of the fight against secondary movements that permeates the New Pact on Migration and Asylum: Member States are allowed to refuse to assess the merits of asylum claims from applicants engaging in secondary movements, executing transfers without adequate safeguards. The absence of an automatic suspensive effect for decisions made in special asylum procedures raises concerns regarding the compliance of the APR's effective remedy provisions with the principle of non-refoulement.

Similar to the AMMR, the Screening Regulation, APR, and Return Border Procedure Regulation increase the responsibility burden on Member States of first arrival, which must equip themselves with additional facilities, staff, and resources to manage asylum seekers at the border and to conduct asylum procedures under stricter deadlines. At the same time, asylum seekers are arbitrarily categorised: on one side, the few "real" asylum seekers, coming from objectively endangered countries and compliant with the rules, are subject to the standard procedure. On the other side, the "instrumental" asylum seekers coming from countries considered safe and engaging in onward movements are channelled to special asylum procedures designed to issue rejections and fasten their return. The regulations analysed hinders asylum seekers' ability to seek protection in a country of their choice and to rely on their individual circumstances for protection. The detachment of asylum from individual factors is taken to its extreme in crisis situations, which will be discussed in the next chapter.

Chapter 6 - EU Emergency Migration Management: Solidarity and Agency Implications of the Crisis and Force Majeure Regulation

The Asylum Migration Management Regulation (AMMR) and the Asylum Procedure Regulation (APR) establish the standard framework governing access to and decision-making within asylum procedures.[1] Solidarity-wise, the AMMR operationalise the principle of solidarity and fair sharing of responsibility via a permanent solidarity mechanism. Asylum seekers have little agency in selecting their country of asylum and in exercising freedom of movement within the host state's territory. Moreover, their procedural rights are curtailed, and opportunities to influence decision-making are significantly restricted, both in the allocation of responsibility and in determining the applicable asylum procedure.

Alongside the AMMR standard migration management, the Crisis and Force Majeure Regulation (CFM Regulation) introduces a crisis control mechanism "to enhance the preparedness and resilience of the Union to manage situations of crisis and to facilitate operational coordination, capacity support and the availability of funding in situations of crisis" (Recital 5, CFRM Regulation).[2]

The CEAS is notably lacking a reliable and predictable crisis control mechanism: Art. 78(3) TFEU allows the adoption of "provisional measures" to

[1] Regulation 2024/1351/EU on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L, 2024/1351; Regulation 2024/1348/EU stablishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L, 2024/1348.
[2] Regulation 2024/1359/EU addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L, 2024/1359.

assist Member States facing an emergency situation marked by a sudden inflow of third-country nationals. The emergency clause was invoked only once, during the 2015 "migration crisis". Even then, the relocation plans adopted proved to be ineffective in providing relief to the benefitting Member States.[3]

To complement Art. 78(3) TFEU, secondary legislation introduced several crisis control mechanisms. Most notably: the Temporary Protection Directive, which will be covered extensively in the next chapter;[4] the early warning, preparedness and crisis management mechanism included in the Dublin III Regulation;[5] the possibility of reintroducing internal border controls under the Schengen Borders Code in case of a serious threat to public policy or internal security;[6] early warning and crisis management mechanisms embedded in the Frontex and EUAA Regulations.[7] In an effort to deflect arrivals at its external borders, the EU expanded its "protection elsewhere" policies by pursuing various externalisation projects targeting neighbouring third countries, with the EU-Turkey Statement being the most notable example.[8]

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[3] See Chapter 3(5). Jonas Bornemann, 'Coming to Terms with Relocation: The Infringement Case against Poland, Hungary and the Czech Republic' (*European Law Blog*, 14 April 2020). Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU' (2024) 2024 9 European Papers - A Journal on Law and Integration 179.

[4] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

[5] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31 (Dublin III Regulation), Art. 33.

[6] Regulation 2016/399/EU on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1, Title III, Chapter II. Chiara Favilli, 'Schengen e Dublino: una convivenza impossibile?', *Per una politica europea dell'immigrazione e dell'asilo* (Edizioni Fondazione Basso 2018).

[7] Regulation 2019/1896/EU on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1, Arts. 29, 32 and 34; Regulation 2021/2303/EU on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L 468/1, Arts. 5(1), 14, 15, 22. For a detailed analysis and mapping of the EU crisis response mechanisms in place before the entry into force of the New Pact, see: Giuseppe Campesi, 'Defining "Crisis" in Migration Governance: A Critical Legal Mapping of EU Crisis Response Mechanisms'.

[8] European Council, 'EU-Turkey Statement, 18 March 2016 [2016] https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/. The expanded scope of "protection elsewhere policies" was described in Chapters 2.1.2, 5.2.2

Despite the numerous tools at its disposal, the EU has repeatedly been unprepared to address the negative impacts of migration-related emergencies and to provide adequate relief to Member States under pressure: the reintroduction of border controls at the internal borders has been widely invoked to stop onward movements. The proliferation of such measures however was poorly motivated by Member States and stretched beyond what was necessary, endangering the functioning of the whole Schengen system.[9] At the same time, the early warning mechanisms in the Dublin III, Frontex and EUAA Regulations did not entail concrete actions on how to address a critical situation.[10] Lastly, until its activation in 2022, the Temporary Protection Directive was never triggered due to a lack of political will.[11] With the New Pact on Migration and Asylum, the EU added one more emergency toolkit to the existent plethora, aiming to fill the effectiveness gap of its crisis response system. The toolkit is composed of an additional early warning mechanism and the CFM Regulation.[12] The latter, in liaison with the revised Schengen Borders Code (hereafter, SBC),[13] provides for a threefold set of measures to support Member States facing emergencies: enhanced solidarity

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and 5.3.2. For an overview of the EU-Turkey statement and its externalisation approach, see: Gamze Ovacık, Meltem Ineli-Ciger and Orçun Ulusoy, 'Taking Stock of the EU-Turkey Statement in 2024' (2024) 26 European Journal of Migration & Law 154; Violeta Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border' (2023) 34 Queen Mary Law Research Paper; Ludger Pries and Berna Safak Zülfikar Savci, 'Between Humanitarian Assistance and Externalizing of EU Borders: The EU-Turkey Deal and Refugee Related Organizations in Turkey' (2023) 11 Journal on Migration and Human Security 57; Anna Casaglia and Agnese Pacciardi, 'A Close Look at the EU–Turkey Deal: The Language of Border Externalisation' (2022) 40 EPC: Politics and Space 1659; Roman Lehner, 'The EU-Turkey-'deal': Legal Challenges and Pitfalls' (2019) 57 International Migration 176; Chiara Favilli, 'La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?' (2016) 10 Diritti umani e diritto internazionale 405.

[9] Cyrille Fijnaut, 'The Refugee Crisis: The End of Schengen?' (2015) 23 European Journal of Crime, Criminal Law and Criminal Justice 313; Favilli (n 6); Steve Peers, 'Restoring the Borderless Schengen Area: Mission Impossible?' (SIEPS 2024); Vasiliki Apatzidou, 'Schengen Reform: "Alternatives" to Border Controls to Curb "Secondary Movements"' (2022) 2022 7 European Papers - A Journal on Law and Integration 573.

[10] Campesi (n 7).

[11] Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive' (2016) 18 European Journal of Migration and Law 1.

[12] Commission Recommendation 2020/1366/EU on an EU mechanism for preparedness and management of crises related to migration [2020] OJ L 317726. Helena Hahn, 'Keeping a Cool Head: How to Improve the EU Migration Crisis Response' (EPC 2022).

[13] Regulation 2024/1717/EU amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2024] OJ L, 2024/1717.

mirroring the AMMR solidarity mechanism; a set of derogations from selected AMMR and APR provisions; and an expedited procedure for processing asylum claims likely to be well-founded.

In the next paragraphs, the CFM Regulation will be critically analysed to outline its solidarity and agency repercussions. The analysis builds on the previous chapters of the thesis, as the CFM Regulation primarily intensifies or derogates from provisions already established under the AMMR and APR, rather than introducing entirely new measures.

1 CFM Regulation: Scope and Activation Process

The CFM Regulation aims to "ensure the effective application" of the principle of solidarity and fair sharing of responsibility, equipping Member States and the Union with the requisite legal tools to respond promptly to crises and situations of force majeure (Recital 6).

The Regulation defines the situations that could trigger its measures. A crisis can manifest in two ways: one, as "an exceptional situation of mass arrivals of third-country […] of such a scale and nature […] that it renders the Member State's well-prepared asylum, reception, including child protection services, or return system non-functional, […] such that there could be serious consequences for the functioning of the Common European Asylum System" (Art. 1(4(a)). Two, as "a situation of instrumentalisation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals […] to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security" (Art. 1(4)(b)). Force majeure refers to "normal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided notwithstanding the exercise of all due care" (Art. 1(5)).

Faced with an emergency, Member States can request the Commission to determine the existence of a situation of crisis or force majeure (Article 2). Within two weeks, the Commission decides whether a crisis exists, and which measures should be adopted to face it in a proposal for a Council Implementing Decision (Art. 3). Concurrently, the Commission can adopt a recommendation on the application of expedited recognition procedures for specific asylum-seeker groups with well-founded claims (Arts. 3(2) and 4(4)). The Council adopts within two weeks an implementing decision setting out the combination of solidarity measures and derogations for the benefit of the requesting Member State (Art. 4). The measures adopted can last for a maximum period of one year (Art. 5).[14] Throughout the process, the Commission and the Council constantly monitor the persistence of the situation of crisis and the compliance of the measures adopted with fundamental rights (Art. 6). The European Parliament has no active role in the procedure: it must be informed of the decisions taken by the Commission and the Council, and it receives reports from the Commission on the monitoring undertaken when a Council implementing decision with solidarity and derogation measures is in place (Arts. 3(3), 4(1), 4(5), 6(4)).

2 Solidarity Provisions

The CFM Regulation lays down the pool of measures from which the Commission and Council can pick when proposing and negotiating the content of the support actions towards Member States facing a crisis. The first batch of measures pertains to solidarity, from which Member States can benefit in crisis situations but not in force majeure situations. The solidarity measures are the same prescribed by the AMMR, namely relocations, financial contributions, or alternative solidarity features (Art. 8(1)). The solidarity measures should be taken, if available, from the pledges in the Solidarity Pool

[14] The implementing decision can last a maximum of three months, with the possibility to extend its duration by another three months period. If the crisis persists, a new implementing decision can be adopted, lasting again three months and extendable by another three months period.

established yearly as part of the migration cycle established by the AMMR (Art. 4(2)(b)(iii)).[15] If the existing pledges are insufficient, additional pledges must be established via a Solidarity Response Plan within the Council Implementing Decision (Arts. 4(2)(b)(iv) and 4(3)(b)).

Like the Solidarity Pool, Member States are free to decide which solidarity measure to pledge and implement with the Solidarity Response Plan (Recital 29).[16] The CFM Regulation tightens up the rules on the matching between needed and pledged solidarity measures: the relocation needs identified in the Council Implementing Decision must be covered at 100% by relocation pledges, and not only at 60% as set out in the AMMR (Art. 9(1)(a)). When the number of pledges does not cover all the needs, the Regulation makes responsibility offsets mandatory to fill the gap. As outlined in Chapter 4.2, responsibility offsets are a form of relocation sur place where a contributing Member State takes up responsibility for asylum applications for which the Member State facing a situation of crisis has been determined responsible. To match needs and pledges, Member States are also bound to go above their fair share if necessary (Art. 9(1)(b)).[17] As for funding and alternative solidarity measures, the pledges must be targeted to address the specific crisis situation (Art. 8(1)(b) and (c)).[18]

3 Derogations from AMMR and APR Provisions

Alongside solidarity measures, the Council Implementing Decision can include a set of derogations "in order to provide for an appropriate response that is proportionate and necessary to address the situation" in the requesting

[15] See Chapter 4.2.
[16] If the benefitting Member State considers relocations as the primary or only solidarity measure to address the situation, such preference must be considered by the Commission when drafting the proposal for a Council implementing decision. Nonetheless, the preference does not impair the discretion of the contributing Member States to choose between the types of solidarity measures (Art. 4(2)).
[17] Member States going above their share are entitled to reduce proportionally their fair share from the implementation of solidarity pledges over a period of five years (Art. 9(4)).
[18] Funding to third countries is allowed if relevant to address the emergency.

Member State (Recital 29). The derogations target APR and AMMR provisions. When the derogations are in place, the overall structure of the Regulations remains in place and binding.

The CFM Regulation relaxes the APR rules on the registration of asylum applications and on the application of border procedures to give a country facing situations of crisis or force majeure additional time to "reorganise its resources and increase its capacity" (Recital 39).[19]

First, in all emergencies prescribed in the CFM Regulation, the registration period of any asylum application made when the derogation is in place can be extended up to four weeks from the day the application was made (Article 10(1)).[20] This derogation can last a maximum of three months and cannot be extended (Art. 10(4)). Even before the adoption of the Council Implementing Decision, Member States can start delaying the registration of asylum applications for a maximum of 10 days from the day they submit the request (Art. 10(6)). When implementing this derogation, Member States must inform the third-country nationals involved and prioritise the registration of applications for persons with special reception needs, minors and their family members, and optionally applications that are likely to be well-founded (Art. 10(2) and (3)).

Second, Member States can access derogations modifying the temporal and personal scope of border procedures. In both crisis and force majeure situations, Member States can prolong the maximum duration of the border procedure from 12 to 18 weeks (Art. 11(1)). Furthermore, the recognition rate threshold triggering the mandatory application of border procedures (set at 20% in Art. 42(1)(j) APR) can be subject to adjustments, either by reduction or increase. In crisis situations arising from mass arrivals or force

[19] Border procedures are outlined in Chapter 5.2.1.
[20] The regular deadline prescribed at Art. 27 APR is 5 days, extendable to 15 days in case of "disproportionate number" of applications being registered at the same time. The registration of asylum applications is the bureaucratic phase following the "making" of the application which happens when the applicant "expresses in person to a competent authority as […] a wish to receive international protection from a Member State" (Art. 21(1), APR).

majeure, Member States may be permitted to waive the application of this criterion or to lower the recognition rate threshold to as little as 5% (Art. 11(2) and (3)). Only in situations of crisis due to mass arrival, Member States may apply border procedures to applicants coming from countries with a recognition rate of up to 50% (Art. 11(4)). These derogations must be lifted in case of compelling medical reasons (Art. 11(9)) and should not impair access to advice and counselling (Art. 11 (10)). The derogations concerning border procedures are more tailored when addressing an instrumentalisation situation, as will be addressed in the next chapter.

The Regulation also foresees derogations from AMMR rules on transfer decisions "in order to avoid the Common European Asylum System becoming non-functional" (Recital 53). Derogations can target both take-charge and take-back procedures (Art. 9). In all situations apart from instrumentalisation, Member States can double the time limits governing the take-back and take-charge procedures laid down in the AMMR (Art. 12).[21] In situations of crisis due to mass arrivals, when arrivals are of "such extraordinary scale and intensity that it could create a serious risk of serious deficiencies in the treatment of applicants, thereby creating a serious risk that the Common European Asylum System is rendered non-functional", take-back obligations for the Member State under pressure can be entirely waived (Art. 13).[22]

[21] The specific extensions of each time limit for submitting or replying to take-back notifications and take-charge procedures are detailed at Art. 12(2).

[22] When the benefitting Member State was responsible under the residual responsibility clause at Art. 16(2) RAMM, responsibility shifts to the Member State where the second application was registered. When the benefitting Member State was responsible under Art. 38(4) RAMM, the Member State where the second application was registered applies the procedure to determine which Member State should take up responsibility. When no responsible Member State is individuated, the second Member State becomes responsible for examining the asylum application (Arts. 13(2) and (3)).

4 The Expedited Procedure

Parallel to the solidarity measures and the derogations, the CFM Regulation foresees the introduction of an expedited asylum procedure to fasten the "examination of the merits of the application as soon as possible and to allow for a swift and efficient granting of international protection in a situation of crisis" (Recital 54). Such a procedure would target groups of applicants from a specific country of origin or a part of such a country when their applications can be considered well-founded according to objective circumstances (Art. 14(1)). Member States can prioritise their claims and omit the personal interview. The analysis on the merits must be concluded no later than four weeks from the lodging of the application (Art. 14(2)). [23] Being a recommendation, the application of the expedited procedure is not mandatory: Member States remain free to decide whether to apply it or not.

The set of measures introduced by the CFM Regulation are difficult to assess in their *ensemble*, given the variety of measures introduced and the great discretion left to the Commission and the Council to tailor the response to each emergency.[24] Furthermore, the measures introduced interlink with other asylum related provisions scattered among several legal texts, such as the AMMR and the APR. In the next paragraph, the analysis will study the CFM Regulation vis à vis its impact on the solidarity and agency provisions.

[23] The interview can be conducted "if there are doubts whether the applicant belongs to the category or categories of persons" targeted by the expedited procedure. The expedited procedure does not apply when an applicant is a threat to internal security (Recital 56).
[24] See, *inter alia*: ECRE, 'Comments on the Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum and Amending Regulation (Eu) 2021/1147' (ECRE, 2024); Meltem Ineli Ciger, 'Unpacking the Crisis Regulation : A Valuable Addition to the European Legal Framework Governing Mass Influx Situations?' (European University Institute 2024); Alberto-Horst Neidhardt, 'The Crisis and Force Majeure Regulation: Towards Future-Proof Crisis Management and Responses?' (EPC 2024); Steve Peers, 'EU Law Analysis: The New EU Asylum Laws, Part 8: The "Crisis" Regulation – and Conclusions' (*EU Law Analysis*, 28 April 2024) 8; Meltem Ineli Ciger, 'Navigating the Labyrinth of Derogations: A Critical Look at the Crisis Regulation – EU Immigration and Asylum Law and Policy' (*EU Immigration and Asylum Law and Policy*).

5 CFM Regulation: General Critique

The CFM Regulation pursues the noteworthy objective of increasing the preparedness and resilience of the EU to address migration-related emergencies. Its measures, in primis the access to derogations, could greatly impact the functioning of the CEAS once implemented, as they target core procedures of the EU asylum system. Therefore, the new rules need to be specific, well-defined, limited to the essential and monitored to ensure that any change to the functioning of the CEAS is proportionate and necessary to address the emergency at stake. The content of the Regulation fails to meet these standards, with negative spillover effects over the solidarity and agency provisions.

The definitions of the situations liable for triggering the solidarity and derogation measures are vague and prone to political interpretation. To be defined as a crisis due to a mass influx of arrivals, many conditions need to be fulfilled: the scale of the mass arrival, calculated taking into account, inter alia, the population, GDP and geographical specificities of the Member State must render the Member State's well-prepared asylum, reception or return system non-functional with repercussions for the whole CEAS (Art. 1(4)(a)). Nonetheless, there is no reference to the nature of arrivals qualifying as mass influx: the limitation to "irregular" arrivals has been cut in the final version of the Regulation, meaning that also "legal" entries can qualify as mass arrivals.[25] The definition does specify in detail which impact the mass influx must have to be qualified as critical: arrivals must render non-functional the "well-prepared" asylum, reception or return system of the Member State concerned. The "well-preparedness" criterion is useful to avoid the misuse of the CFM Regulation measures by Member States who are facing a crisis not due to the increase of arrivals but rather due to their unpreparedness: Member States must have a functional migration management system ready

[25] Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum [2020] COM/2020/613 final, Art. 1(2).

to face the recurrent changes in migratory flows targeting the EU. Only then they can access the Regulation measures if faced with a crisis. Notwithstanding the specification, there is no definition of what a "well-prepared" system looks like: it will be up to the Commission and the Council to assess the well-preparedness of national asylum systems on a case-by-case basis.[26]

Lastly, the definition of force majeure shares with crisis situations the same lack of clarity, such as what constitutes "abnormal and unforeseeable circumstances".[27] Despite being a novelty in the asylum field, the definition of force majeure is however less problematic given the existence of standards set by the CJEU caselaw in other fields.[28]

Overall, the definitions lack conceptual clarity and could be misused by Member States pursuing political motives. Some flexibility within the system is necessary to ensure that CFM Regulation instruments are tailored to address different emergencies. However, the open-ended definitions weaken the predictability of the whole system. The Regulation prescribes some general safeguards, such as the requirement for the measures adopted to be necessary and proportional, and appropriate to achieve the stated objectives whilst ensuring the rights of asylum seekers and beneficiaries of international protection (Art. 1(2)).[29] The Commission and the Council are tasked with

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[26] ECRE argues that "'"well-preparedness" should be defined as an asylum system that generally functions in compliance with the all elements of the CEAS which should render it robust enough to deal with an exceptional situation. ECRE, 'Comments on the Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum and Amending Regulation (EU) 2021/1147' (2024).

[27] The preamble cites pandemics and natural disasters as examples of force majeure events. The list is non-exhaustive (Recital 20, CFM Regulation).

[28] In *Tomas Vilkas*, the Court specified that force majeure's scope varies depending on the sphere of application of EU law, meaning that its meaning "must be determined by reference to the legal context in which it is to operate". C-640/15, *Tomas Vilkas*, EU:C:2017:39, para 54. In *CD v Syyttäjä*, the Court defined force majeure as "referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care". C-804/21 PPU, *CD v Syyttäjä*, EU:C:2022:307, paras. 44-45.

[29] Recital 8 ensures the compliance of the Regulation with the fundamental rights of third-country nationals, listing in "the respect and protection of human dignity, prohibition of torture and inhuman or degrading treatment or punishment, respect for private and family life, the principle

monitoring that the measures adopted are in line with these safeguards. If they consider the situation to no longer be critical, they are bound to recall the adopted measures even if they have not yet reached their deadline. However, no specific repeal procedure is provided, and there is no sanctioning mechanism for actions breaching fundamental rights. Furthermore, no independent monitoring is foreseen: the only migration-specific institution involved is the EUAA, albeit only upon explicit request by the Commission (Art. 6). The lack of specific rules on fundamental rights compliance is problematic, especially considering the impact that some of the measures foreseen in the Regulation might have on asylum seekers' rights.

The lack of a robust monitoring system is worrisome also vis à vis the temporal dimension of the CFM Regulation. Each emergency can be targeted by measures lasting a maximum of 12 months. However, the CFM Regulation explicitly foresees the possibility for Member States to benefit from measures targeting several critical situations simultaneously (Recital 26). No rules specify how to distinguish one critical situation from another. As a result, Member States could extend the maximum duration of measures by asserting the existence of successive crises with only minor differences. Such a scenario is not unlikely looking at the past and current practices affecting the Schengen system, where some Member States have never lifted the reintroduction of border controls imposed in the wake of the 2015 "migration crisis".[30] The risk of Schengenification of the CEAS will be tested once the Regulation implementing period on 1 July 2026 is over and the mechanism is triggered.

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of the best interests of the child, the right to asylum and protection in the event of removal, expulsion or extradition".

[30] Neidhardt (n 24); Sergio Carrera and others, 'The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016' (LIBE Committee 2018); Fijnaut (n 9).

6 Solidarity Measures: Solidarity and Agency Implications

The CFM Regulation operationalises Art. 80 TFU through a set of solidarity measures that can be triggered upon necessity. Access to solidarity prescribed by Chapter III of the Regulation mirrors the AMMR solidarity provisions. Therefore, it retains the criticisms on the matching between solidarity measures and the needs identified: on relocations, both the AMMR and the CFM Regulation prescribe the matching between needs and pledges, with no reference to actual relocations. There is no sanctioning mechanism for Member States not executing their pledges: the Union oversight is limited to the needs-pledges matching. Therefore, the success of the solidarity response remains dependent on the willingness of Member States to address the identified needs through the effective implementation of the pledges. On funding, financial contributions to third countries are maintained, despite the explicit limitation to funding "relevant to address the situation of crisis" (Art. 8(1)(c)).[31]

However, the CFM Regulation strengthens the prescriptive nature of solidarity pledges, with a welcome focus on relocations and the requirement for relocation pledges to match 100% of the identified needs. When necessary to meet the relocation needs, Member States must recourse to responsibility offsets and go above their fair share of relocation. This serves as a tangible and dependable tool for achieving relocation objectives. Member States remain free to pledge the mix of solidarity measures they find appropriate. However, such a mix is subjected to an objective evaluation: Do the measures pledged meet the needs identified in the Council Implementing Decision? Under the AMMR, if the answer to this question is no, the benefitting Member State can recourse to responsibility offsets only when the pledges fall short of the numerical threshold for yearly relocations (30 000) or are below 60%

[31] See Chapter 4.3.

of the needs identified (Art. 63(3) AMMR). Under the CFM Regulation, the answer is much more straightforward: if relocation pledges do not cover 100% of the needs, Member States must act to fill the gap through responsibility offsets and derogating from the fair sharing of responsibilities principle.[32] Responsibility offsets remain a secondary form of solidarity complementing regular relocations when pledges are insufficient to cover the needs. However, their operationalisation is much more direct and automatic.

Agency-wise, relocations greatly influence the choice of asylum seekers' country of asylum but do not increase their agency: the CMF Regulation does not change the procedure behind the decision of the country of relocation. In both standard and emergency situations, asylum seekers' consent is not required for the execution of relocations. Furthermore, their involvement in selecting the relocation country—though enhanced compared to the AMMR responsibility-allocation mechanism—remains non-binding: Member States must take into account meaningful links between the asylum seeker and the relocation country during the procedure. However, they are not obligated to follow these connections when selecting the relocation destination.[33] The CFM Relocation stresses that vulnerable persons should be given primary consideration for relocation, including a list of categories which are likely to qualify for having special reception needs (Recital 37). The priority reserved for vulnerable applicants must be read in conjunction with the prohibition of intra-EU transfers of asylum seekers when they could result in inhumane or degrading treatments, which is especially relevant in the context of vulnerabilities.[34] Given the special reception condition needs of vulnerable applicants, the control of the compliance of the transfer with Art. 4 Charter must be rigorous. It can be argued that transfers not accounting for the consent of vulnerable individuals may expose them to inhumane and

[32] The CFM Regulation still provides contributing Member States with compensation for their extra contributions, enabling them to proportionally reduce their fair share of contributions under either the upcoming annual cycles of Regulation or future Solidarity Response Plans over a period of five years (Art. 9(4)).
[33] Art. 67(3) AMMR. See Chapter 4.3.
[34] Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127.

degrading treatment and therefore cannot be executed, even though asylum seekers subject to relocation do not have the right to challenge the decision.

Furthermore, the CFM Regulation has an enhanced positive impact on asylum seekers' agency through the way responsibility offsets are implemented. First, the mandatory use of responsibility offsets to meet the 100% match between relocation pledges and needs makes their use in emergency situations much more prescriptive. Second, through responsibility offsets Member States accept to take up responsibility for asylum seekers who happen to be in their territory but for which they are not responsible according to AMMR criteria. This *de facto* recognition of movement reinforces the one established through the regular responsibility offsets provided in the AMMR.

7 Derogation Measures: Solidarity and Agency Implications

Alongside solidarity measures ensuring the "effective application of the principle of solidarity and fair share of responsibility", the CFM Regulation prescribes a set of derogations to support Member States and the Union with "the necessary legal tools at their disposal to react swiftly to situations of crisis and force majeure" (Recital 6). Solidarity and derogation measures are interchangeable in the Council Implementing Decision. It is up to the requesting Member State, the Commission and ultimately the Council to decide which measures to prioritise.

The parallelism between solidarity and derogations, without any hierarchical order, has repercussions on the overall conceptualisation of the content and intent of solidarity. The crisis response mechanism is framed with the sole objective of achieving a result – the resolution of the crisis – without imposing conditions on the measures to be adopted in pursuit of that goal. However, the way solidarity and derogation measures reach the goal of

overcoming a crisis greatly differs, especially concerning the treatment reserved for the persons caught up in the emergency.

Among the derogations listed in the AMMR, the suspension of take-back obligations prescribed in Art. 13 entails a solidaristic vision via the cooperation between Member States. Such derogation works similarly to responsibility offsets, relieving the benefitting Member State of its obligation to take back an asylum seeker who lodged their application on their territory and then moved irregularly during the responsibility-allocation process. The codification of derogations to the responsibility-allocation rules is unprecedented: in *Jafari*, the Court resolutely backed the prescriptiveness of Dublin rules in any situation, regardless of the scale of arrivals, given the existence of complementary instruments at its disposal to showcase solidarity.[35]

Under the CFM Regulation regime, EU legislators instead acknowledged the irreconcilability of the responsibility-allocation rules with mass arrivals.[36] Consequently, they enabled the derogation from take-back procedures, offering immediate relief to the Member State under pressure and *de facto* legitimising asylum seekers' onward movements. The take-back derogation qualifies as a form of horizontal and vertical solidarity. First, benefitting Member Stares are relieved from the obligation to take back asylum seekers for which they are responsible, hence reducing the number of applications they have to process. Second, asylum seekers are not sanctioned for their onward movements when leaving a Member State facing a crisis situation: when the take-back derogation is in place, the Member State where asylum seekers move to – exercising their agency – becomes responsible for

[35] Case C-646/16, *Proceedings brought by Khadija Jafari and Zainab Jafari*, EU:C:2017:586, paras 54, 74 and 94-98.
[36] In the past, the application of Dublin rules – not sufficiently rebalanced with solidaristic measures – led to widespread non-compliant attitudes from Member States. Lukasz Dziedzic, 'Solidarity and Critique in the EU: A Case Study of Asylum' (PhD Thesis, Tilburg University 2022) 219; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000).

launching the responsibility-allocation mechanism. If no other Member State is deemed responsible, it must process the asylum claim.

The take-back derogation share with responsibility offsets the limitation of its application as a measure of last resort: specifically, only in a situation of crisis when mass arrivals are of "such extraordinary scale and intensity that it could create a serious risk of serious deficiencies in the treatment of applicants" (Art. 13(1)). There are no criteria for determining what constitutes an exceptional situation compared to the "regular" level of critical mass arrivals. Such lack of clarity may hinder access to the derogation. However, the reference to serious deficiencies recalls the "systemic deficiencies" doctrine governing the suspension of transfers under the Dublin III Regulation.[37] *Mutatis mutandis*, the CJEU case law defining the conditions under which a national asylum system is deemed dysfunctional can provide guidance in assessing when a mass influx is creating deficiencies which justify access to take-back derogations. In conclusion, the possible suspension of take-back obligations is a solidaristic derogation which does not impact negatively asylum seekers' rights and provides immediate support to the benefitting Member State without excessive bureaucratic complexities.

The other derogations listed in the CFM Regulation, targeting the registration of asylum applications and the application of border procedures, do not qualify as solidarity measures per se, as they do not involve any cooperative effort or sharing of burden between Member States. Instead, they implement a "blind eye" approach, where EU institutions and Member States allow a Member State not to apply EU standards to have enough flexibility to address an emergency. The derogations endanger the "sharing of norms" at the basis of the solidarity principle governing the EU asylum policy.[38] With

[37] Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865; ECtHR, *M.s.s v Belgium and Greece*, Judgment of 21 January 2011, Application no. 30696/09; Dublin III Regulation, Art. 3(2). See Chapter 3.1.
[38] See Chapter 1.2.3.1.

their introduction, the CFM Regulation codifies a system of built-in de-harmonisation under the CEAS. The level of legalised disintegration of the EU asylum acquis will depend on the implementation of the very complex rules governing the derogations available for the different emergency regimes. The risks of continuous crisification allowed by combining different regimes and prolonging their application might impact the primary objective of EU asylum law to achieve a "common policy", with repercussions on the upholding of the principle of mutual trust (Art. 78(1) TFEU).

APR derogations impact asylum seekers' agency not in choosing the country of asylum but in accessing asylum procedures. The delay of the registration of asylum applications up to 4 weeks has a very practical consequence: the postponement of registration causes a chain delay also in all the following procedures, including the determination of the responsible Member State. In the event of a mass influx, extended timeframes can be beneficial for Member States providing additional time to adjust their operational capacities to the emergency. However, the extension of the period between the making and the registration of the asylum application adversely affects asylum seekers: while awaiting registration, they are confined in a country that may not be responsible for processing their application, with no option to relocate. The CFM Regulation indeed permits Member States to delay the registration of asylum applications but does not exempt them from the obligation to collect and store asylum seekers' biometric data in Eurodac (Art. 10(7)). During the extended period between the lodging and registration of an application, asylum seekers are filed on the migration-related IT systems but denied access to the full range of services and guarantees associated with asylum seeker status. Consequently, in cases of onward movement, they remain subject to take-back procedures.

While waiting for their application to be registered, asylum seekers still enjoy the right to remain (Art. 10 APR) and access to material reception

conditions (Recital 7, Art. 16(1), Reception Conditions Directive).[39] Nonetheless, the derogation allowing to delay the registration of asylum applications will exacerbate many of the obstacles faced by asylum seekers in the first phases of their asylum application: access to reception conditions, albeit legally required, is already under strain in the current framework and could be further limited through this derogation.[40] Furthermore, the delayed registration impacts access to many rights which are conditional upon it, such as the right to work and the right to information.[41]

The assessment of the impact on asylum seekers' agency of the derogations targeting the activation and temporal scope of border procedures is more complex. The rationale underlying the derogations from the Asylum Procedures Regulation is difficult to discern, beyond the apparent aim of affording Member States maximum discretion in times of crisis. Art. 11 enables Member States to both expand and restrict the use of border procedures in emergency situations by modifying the primary criterion that triggers their mandatory application: the 20% recognition rate threshold.[42]

On one side, Member States can be allowed to disregard the criterion altogether, or alternatively to lower the reference threshold to 5%. Consequently, the number of asylum seekers mandatorily subjected to border procedures would decrease. The connection between the reduction of mandatory border procedures and the support for Member States under pressure is evident: redirecting asylum seekers to standard procedures could

[39] Directive 2024/1346/EU laying down standards for the reception of applicants for international protection [2024] OJ L, 2024/1346.
[40] An overview of reception conditions across the EU is available here: Woollard, C., Liebl, J., Testi, E. et al., "Reception conditions across the EU" (European Parliament, 2023).
[41] Asylum seekers can access work within six months from the registration of the application (Art. 17(1), Reception Conditions Directive). The provision of information concerning the processing of asylum applications is ensured after the registration of the application (Art. Arts. 9(2) and 15(2) APR). Lastly, the risks attached to delay of registration can be applied also to the delayed lodging of the application after the registration. See for details: ECRE (n 26)., pp. 38-39.
[42] Art. 421(j) makes border procedures mandatory when the applicant comes from countries with low recognition rates (below 20%, according to the latest available yearly Union-wide average Eurostat data). See Chapters 5.2.1. and 5.3.1.1.

help prevent the overcrowding of border facilities and ease the workload on border authorities, who operate under strict deadlines.

On the other side, Member States can expand the application of border procedures to applicants coming from countries with a recognition rate of up to 50%. This way, the number of people subjected to border procedures would extremely increase. The aggregated recognition rate at first instance for EU-regulated forms of protection in 2023 – the highest percentage since 2016 – was 43%.[43] This implies that, in crisis situations, the expanded use of border procedures would result in the majority of lodged applications being processed at the border. The expanded use of border procedures would inevitably lead to an increased administrative burden for national authorities.

The CFM Regulation prescribes the possibility of extending the duration of border procedures from 12 to 18 weeks (Art. 11(1)). Such a provision would give national authorities more time to process the increased volume of border procedures. At the same time, it would slow down the turnover rate in reception facilities, whose maximum capacity would be reached more quickly due to the increased number of arrivals and the expanded use of border procedures. Furthermore, the CFM Regulation specifies that the applications processed under the expanded border procedures should not be considered as part of the Member States' adequate capacity.[44] This means that the number of applications processed at the border could exceed the adequate capacity of Member States, yet it would not relieve national authorities of their obligations to perform border procedures, with clear consequences for the quality of reception conditions and decision-making. Against this background, it can be questioned whether the prolongation and/or expansion

[43] EUAA, Asylum Report 2024 (2024), Section 3.13.
[44] Adequate capacity refers to the number of persons who must be subjected to border procedures at any given moment (Art. 3(11), APR). Once a Member State reaches its adequate capacity, it is no longer required to mandatorily apply border procedures (Art. 47(2), APR). Alongside adequate capacity, the APR sets a maximum threshold of border procedures to be performed on a yearly basis: once the threshold is reached, the Member State is relieved from the obligation to apply border procedures in all cases but to procedures related to risks connected to national security and public order (Art. 50, APR). See Chapter 5.2.1.

of border procedures would meet the feasibility, necessity and proportionality requirements prescribed in Arts. 1, 3 and 4 CFM Regulation.

The expanded and prolonged use of border procedures greatly impacts asylum seekers' treatment pending a decision on their protection needs. Generally speaking, APR border procedures negatively impact asylum seekers' agency by enforcing border containment, restricting access to remedies, and expediting the assessment of protection needs.[45] Under the CFM Regulation regime, such criticalities would be exacerbated, despite the provisions ensuring the respect of fundamental rights and vulnerable categories' protection needs (Art. 11(10)).[46] Some may argue that the increased number of individuals subjected to border procedures could widen the fairness gap between standard and special asylum procedures. This could result in a punitive approach towards applicants entering EU territory during a crisis, based solely on the general situation surrounding their irregular border crossing, and completely detached from their individual circumstances.

The last derogation envisaged by the CFM Regulation is the expedited procedure allowing for the accelerated assessment of well-founded claims. The expedited procedure is governed by a standalone Chapter in the CFM Regulation. Nonetheless, it is a derogation *stricto sensu*: if implemented, it entails the derogation from the standard asylum procedure through the omission of the personal interview and the reduction of its duration to four weeks. Such a procedure is a welcome addition, despite the reduced involvement of asylum seekers in the decision-making. The lack of a personal interview is justified by the purpose of speeding up the delivery of asylum decisions in well-founded cases: asylum seekers will receive a most likely positive decision in a very short time, while retaining access to the interview

[45] See Chapter 5.3.1.
[46] As under the APR, the CFM Regulation does not generally exempt vulnerable applicants from border procedures but instead provides for the prioritised examination of applications lodged by individuals with special procedural or reception needs (Art. 11(5)).

"if there are doubts whether [they] belong to the category or categories of persons identified in that recommendation or whether the exclusion grounds apply" and the right to an effective remedy in case of a negative outcome (Recitals 55 and 56).

The expedited procedure creates a new venue for accelerated protection recognition under the EU asylum acquis: its activation is complementary with the other EU instrument granting faster access to protection, the Temporary Protection Directive.[47] Furthermore, the expedited procedure can be combined with all the other measures prescribed by the CFM Regulation, including derogations, limiting their negative offsets. The prioritisation of the analysis of well-founded claims also provides relief to national authorities under migratory pressure, simplifying the procedure and reducing the backlog of asylum claims resulting from an increase in applications.

The Commission and the Member States will determine the actual impact of the expedited procedure. The CFM Regulation minimal guidance provides on what makes an asylum claim "well-founded". In its assessment, the Commission can rely on the assessment of the safety of the country of origin – as a whole or in part – or on the criteria set out in the Qualification Regulation.[48] However, the personal scope of the applicants covered by the expedited procedure cannot be the whole population of a country, but only "groups of applicants". How will the Commission identify such groups? The Regulation allows but not binds the Commission to consult the relevant EU Agencies, such as the EUAA or Frontex, the UNHCR and other relevant

[47] The expedited procedure was originally named "immediate protection status" (with some differences from the current procedure) and aimed at substituting the Temporary Protection Directive. Following the activation of the latter March 2022, EU institutions decided to refrain from repealing the Temporary Protection Directive. Instead, they proposed the expedited procedure as a complementary tool. Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum [2020], COM/2020/613 final, Art. 10. On temporary protection, see Chapter 7.2

[48] Regulation 2024/1347/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council [2024] OJ L, 2024/1347.

organisations, in assessing the necessity and scope of the expedited procedure. Furthermore, the European Parliament is completely excluded from the decision-making: only the High-Level EU Solidarity Forum established within the Council must be consulted.[49] Overall, the procedure for determining the adoption of the expedited procedure is marred by excessive discretion granted to the Commission, raising concerns about the governance of the entire mechanism. In particular, the CFM Regulation lacks an effective monitoring framework to ensure the proportionality and necessity of its assessment.

The main actors responsible for the successful implementation of the expedited procedure are the Member States, who remain free to decide whether to apply or not a Commission Recommendation suggesting its application. The choice of the Recommendation as the legal instrument to propose the expedited procedure extremely limits its application. In particular, it risks causing de-harmonisation in case Member States do not follow a cohesive implementing strategy. Nevertheless, the inclusion of the expedited procedure among the tools available to Member States in crisis situations empowers them to address the emergency by adopting a procedure that is not punitive towards asylum seekers. Instead, it focuses on swiftly recognising protection needs as a solution, rather than prolonging the use of substandard asylum procedures.

The patchwork of derogations analysed above further widens the gap between asylum seekers' agency and the choice of the country of asylum: the decision-making concerning access to procedures, as well as the outcome of the procedures themselves, is heavily impacted not by subjective conditions, but by the context of their arrival.[50] Under the CFM Regulation, exogenous factors pertaining to the migration flow and not to the situation of the asylum

[49] Art. 13, AMMR. The Forum supports EU institutions in ensuring the effective implementation of the solidarity mechanism.
[50] Felix Peerboom, 'Flexible Responsibility or the End of Asylum Law as We Know It?' (*Verfassungsblog*, 26 April 2023).

seeker exert great influence over the outcome of their application. This is problematic: all asylum applications lodged in the EU must indeed undergo a rigorous individual assessment of protection needs, irrespective of the conditions following which the applicant has arrived. As addressed in the next chapter, the disentanglement between asylum procedures and individual protection needs is particularly evident in instrumentalisation situations, where the derogations prescribed by the CFM Regulation are coupled with measures contained in the revised SBC.

8 Conclusion

With the CFM Regulation, the EU is equipped with a toolkit of prescriptive measures to target migration-related emergencies. The introduction of a predictable crisis control mechanism is welcome, given the rather confusional and ineffective framework currently in place. The emergency measures impact the overall functioning of the CEAS, especially some of the derogations targeting core elements of the EU migration management. It has been argued that the CFM Regulation does not establish sufficiently clear and predictable guarantees overseeing the implementation of the emergency measures: the definitions of crisis, instrumentalisation and force majeure are vitiated by arbitrary qualification criteria and vague terms. In addition, the possibility of combining different emergencies and related reaction measures risks dooming the future CEAS to a state of permanent "Schengenification".

Solidarity-wise, the CFM Regulation retains the positive features of the AMMR solidarity mechanism, as well as its critical features, in primis the lack of a control mechanism over the actual implementation of pledges and the limited involvement of asylum seekers in the process. The Regulation nonetheless increases the efforts to implement relocations. The new rules on responsibility offsets, combined with the derogation permitting the suspension of take-back obligations for Member States under pressure,

increase the likelihood of implementing solidarity measures that acknowledge asylum seekers' movements as valid, even if only retrospectively. The conceptualisation of solidarity measures and derogations as equally valid tools to support Member States in crisis situations contrasts with the understanding of solidarity as a collaborative approach between Member States: it will be up to the Commission and the Council to decide whether to prioritise solidarity or derogations in the response to future crisis situations, without a hierarchical order ensuring the maximisation of solidarity measures.

Derogations targeting the APR border procedures convey a model of solidarity which endangers the "sharing of norms" pursued by EU asylum law. Furthermore, the derogations almost exclusively negatively impact asylum seekers' agency by increasing the arbitrary application of border procedures: first, the delayed registration of asylum applications will cause a chain reaction of rights-diminishing consequences extending the legal limbo for asylum seekers awaiting access to asylum procedures. Second, the changes to border procedures can either lead to fewer or more people being channelled to them, making their impact hard to predict.

Should derogations be used to expand the personal and temporal scope of border procedures, they may restrict the enjoyment of the rights and guarantees attached to the asylum seeker status: freedom of movement within the responsible Member State is limited and access to remedies is restricted. It has been argued that the CFM Regulation does not provide for sufficient guarantees in return for derogations: the few agency-enhancing derogations– responsibility offsets and derogations from the AMMR take-back obligations – remain accessible only as a last resort, while the optionality of the expedited procedure leaves a great deal of discretion in the hands of the Member States.

The CFM Regulation represents the final stage of the "crisification" process in EU migration management. It codifies measures originally conceived as exceptional, embodying the model of "lawification" of rights-

curtailing practices theorised by Moreno-Lax.[51] Many of the measures triggered under the CFM Regulation had already been proposed as immediate relief for Member States at the EU's eastern land border, which, since winter 2021, has experienced an increase in asylum seekers arriving via Belarus. The resulting instrumentalisation approach is the subject of the next chapter.

[51] Moreno-Lax (n 8).

Part III
Case Studies on Solidarity and Agency Interrelations under "Crisification"

Throughout the thesis, solidarity and agency have been approached as systemic components of the EU migration management. It has been argued that solidarity in EU asylum law should be established as a permanent principle, requiring responsibility-sharing among Member States with a redistributive purpose and yielding positive outcomes for asylum seekers as well. From an agency perspective, the EU asylum policy is premised on the notion that asylum seekers do not have the right to choose the country in which to request and receive asylum.

The practical implementation of both solidarity and agency under EU asylum law is more nuanced. Solidarity assumes a more structured role under the New Pact on Migration and Asylum, However, its implementation continues to be driven by an emergency-oriented mindset: the solidarity mechanism introduced by the Asylum and Migration Management Regulation is intended to address the inevitable inequalities resulting from the continued implementation of the unaltered Dublin responsibility-allocation system. Although agency is not among the criteria governing the responsibility-allocation mechanism, it is not entirely denied under the Dublin system. The Dublin III regime, as interpreted by the CJEU, incorporates safeguards and guarantees that allow asylum seekers to maintain a degree of agency in determining where to seek asylum: transfers cannot be executed when the conditions in the transferred Member State might violate Art. 4 Charter.[1] Furthermore, asylum seekers are involved in the

[1] See Chapter 3.1 nd Chapter 3.4. The CJEU ruled the non-execution of transfers when in breach of Art. 4 Charter (Joined cases C-411/10 and C-493/10, *N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865; Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, EU:C:2019:218; Joined Cases C-297/17, C-318/17, C-

operalisation of the responsibility-allocation mechanism through procedural rights, especially thanks to access to remedies.[2] These limited spaces for agency are retained, albeit further restricted, under the Asylum and Migration Management Regulation, while the Screening Regulation and Asylum Procedures Regulation introduce a new range of barriers to both physical and legal access to asylum procedures.

Particularly impactful on how solidarity and agency are designed and implemented is the "crisification" of the EU migration management.[3] As explained by Moreno-Lax, in the past decade the EU has introduced in its legal system a set of measures regulating migration which are first labelled as exceptional but then standardised and institutionalised via legislative reforms.[4] This is the case of the CFM Regulation, which includes both solidarity and agency as tools of emergency relief. Solidarity measures are accompanied by a worrisome set of derogations to the EU rules governing asylum procedures. The derogations prescribed significantly affect asylum seekers' agency, consistently limiting their autonomy in accessing and navigating asylum procedures.

Against this backdrop, the final part of the thesis analyses two case studies positioned at opposite ends of the spectrum of agency-solidarity interrelations: on one side, the agency-denial instrumentalisation approach; on the other, the agency-enhancing Ukrainian temporary protection scheme.

319/17 C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, EU:C:2019:219; Joined Cases C-228/21, C-254/21, C-297/21 C-315/21 C-328/21, *Ministero dell'Interno, Dipartimento per le Libertà civili e l'Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934; Case C-578/16 PPU, *C. K. and Others v Republika Slovenija*, EU:C:2017:127).

[2]See Chapter 3.2 and Chapter 3.3. The CJEU ruled out the execution of transfers also when asylum seekers procedural rights are breached (inter alia, Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409; Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410; Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, ECLI:EU:C:2017:587; Case C-201/16, *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl*, EU:C:2017:805.

[3] Violeta Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border' (2023) 34 Queen Mary Law Research Paper.

[4] Moreno-Lax differentiate between processes of "lawification" (turning illegal practices into law) and "softification" (lowering legal protections via informal or legally creative measures). Here the focus is on the "lawification" side of crisification. Ibid.

Chapter 7 - The Interrelations Between Agency and Solidarity: The Instrumentalisation - Temporary Protection Spectrum

Even though the effects of the codification of the EU emergency mechanism under the New Pact will materialise only once the reforms are enforced in mid-2026, the consequences of the "crisification" of EU migration management are already evident in two recent examples: the Belarus humanitarian crisis and the war in Ukraine. Starting from 2021-2022, the EU Eastern land border was targeted by two migration flows caused by exogenous factors: starting from summer 2021, an increasing number of people on the move crossed or attempted to cross the Belarus border with Latvia, Lithuania and Poland facilitated by Belarus authorities. In February 2022, Russia began the full-scale invasion of Ukraine, causing the displacement of millions of Ukrainians who in great part sought protection in the EU territory. Despite the similar timings and border areas involved, the two phenomena were greatly different in both magnitude and reaction from the EU. Despite the small absolute numbers, border crossings at the Belarus border were considered a security threat destabilising the Union and targeted by a strong securitising approach. The Ukrainian displacement represented the largest migration flow on the European continent since the end of World War II and was managed relatively smoothly and efficiently by the EU, through a common approach centred on immediate temporary protection and the sharing of responsibilities among Member States.

The EU response to the crises at the Eastern land border heavily influenced the negotiation process of the New Pact: the instrumentalisation strategy envisaged in the Belarus context has been codified in the Crisis and Force

Majeure Regulation (CFM Regulation). The successful application of the Temporary Protection Directive (TPD) in the context of the Ukrainian humanitarian crisis prompted the Commission not to withdraw the instrument as originally envisaged. Furthermore, the Belarus and Ukrainian crises keep influencing the political debate over migration management in the EU: supporters of the instrumentalisation approach advocate for more discretion and flexibility in the hands of Member States to face crisis situations. In contrast, the success of the Ukrainian temporary protection scheme demonstrated the feasibility of a structured, common approach to managing refugee influxes, focusing on swift recognition of protection rather than on curbing arrivals and movements within the EU.

The final chapter of the thesis begins by highlighting the markedly different responses to the Belarusian and Ukrainian crises. It then proceeds to examine their agency and solidarity implications. The focus of the analysis is the interaction between solidarity and agency in the EU crisis response: on one side, the instrumentalisation approach builds its solidaristic features on the denial of asylum seekers' agency. On the other side, the Ukrainian temporary protection scheme utilises agency as a tool to operationalise solidarity and fair sharing of responsibilities among Member States. This model challenges the view of solidarity and agency as mutually exclusive, proposing a protection-oriented crisis response mechanism where solidarity and agency work synergistically, offering support not only to Member States but also to asylum seekers.

1 Instrumentalisation

The concept of instrumentalisation is not entirely new, as it has been increasingly used in the field of political sciences to describe the "cross-border population movements that are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or

states".[1] Since the 2015 "migration crisis", numerous migratory events targeting the EU could be labelled as instrumentalisation: a recent taxonomy identified as many as 40 cases of migration instrumentalisation targeting the EU between 2014 and 2020.[2] Until then, the labelling of a migration flow as "instrumentalisation" was not relevant for legal studies per se, bearing no consequences in relation to legal actions adopted in its response.

Starting from 2020 however, the term started being used also by EU politicians. In early 2020, Greece suspended the right to asylum for a month following a surge in arrivals from Turkey after Turkish President Erdoğan announced the decision to "open the doors" to Europe.[3] The Commission did not start an infringement proceeding and, on the contrary, praised Greece for being the "shield" of Europe.[4] In the same year, the relaxation of border controls in Morocco at the borders with the Spanish exclaves of Ceuta and Melilla was criticised by EU and Spanish officials as an act of instrumentalisation of migration.[5] The politicisation of the term was swiftly followed by a relentless series of attempts by the Commission and the Council to codify it within the EU asylum framework, as highlighted in the next section.

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[1] Kelly M Greenhill, 'Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion; Strategic Insights, v. 9, Issue 1 (Spring-Summer 2010)' (2010) 9 45.
[2] Alia Fakhry, Roderick Parkes and András Rácz, 'Migration Instrumentalization: A Taxonomy for an Efficient Response' 40..
[3] Matina Stevis-Gridneff and Carlotta Gall, Erdogan Says, 'We Opened the Doors,' and Clashes Erupt as Migrants Head for Europe' (*New York Times,* 1 March 2020) https://www.nytimes.com/2020/02/29/world/europe/turkey-migrants-eu.html. The Greek decision is available here: Government Decree on suspension of the submission of asylum applications, Gov. Gazette A' 45/2.3.2020, https://bit.ly/2XFsMvb. More information on the 2020 Greek-Turkey border crisis here: RSA, 'Analysis: Rights Denied during Greek Asylum Procedure Suspension' (RSA 2020); Middle East Research Department, '"Open The Gates": Erdoğan's Infamous Foreign Policy' (Brussels International Centre 2020).
[4] European Commission, "Remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel" (3 March 2020), Statement, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_380.
[5] Miguel A Acosta Sánchez, 'Migration Flows as an Instrument of Political Pressure: The Case of Morocco' (*ADiM Blog*, March 2023); Fakhry, Parkes and Rácz (n 6).

1.1 The Belarus Crisis and the Codification of Instrumentalisation

Instrumentalisation officially entered the legal discourse in 2021 in the context of the Belarus humanitarian crisis.[6] Irregular border crossings at the EU eastern land border have been historically low, irrelevant to the total number of apprehensions at the EU external border: in 2019, only 677 arrivals were detected.[7] The situation suddenly changed in the second half of 2021, when arrivals from Belarus started to increase, reaching around 8 000 at the end of the year, a more than tenfold increase in comparison to 2020.[8] What makes such a surge in arrivals peculiar is not its volume, but the modality and geopolitical context within which it is embedded: the inflow of third-country nationals, mainly Iraqis, Afghans and Syrians, was a retaliatory measure of the Belarus regime against the package of sanctions imposed by the EU after the fraudulent August 2020 presidential election.[9]

The Member States targeted by the increased arrivals – Latvia, Lithuania and Poland – did not wait for a coordinated approach at EU level but rather adopted national measures aimed at stopping the inflow of people in their territory. Such measures involved the declaration of states of emergency, the militarisation of the border and the implementation of national legislation legitimising detention at the border and pushbacks.[10] The states of emergency

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[6] Roderick Parkes, 'The EU's "hybrid" Migration Wars: A Case of Mistaken Identity' in Luigi Lonardo (ed), *Addressing Hybrid Threats* (2024).

[7] Frontex, 'The Eastern Borders Route up until 2022' (2022), https://www.frontex.europa.eu/assets/Migratory_routes/2024_website_update/ANNEX_Eastern-borders_up-to-2022.pdf.

[8] Frontex, 'EU external borders in 2021: Arrivals above pre-pandemic levels' (11 January 2022), https://www.frontex.europa.eu/media-centre/news/news-release/eu-external-borders-in-2021-arrivals-above-pre-pandemic-levels-CxVMNN.

[9] Belarus' strategy involved attracting third-country nationals, primarily from the Middle East, by relaxing its visa policy, increasing flight connections, particularly with Iraq, and organising transfers from Minsk to the Western border. Fakhry, Parkes and Rácz (n 4). Piotr Łubiński, 'Hybrid Warfare or Hybrid Threat – The Weaponization of Migration as an Example of the Use of Lawfare – Case Study of Poland' (2022) 51 Polish Political Science Yearbook 1.

[10] Sarah Ganty, Aleksandra Ancite-Jepifánova and Dimitry V Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"' (2024) 16 Hague Journal on the Rule of Law 739; Aleksandra Ancite-Jepifánova, 'Beyond the "Hybrid Attack" Paradigm: EU-Belarus Border Crisis and the Erosion of Asylum Seeker Rights in Latvia, Lithuania and Poland' (2024) 35 Forum Transregionale Studien.

have been continuously prolonged and many of the measures implemented are still in place by the end of 2024.

The measures adopted were strongly criticised by several international organisations and NGOs that argued that their implementation effectively deprived people on the move from Belarus of the right to asylum enshrined in Art. 18 Charter.[11] With the normalisation of pushbacks and detention at the border, the EU-Belarus became a very dangerous area, with a total of 82 deaths counted until summer 2024.[12]

The Commission did not intervene to police the compliance of these measures with EU and international standards. Rather, it proposed a set of emergency measures mirroring the national measures already adopted through the emergency clause of Art 78(3) TFEU.[13] The measures were never adopted by the Council. Within two weeks, the Commission merged the measures initially labelled as temporary in a set of proposals composing a "more permanent toolbox to address future attempts" of instrumentalisation, institutionalising the emergency measures beyond the specific case of Belarus.[14] The

[11] See, inter alia: Commissioner for Human Rights, 'Latvian authorities should put an end to pushbacks and safeguard the human rights of people seeking protection at the border with Belarus' (6 February 2023), https://www.coe.int/en/web/commissioner/-/latvian-authorities-should-put-an-end-to-pushbacks-and-safeguard-the-human-rights-of-people-seeking-protection-at-the-border-with-belarus; ECRE, 'Seeking Refuge in Poland: A Fact-Finding Report on Access to Asylum and Reception Conditions for Asylum Seekers' (ECRE, April 2023); Amnesty International, 'Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned' (Amnesty International, June 2022).

[12] MSF - Médecins Sans Frontières, 'Poland-Belarus border crisis: "We don't want people to die in the forest"' (3 February 2022) https://www.msf.org/poland-belarus-border-crisis-we-don%E2%80%99t-want-people-die-forest; Norwegian Refugee Council, 'Poland: Urgent action needed for refugees trapped in Europe's 'death zone'' (10 July 2024) https://www.nrc.no/news/2024/july/poland-urgent-action-needed-for-refugees-trapped-in-europes-death-zone/#:~:text=82%20deaths%20related%20to%20the,crossing%20for%20refugees%20seeking%20protection.

[13] Communication a proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland [2021] COM/2021/752 final.

[14] Communication on Responding to state-sponsored instrumentalisation of migrants at the EU external border [2021] JOIN/2021/32 final, p. 1. The toolbox most notably introduces two new legal texts: a reform of the Schengen Borders Code (Proposal COM/2021/891 final for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2021]) and the Instrumentalisation Regulation (Proposal COM/2021/890 final for a Regulation of the

Instrumentalisation Regulation was composed of a list of derogations from core provisions of the CEAS.[15] Such derogations would allow Member States targeted by an instrumentalisation situation to: intensify border controls;[16] generally apply border procedures;[17] and *de-facto* systematically detain asylum seekers.[18] Like the Emergency Measures, the Instrumentalisation Regulation did not receive the avail of the Council, which then blocked the proposal in December 2022.[19]

The stalling of the Instrumentalisation Regulation did not mark the end of efforts toward its codification: most of its provisions were indeed incorporated in existing proposals being discussed in the framework of the negotiations on the New Pact. The measures on border controls were inserted in the Revised Schengen Borders Code (hereafter, Revised SBC), while the derogations concerning the registration of asylum applications and the application of border procedures were included in the Crisis and Force Majeure Regulation (hereafter, CFM Regulation).[20]

1.2 The Instrumentalisation Features of the New Pact

The CFM Regulation defines instrumentalisation as a crisis situation "where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals […] to the external borders or to a Member State, with the aim of destabilising the Union or a Member State,

European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum [2021]).

[15] Niovi Vavoula and Vasiliki Apatzidou, 'The EU Response to the Instrumentalisation of Migration: Towards Normalised Derogations, Intensified Border Surveillance and Flexible Responsibility?' in Luigi Lonardo (ed), *Addressing Hybrid Threats* (2024).

[16] Arts. 5 and 13 of Proposal COM/2021/891.

[17] Art. 2 of Proposal COM/2021/752 and at Art. 2(1) of Proposal COM/2021/890.

[18] The derogation allowing Member States to decide at their border or transit zones on the admissibility and the substance of all applications (Art. 2(2) COM/2021/752) implies the detention of applicants throughout the procedure. Such format is mirrored in Recital 8 and Art. 2(1)(b) of Proposal COM/2021/890.

[19] ECRE, 'No Majority for Instrumentalisation Regulation' (8 December 2022) https://ecre.org/ecre-reaction-no-majority-for-instrumentalisation-regulation/.

[20] Regulation 2016/399/EU on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1 (consolidated version); Regulation 2024/1359/EU addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L, 2024/1359.

and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security" (Art. 1(4)(b), CFM Regulation). The preamble excludes from instrumentalisation situations relating to "organised crime, in particular smuggling", and "[h]umanitarian assistance", when there is "no aim to destabilise the Union or a Member State" (Recitals 15 and 16, CFM Regulation).

Crises due to instrumentalisation and due to mass arrivals share the main features of the activation process and of the accessible measures, with some additional conditions.[21] To request the activation of measures under the CFM Regulation, a Member State facing an instrumentalisation situation must submit a reasoned request to the Commission, detailing how the situation endangers its essential functions. (Art. 2(2)(a)(ii), CFM Regulation). In its assessment, the Commission must evaluate the existence of a hostile instrumentalising actor; whether the Member State effectively demonstrated that the instrumentalisation actions have the aim of destabilising the Union or the Member State concerned; if there is an unexpected increase of asylum applications compared to the average number of applications; and if there are alternative measures that can be adopted under the AMMR Permanent EU Migration Support Toolbox.[22] In granting access to the emergency relief measures, the Council implementing decision must identify the third-country nationals or stateless persons subject to instrumentalisation (Art. 4(5)(c), CFM Regulation).

Looking at the relief measures accessible to the Member State facing an instrumentalisation situation, all the enhanced AMMR solidarity measures can be triggered (Arts. 8 and 9, CFM Regulation). However, the AMMR derogations on the take-back and take-charge responsibilities, especially the suspension of take-back obligations, are not available in instrumentalisation

[21] See Chapter 6.1.
[22] Regulation 2024/1351/EU on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L, 2024/1351, Art. 6(3).

situations. Member States can access the APR derogations concerning the extension of the registration period of asylum applications up to 4 weeks (Art. 10(1), CFM Regulation). They can also increase up to 18 weeks the maximum duration of border procedures – according to which asylum applications are examined at the border via an accelerated procedure and under the application of the "fiction of non-entry" (Art. 11(1), CFM Regulation).[23]

On border procedures, instrumentalisation situations differ from the other scenarios in the specific derogations governing their mandatory application. In crisis situations involving mass arrivals or force majeure, the 20% recognition rate criterion, which mandates the application of border procedures to individuals arriving from countries with low recognition rates, can be adjusted by either lowering or raising the threshold for the criterion's applicability. In instrumentalisation situations, Member States can solely be authorised to apply border procedures to the totality of asylum applications lodged by asylum seekers subject to instrumentalisation (Art. 11(6), CFM Regulation).[24]

Parallel to the CFM Regulation measures, Member States facing an instrumentalisation situation can also be allowed to "temporarily close, or limit the opening hours of, specific border crossing points" (Art. 5(4), Revised SBC). In doing so, they must take full account of the rights of persons enjoying the right of free movement; of third-country nationals who are long-term residents or who hold national long-stay visas, as well as of their respective family members; and of asylum seekers.[25]

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[23] For the rules governing asylum border procedures, see Chapter 5.2.2.1.

[24] As identified in the Council Implementing Decision at Art. 4(5)(c). Art. 11(7) prescribes the exclusion from the application of border procedures in instrumentalisation situations to "minors under the age of 12 and their family members, and persons with special procedural or special reception needs".

[25] The revised SBC contains other provisions which impact the agency of people on the move. Most notably, the Regulation introduces a fast-track return procedure allowing the immediate return (within 24 hours) of a third-country national apprehended "during checks involving the competent authorities of both Member States within the framework of bilateral cooperation" when "there are clear indications that [they have] arrived directly from another Member State" and they have "no right to stay on the territory of the Member State in which [they have] arrived" (Art. 23a, revised SBC). Such a procedure is in derogation of the Return Directive, which provides

The EU instrumentalisation approach, initially proposed as a standalone pillar of the EU migration management framework, has been incorporated into the EU crisis control mechanism as revised by the CFM Regulation. For a great part, the rules governing instrumentalisation situations are comparable to the ones covering crisis due to mass arrivals and force majeure situations. As such, they share the same criticalities and opportunities vis à vis solidarity and agency outlined in Chapter 6. However, the distinct elements underlying the codification of instrumentalisation, combined with the potential integration of measures targeting border crossing points and border procedures, introduce a new array of legal challenges.

1.3 Instrumentalisation Approach: Solidarity and Agency Implications

Like crises due to mass arrivals and force majeure situations, the main problem arising from the codification of instrumentalisation lies in its definition. In this case, the consequences of the definition are particularly significant, as the term is introduced for the first time in an EU legal text. The codification of the term is *per se* problematic. An instrumentalisation situation is not defined by objective criteria such as the scale and impact of a migration flow: Art. 1(4)(b) CFM Regulation does not specify the number of instrumentalised people whose movement to the EU external border might request the activation of emergency measures.[26] Rather, what qualifies a

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that Member States shall issue a return decision to any third-country national staying illegally on their territory (Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98, Art. 6(1)). The fast-track procedure does not apply to asylum seekers or beneficiaries of international protection. The revised Regulation also empowers explicitly Member States to "take the necessary measures to preserve security, law and order" when "a large number of migrants attempt to cross the external border in an unauthorised manner, en masse and using force" (Art. 5(3), Revised SBC). Lastly, the rules on the reintroduction of internal border checks and controls are modified, allowing for longer periods of legally authorised reintroduction of border controls (Art. 25, Revised SBC). For a detailed overview of the amendments introduced by the revised SBC, see: Steve Peers, 'Restoring the Borderless Schengen Area: Mission Impossible?' (SIEPS 2024).

[26] Interestingly, for an instrumentalisation situation to arise, it is not necessary for the instrumentalised people to cross the EU external border, but it is sufficient their movement *to* the border.

situation as instrumentalisation is the intention of a hostile actor who causes the migration movement to destabilise the Union. Instrumentalisation is thus more closely linked to the domains of security and external relations than to migration and asylum policies. The CFM Regulation nonetheless targets an instrumentalisation situation exclusively through migration control measures.

The definition of instrumentalisation is exceptionally broad, encompassing both state and non-state actors as instrumentalising agents, provided they are vaguely deemed "hostile". The exclusion of smuggling and humanitarian assistance from the definition is conditional upon their intention not to "destabilise the Union". Such a condition, combined with the absence of a clear definition of what constitutes "humanitarian assistance," could enable Member States to intensify the criminalisation of NGO-sponsored search and rescue operations, already in place in many frontline Member States.[27] Furthermore, the definition is silent on how to assess whether an actor is "encouraging" or "facilitating" the migration flows, leaving it open to the interpretation of the Member States.[28] Lastly, the definition is vague concerning the expected impact of instrumentalisation: the actions of a hostile actor must have the "aim" to destabilise the EU or a Member State and be "liable" for putting at risk the essential functions of a Member State. It is not required for the instrumentalisation situation to have a tangible impact: the likelihood of having such an impact is sufficient.

The vagueness of the definition of instrumentalisation, which is not linked to objective criteria such as the scale or intensity of a migration movement, renders instrumentalisation susceptible to politically charged

[27] Federico Alagna, 'The Continuation of Criminalization by Other Means: The Role of Judicial Agency in the Italian Policing of Humanitarian Assistance at Sea' (2024) 29 Mediterranean Politics 235.

[28] In the original definition of the Commission there was the reference to the "active" encouragement and facilitation, which would have given some guidance on how to assess actions liable to be instrumentalising a migration flow. See: Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders [2021]] COM/2021/891 final, Art. 2(27).

activations. Once triggered, instrumentalisation measures have dire consequences at the level of both agency and solidarity.

The combination of the APR and SBC derogations – available only under instrumentalisation situations – places obstacles to access to EU territory and asylum procedures by people on the move. The physical limitation on access to the territory of a specific group of third-country nationals – likely in need of protection – is a unicum in the EU legal framework. The SBC rules on border crossings incentivise Member States to strategically limit their entry points to a minimum, with the clear intent to frustrate the attempts of instrumentalised people to enter their territory and seek protection. There are questions concerning the compatibility of this provision with the obligation of Member States to ensure "effective" access to asylum as prescribed by Art. 18 Charter. The CJEU recently emphasised that effective access to asylum should be "as straightforward as possible," and that the requirement to apply for asylum at designated locations must not "in practice, prevent third-country nationals, or some of them, from lodging an application or from lodging one as soon as possible".[29]

The rules restricting legal access to asylum proceedings are similar to the ones governing other crisis situations under the CFM Regulation framework. However, the provision permitting the indiscriminate application of border procedures to 100% of instrumentalised asylum seekers exacerbates concerns about the expanding scope of such procedures. Particularly worrying is the normalisation of differential treatment based on non-subjective criteria, which will likely lead to diminished procedural guarantees.[30] The absolute exclusion of instrumentalised asylum seekers from standard procedures greatly endangers the effective assessment of their protection needs. Whilst Member States retain the discretion to redirect complex cases to standard procedures, asylum seekers have no agency in

[29] Case C-72/22 PPU, M*.A. v Valstybės sienos apsaugos tarnyba*, ECLI:EU:C:2022:505, paras 60, 65.
[30] See Chapter 6.7.

requesting the non-application of border procedures based on their individual circumstances. Furthermore, the EU law regime on the foresees only extremely limited vulnerability exceptions, i.e. age and family relations.[31]

In practice, instrumentalised asylum seekers will have restricted access to the EU at the border followed by a 4-week legal limbo to have their claim registered and then processed in a substandard asylum border procedure. Throughout these processes, asylum seekers' individual circumstances have no role in determining their inclusion or exclusion from the CFM Regulation derogations. It is only up to the Commission and the Council to decide who is considered an instrumentalised migrant, without the support of any EU Agency with migration expertise in the drafting process of the Council Implementing Decision (Art. 4, CFM Regulation). The practical and legal obstacles to access to asylum challenge the effective enjoyment of the right to asylum and the compliance with the principle of non-refoulement, as indicated in the European Parliament Substitute Impact Assessment.[32]

The derogations related to instrumentalisation dehumanise people on the move, framing their migration not as an exercise of personal agency, but rather as a "security threat" governed by third countries along migration routes. In framing migration flows as instrumental, the EU adopts a strategy of closure and defence, not taking into account any humanitarian purpose. Despite presenting migrants under instrumentalisation situations as agency-less victims at the disposal of hostile actors, the CFM Regulation and revised SBC target them with punitive provisions. Such an approach is contradictory: people on the move in an instrumentalisation situation are allegedly forced to cross the border by an instrumentalising hostile actor. Such a situation is

[31] Only minors under 12 and their family members are excluded from border procedures in instrumentalisation situations (Art. 11(7), CFM Regulation).
[32] Giuseppe Campesi 'Substitute Impact Assessment: Proposal for a Regulation Addressing Situations of Instrumentalisation in the Field of Migration and Asylum (European Parliament, October 2023), pp. 57-69. The impact assessment was commissioned by the European Parliament as the Commission did not attach one to the original proposal of the Instrumentalisation Regulation. Most of the provisions in the proposal was inserted in the CFM Regulation. Hence, the conclusions reached in the substitute impact assessment remain valid.

likely to put them in a vulnerable condition increasing, not decreasing, their protection needs. Nonetheless, the derogations introduced de facto obstruct their physical and legal access to the EU territory and asylum, making the recognition of their protection needs more complicated and with fewer chances of success.[33]

The derogations accessible to tackle instrumentalisation situations – especially the application of border procedures to 100% of instrumentalised applicants – are motivated by the need to "prevent a third country or a hostile non-state actor from targeting specific nationalities or specific categories of third-country nationals or stateless persons" (Recital 49, CFM Regulation). The EU instrumentalisation strategy therefore aims to deter hostile actors from instrumentalising migration flows to destabilise the Union. However, no provision explicitly sanctions the conduct of such actors, nor is it clarified how the expansion of border procedures' scope would effectively deter hostile actors from instrumentalising migration flows.[34] There is therefore a misalignment between the problem and the actions taken to address it, questioning the adherence of the CFM Regulation with the general principle of necessity.

On the contrary, it can be argued that the derogations envisaged in the CFM Regulation and revised SBC will negatively impact the fundamental rights of instrumentalised people on the move. Both legal texts include safeguards to ensure the respect of fundamental rights in instrumentalisation situations.[35] Therefore, the derogations in place do not amount to an authorisation of pushbacks or a suspension of the right to asylum. Nonetheless, the practice adopted in the past years by many Member States facing self-declared instrumentalisation threats – together with the fact that

[33] Ibid., p. 60.
[34] Ibid., p. 100.
[35] The CFM "respects the fundamental rights of third-country nationals and stateless persons and observes the principles recognised by […] Charter" (Recital 8). The revised SBC is "without prejudice" to the rights of refugees and asylum-seekers. It requires Member States to act in "full compliance" with the EU Charter, the Refugee Convention, and "obligations related to access to international protection" (Arts. 3 and 4).

the Commission did not react to uphold compliance with EU law – cast a shadow over the effective compliance of the future EU-availed derogations with fundamental rights.[36]

From a solidarity perspective, the instrumentalisation approach significantly exacerbates the crisis of solidarity and contributes to the securitisation of migration through the process of "crisification". Initially, the proposed emergency measures were heralded as a "living manifestation of solidarity" against efforts to undermine the EU.[37] Similarly, the Commission framed the instrumentalisation toolbox, later codified in the CFM Regulation, as a means to reinforce the "collective strength and solidarity of the EU working as a whole," highlighting the "EU's added value in border and migration management".[38] However, the type of "full solidarity" extended to affected Member States amounts to little more than a reinforced blind-eye policy.[39] Instead of equipping Member States with tools to foster cooperation, the Commission has provided them with the legal basis to stretch the boundaries of EU migration and asylum law to achieve a singular objective: preventing the arrival of migrants. Consequently, actions that were deemed breaches of EU law before the New Pact are now rebranded as part of a "derogation regime," designed to enforce a non-entry policy in vaguely defined instrumentalisation situations.

The codification of instrumentalisation further endangers the "sharing of norms" at the heart of the solidarity principle governing the EU asylum policy. EU institutions strive to ensure Member States' compliance with the new rules by empowering them to derogate from key provisions governing the functioning of asylum procedures. The law-by-derogation modus operandi not only weakens

[36] See paragraph 1.1. Ganty, Ancite-Jepifánova and Kochenov (n 10); Ancite-Jepifánova (n 10).
[37] European Commission, 'Asylum and return: Commission proposes temporary legal and practical measures to address the emergency situation at the EU's external border with Belarus' (1 December 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6447.
[38] Communication Responding to state-sponsored instrumentalisation of migrants at the EU external border [2021] JOIN(2021) 32 final, p. 3.
[39] Such a form of solidarity was outlined in Chapter 6.6.

the homogeneity of the EU legal *acquis*, but it is also likely to fail in pursuing national compliance with EU (lowered) standards.

The practical reality at the EU-Belarus border following the adoption of the instrumentalisation strategy calls into question its effectiveness in both reducing arrivals and ensuring Member States' compliance with EU law. After a decrease in arrivals in 2022-2023, the number of irregular border crossings exponentially increased during 2024. Between January and September 2024, over 15 000 crossings were detected, a 195% increase from 2023 (1 611).[40] Such an increase happened regardless of the emergency measures adopted by bordering Member States: in particular, many of the exceptional measures adopted by Latvia, Lithuania and Poland are still in place despite the clashes with EU rules on asylum identified by scholars and the CJEU.[41]

In the meantime, Member States along the Eastern land border have implemented even more drastic measures, outlined below, facing no tangible repercussions from the Commission. Since autumn 2023, Finland has been targeted by increased arrivals from Russia.[42] The Finnish government adopted legislation to stop the inflow labelled as an instrumentalisation situation.[43] The law restricts the reception of asylum applications at the border and empowers border guards to refuse to register asylum applications made at the border and

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[40] Frontex, 'EU external borders: irregular border crossings drop 43% in first 10 months of 2024' (8 November 2024), https://www.frontex.europa.eu/media-centre/news/news-release/eu-external-borders-detections-down-42-in-first-9-months-of-2024-xETgIg. The increase is particularly noticeable once compared with the EU-wide trend, which saw a decrease of 43% of detections.

[41] In the *M.A.* case, The CJEU ruled that Lithuania's legislation, which prevented irregular migrants from lodging asylum applications and subjected them to systematic detention during times of "migrant influxes," violated EU law. Case C-72/22 PPU, M.A. v Valstybės sienos apsaugos tarnyba, EU:C:2022:505. Ganty, Ancite-Jepifánova and Kochenov (n 14); Ancite-Jepifánova (n 14); Artem Graban, 'Instrumentalisation of Fear and Securitisation of "Eastern Borders Route": The Case of Poland-Belarus "Border Crisis"' (2024) 33 European Security 236.

[42] The increase is only in relative numbers, given the little absolute number of arrivals: around 1 300 people crossed the border between fall 2023 and spring 2024. EU News, 'Finland's alarm: Russia piles migrants along the border' (4 March 2024), https://www.eunews.it/en/2024/03/04/finlands-alarm-russia-piles-migrants-along-the-border/.

[43] Finnish Government, 'Finland enacts legislation to combat instrumentalised migration' (16 July 2024), https://valtioneuvosto.fi/en/-/1410869/finland-enacts-legislation-to-combat-instrumentalised-migration.

to return people to Russia.[44] Furthermore, the government repeatedly announced the closure of all border crossings with Russia.[45] In October 2024, the government proposed amendments to the Aliens Act, which increase the maximum duration of detention preceding deportation (18 months rather than the current 12) and a ten-year extension to the maximum duration of temporary entry bans (15 years rather than 5).[46] Despite the likely clashes of the Finnish legislation with the EU asylum acquis, also here there was no reaction from the Commission.

Concurrently, the change in government in Poland, marked by the victory of Donald Tusk's pro-European platform, did not result in any shift in its migration policy at the Belarus border. Quite the contrary: during the summer 2024, the "no-go" zone at the border was reintroduced, militarising the border and preventing non-authorised people from entering.[47] Even more jarringly, on 15 October 2024 the Polish government temporarily suspended

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[44] Amnesty International, Finland: Emergency law on migration inconsistent with EU law and must be "rigorously scrutinized" (12 July 2024), https://www.amnesty.org/en/latest/press-release/2024/07/finland-emergency-law-on-migration-inconsistent-with-eu-law-and-must-be-rigorously-scrutinized/; ECRE, 'EU EASTERN BORDERS: Significant Increase in Arrivals via EU Eastern Borders Despite Overall Decrease in EU — Finland Adopts Controversial 'Pushback' Law — Asylum Seekers File Lawsuit Against Lithuania for Unlawful Detention — NGO Calls for Urgent Action to Help People Trapped in 'Death Zone' Along Poland-Belarus Border — Poland Asks France and Germany for Support to Secure Belarus Border' (19 July 2024), https://ecre.org/eu-eastern-borders-significant-increase-in-arrivals-via-eu-eastern-borders-despite-overall-decrease-in-eu-%E2%80%95-finland-adopts-controversial-pushback-law-%E2%80%95-asylum-seeker/; Commissioner for Human Rights, 'Finland should reject the draft law on instrumentalisation of migration, protect access to asylum and prevent summary expulsions' (11 June 2024), https://www.coe.int/en/web/commissioner/-/finland-should-reject-the-draft-law-on-instrumentalisation-of-migration-protect-access-to-asylum-and-prevent-summary-expulsions.

[45] Pekka Pohjankoski, 'A Borderline Case: When National Security and the Right to Asylum Conflict' (*Verfassungsblog*, 1 December 2023).

[46] ECRE, 'EU EASTERN BORDERS: Significant increase in irregular crossings on eastern borders — Finland plans stricter rules on detention and entry bans— More ECtHR rulings related to Hungarian transit zones — Poland unveils new migration strategy, including 'temporary' suspension of asylum rights' (17 October 2024), https://ecre.org/eu-eastern-borders-significant-increase-in-irregular-crossings-on-eastern-borders-%E2%80%95-finland-plans-stricter-rules-on-detention-and-entry-bans%E2%80%95-more-ecthr-rulings-related-to-hungarian-t/.

[47] Infomigrants, 'Poland to redeploy no-go buffer zone at Belarus border' (11 June 2024), https://www.infomigrants.net/fr/post/57663/poland-to-redeploy-nogo-buffer-zone-at-belarus-border. The "no-go" zone was prorogated for 90 days in September. Reuters, 'Poland to extend no-go zone on Belarus border for 90 days' (10 September 2024), https://www.reuters.com/world/europe/poland-extend-no-go-zone-belarus-border-90-days-2024-09-10/.

the right to asylum in the country, quoting once again the need to oppose the instrumentalisation of migration flows.[48] Despite the evident limitation of Art. 18 Charter, which might deprive the right to asylum of its essence, the Polish strategy was supported by the European Council which stated that "exceptional situations require appropriate measures".[49]

Building upon the statement of the European Council, on 11 December 2024 the Commission published a Communication issuing guidelines "on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders".[50] In the Communication, the Commission recalls the wide range of operational and legislative support provided in the past years to sustain Member States facing instrumentalisation, including the CFM Regulation whose implementation is presented as a priority.[51]

Nonetheless, the Commission recognised that "in view of hybrid threats posed by hostile States, putting at risk the security and territorial integrity of the Member States, and the maintenance of law and order, Member States may adopt exceptional measures to defend themselves against external threats." Such exceptional measures are deemed compliant with EU law as they are adopted under the Member States' duty to uphold law and order and

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[48] ECRE, 'EU EASTERN BORDERS: Significant increase in irregular crossings on eastern borders — Finland plans stricter rules on detention and entry bans— More ECtHR rulings related to Hungarian transit zones — Poland unveils new migration strategy, including 'temporary' suspension of asylum rights' (17 October 2024), https://ecre.org/eu-eastern-borders-significant-increase-in-irregular-crossings-on-eastern-borders-%E2%80%95-finland-plans-stricter-rules-on-detention-and-entry-bans%E2%80%95-more-ecthr-rulings-related-to-hungarian-t/; Polish Government, 'Uchwała w sprawie przyjęcia dokumentu „Odzyskać kontrolę. Zapewnić bezpieczeństwo. Kompleksowa i odpowiedzialna strategia migracyjna Polski na lata 2025-2030"' (15 October 2024), https://www.gov.pl/web/premier/uchwala-w-sprawie-przyjecia-dokumentu-odzyskac-kontrole-zapewnic-bezpieczenstwo-kompleksowa-i-odpowiedzialna-strategia-migracyjna-polski-na-lata-2025-2030.

[49] European Council, European Council meeting (17 October 2024) – Conclusions [2024] EUCO 25/24.

[50] Communication on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders [2024] COM(2024) 570 final.

[51] Such measures include the Action Plan against Smuggling; the revised SBC; the Digital Services Act, with its provisions against disinformation; the support by EU agencies and the financial support; and the framework for restrictive measures in response to Russia's destabilizing actions abroad.

protect national security. (Art. 4(2) TEU). To fulfil this duty, Member States can adopt derogations to EU secondary legislation in the Area of Freedom, Security and Justice (Art. 72 TFEU). The Commission hence greenlights autonomous national derogations to EU law, provided that they are proportional, necessary and temporary.

The Communication represents an unprecedented concession by the Commission, allowing Member States to autonomously derogate from the right to asylum on national security grounds, which may be invoked in instrumentalisation situations. The Commission relies on Art. 52(1) Charter as the legal basis allowing limitations of fundamental rights. Furthermore, it quotes the Council Decision on restrictive measures targeting disinformation campaigns sponsored by Russian media as a precedent concerning the limitation of the right to expression to counter hybrid threats posed by Russia.[52] Lastly, the Commission considers the derogations – if respecting its guidelines – to comply with the ECtHR caselaw, which recognises that certain exceptional situations impact the interpretation of the rights under the ECHR.[53]

The Communication recognises an existing reality: a *carte blanche* situation allowing Member States to take any measure they consider relevant to counter self-assessed instrumentalisation situations. Member States are empowered via Art. 72 TFEU to independently implement derogations, without undergoing the procedure and scope limitations prescribed by the CFM Regulation. In light of this, the necessity of the CFM Regulation provisions targeting instrumentalisation is highly questionable.

It is however questionable whether the interpretation of the Commission is compatible with the Court's interpretation of Art. 72 TFEU. In

[52] Council Decision 2022/351/CFSP amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 65/5.
[53] ECtHR, *N.D and N.T. v Spain*, Judgment of 13 February 2020, Applications nos. 8675/15 and 8697/15, para 231; ECtHR, *A.A. and Others v North Macedonia*, Judgment of 5 April 2022, 2022, Applications nos. 55798/16 and 4 others, para. 123.

the recent *M.A.* case, the Court ruled that Lithuanian measures adopted in the context of instrumentalisation, specifically the application of derogations under Art. 72 TFEU, were incompatible with Art. 18 Charter if they effectively denied asylum seekers access to asylum procedures.[54] The Court ruled out the application of derogations adopted in light of Art. 72 TFEU if they effectively deprive asylum seekers of the opportunity to access asylum procedures. According to the Court, the derogations were unnecessary, given the existence of border procedures that "enable the Member States to carry out, at the European Union's external borders, their responsibilities with regard to the maintenance of public order and the safeguarding of internal security, without it being necessary to rely on a derogation under Art. 72 TFEU".[55] In other words, the CJEU considered the EU framework already equipped with adequate mechanisms to respond to the challenges at the EU-Belarus border without the need to have recourse to the derogations contained in Art. 72 TFEU. Border procedures are already in place under the Asylum Procedures Directive, preceding the adoption of the reforms contained in the New Pact.[56] The new APR broadens the scope of border procedures, while the CFM Regulation facilitates their extended application in crisis situations, including instances of instrumentalisation. It can therefore be argued that the adoption of new provisions enhancing the use of border procedures makes Art. 72 TFEU derogations even less necessary.

The Commission's complicity regarding national measures countering instrumentalisation serves as a clear warning of the risks associated with the codification of derogations in EU law: derogations further normalise an approach of continuous exception to the rule of law. The instrumentalisation approach demonstrates how the crisification of migration management, once initiated, can become a never-ending vicious process. The proliferation of instrumentalisation phenomena at the EU external borders is a reality and an

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[54] Case C-72/22 PPU, M.*A. v Valstybės sienos apsaugos tarnyba*, EU:C:2022:505, para 63.
[55] Ibid., para. 74.
[56] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180-60, Art. 43. See Chapter 5.2.1.

understandable concern. At the same time, a legitimate concern cannot be addressed by legislative measures unnecessarily and unproportionally derogating from EU standards and restricting asylum seekers' rights and agency.[57] Even if labelled as instrumentalised, people on the move enjoy the right to seek asylum in the EU: Without the effective implementation of the (weak) procedural safeguards outlined in the revised SBC and CFM Regulations, and the rigorous enforcement of EU law standards on national derogations, some could argue that the instrumentalisation approach fails to comply with the right to asylum enshrined in Art. 18 Charter.

2 Ukrainian Temporary Protection Scheme

The (relative) surge of arrivals from Belarus in 2021 tested the resilience of the EU asylum policy and deeply influenced the negotiation process of the New Pact. Two months after the proposal of the "instrumentalisation toolbox", the same Eastern land border was targeted by a much more impactful migration flow following the Russian full-scale invasion of Ukraine.

The war in Ukraine has led to the biggest and fastest growing inflow of persons escaping violence in Europe since the Second World War: as of November 2024, more than 42 million border crossings from Ukraine were detected since 24 February 2022.[58] The migration flow was extremely consistent and sudden: during the first month of the war, over 3,6 million persons were forced to flee Ukraine.[59] Currently, over 6.2 million people who fled from Ukraine are recorded in Europe.[60] By comparison, in all of 2015 – the peak of the

[57] Iris Goldner Lang, 'Instrumentalisation of Migrants: It Is Necessary to Act, but How?' (*EU Immigration and Asylum Law and Policy*, 15 October 2024).
[58] UNHCR, 'Ukraine Refugee Situation', https://data.unhcr.org/en/situations/ukraine.
[59] UNHCR, 'Ukraine Situation Flash Update #5' (24 March 2022), https://data.unhcr.org/en/documents/details/91589.
[60] The data include all European countries, not only EU Member States. UNHCR, 'Ukraine Refugee Situation', https://data.unhcr.org/en/situations/ukraine.

"migration crisis" – the number of border crossings along all the Mediterranean routes totalled 1 million.[61]

Faced with the unprecedented scale of the Ukrainian humanitarian crisis, EU leaders managed to swiftly and cohesively react. In the span of a week after the beginning of the war in Ukraine, the EU agreed to award temporary protection to refugees entering its territory.

The temporary protection regime is not an exclusive tool of the CEAS. While the 1951 Geneva Convention provides for the definition of refugee status, it does not address large-scale movements of people fleeing conflicts.[62] To ensure protection for people escaping from generalised violence in their country of origin, States increasingly introduced in their national legislation "temporary refuge provisions".[63] Contrary to international protection, temporary protection is a group-based immediate protection set up in crisis situations. It aims to provide fast assistance to individuals in need while preventing the overwhelming of a State's asylum system with a high volume of applications.[64] For a long time addressed exclusively in national legislation, during the 1990s Balkan wars temporary protection was recognised by the United Nations High Commissioner for Refugees (UNHCR) as a "flexible and pragmatic mean of affording needed protection to large numbers of people fleeing human rights abuses and armed conflict in their country of origin, who might otherwise have overwhelmed asylum procedures".[65]

Precisely during the Balkan Wars, many Member States introduced national practices concerning temporary protection, without a proper common

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[61] Council of the European Union, infographic - Irregular arrivals to the EU (2008-2024)' https://www.consilium.europa.eu/en/infographics/irregular-arrivals-since-2008/.
[62] United Nations, Convention relating to the Status of Refugees [1951] and Protocol Relating to the Status of Refugees [1967].
[63] Karoline Kerber, 'Temporary Protection in the European Union: A Chronology' (1999) 14 Georgetown Immigration Law Journal 35.
[64] Meltem Ineli-Ciger, 'The Legal Basis of Temporary Protection in International Law', *Temporary Protection in Law and Practice* (Brill 2017).
[65] UNHCR, Note on International Protection, UNHCR, 44th Sess. (1993) U.N. Doc. A/AC.96/815, para. 25; UNHCR, Note on International Protection, 45th Sess. (1994), U.N. Doc. A/AC.96/830, para. 45. For a chronology on the emergence of temporary protection, see: Kerber (n 63).

approach. During the 1999 Kosovar crisis, the need for a coordinated EU effort to harmonise national temporary protection schemes became evident. Without any coordination nor responsibility sharing among Member States, displaced persons from the Balkans entered, settled, and circulated in the EU with different legal statuses, entitled to different sets of rights and guarantees.[66] Building on the challenges encountered and the enhanced competencies conferred by the Amsterdam Treaty, the EU adopted the Temporary Protection Directive in 2001 (hereafter, TPD).[67] It was the first legislative instrument in the field of asylum to ever be approved at EU level and remains the oldest piece of legislation in the field still in force today.

2.1 Temporary Protection Directive: Content and Previous Non-Application

The TPD can be activated "in the event of a mass influx of displaced persons" (Art. 1, TPD). Mass influx is "a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme" (Art. 2(d), TPD). It is up to the Council, on a proposal from the Commission, to evaluate the existence of such mass influx and activate temporary protection (Art. 5(1), TPD).[68] The Parliament is not involved in the procedure but must be informed (Art. 5(5), TPD). Temporary protection may last for a maximum of one year and can be extended in six-month increments for an additional year. A final one-year extension may be granted if the circumstances justifying temporary protection persist (Art. 4, TPD).

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[66] Morten Kjaerum, 'Temporary Protection in Europe in the 1990s' (1994) 6 International Journal of Refugee Law 444.

[67] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

[68] A Member State can also submit a proposal directly to the Council (Art. 5(1), TPD). Upon activation, the Council must outline the specific groups to which temporary protection applies and its duration (Art. 5(3), TPD).

Upon activation, temporary protection entails a set of minimum rights detailed in Chapter III, including access to work, accommodation, social assistance, healthcare, and education. Temporary protection is without prejudice to access to asylum. Nonetheless, Member States might decide to postpone the analysis of the claims lodged by beneficiaries of temporary protection to the end of the protection period (Art. 17, TPD). Once temporary protection ends, Member States are tasked to process the pending asylum applications and to return former beneficiaries (Chapter III, TPD).

Lastly, the TPD devotes a chapter to solidarity, stating that "the Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity" (Art. 25(1), TPD). Such solidarity is realised through the establishment of national reception capacities, beyond which the Council may recommend additional support (Art. 25, TPD). In addition, Art. 26 prescribes the possibility for transfers of beneficiaries of temporary protection from one Member State to another, upon the consent of the person to be transferred.

The TPD pursues two complementary objectives: one, "to establish minimum standards for giving temporary protection"; two, "to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons" (Art. 1 TPD). The first objective is a standard application of the soft harmonisation approach adopted under the Amsterdam regime in the asylum field. Member States are given a set of guidelines on how to implement temporary protection and can provide for more generous treatment. The second objective should be achieved in a "spirit of solidarity" which should govern the TPD and might be concretised via relocations. Such a pragmatic conceptualisation of solidarity remained a unicum in the CEAS until the adoption of the AMMR solidarity mechanism. Even more interestingly, this embryo of solidarity relocation is compliant with beneficiaries' agency: people to be transferred must consent to the relocation for the procedure to take place. What underpins the innovative TPD solidarity framework is the fundamental condition for the granting of the status: the return

of temporary beneficiaries as soon as the situation in their country of origin is stabilised. Return is framed as the sole possible outcome upon the expiration of temporary protection.[69] The TPD indeed explicitly precludes its conversion into a permanent residence permit and excludes any integration measures.[70]

The EU temporary protection regime is a synthesis between solidarity and agency: on one side, Member States are relieved from the pressure to process asylum applications individually and have their asylum systems overwhelmed. The TPD also conceives a model of solidaristic aid – in the form of "additional support" or potential relocation – to Member States facing an influx of beneficiaries of temporary protection which exceeds their fair share. On the other side, refugees are empowered to enter the EU territory and obtain immediate protection. If targeted by a solidaristic relocation measure, they take part in it only if they provide explicit consent, hence avoiding transfers in breach with their agency.

Despite (or maybe exactly because of) its potential, the TPD was never activated before 2022: The vague definition of the concept of "mass influx", coupled with the (in principle) long and complex activation procedures were considered its main weaknesses. Consequently, the Directive was deemed obsolete and not fitting the current migratory challenges.[71] Ultimately, in the New Pact on Migration and Asylum, the Commission considered the TPD to "no longer respond to Member States' current reality and needs" and proposed to

[69] While asylum functions without prejudice to the TPD, it is conceived as an alternative to temporary protection rather than its continuation.
[70] Meltem Ineli-Ciger, 'Eu Temporary Protection Directive', *Temporary Protection in Law and Practice* (Brill Nijhoff 2017); Achilles Skordas, 'Temporary Protection Directive 2001/55/EC' in Daniel Thym (ed), *EU Immigration and Asylum Law* (Nomos Verlagsgesellschaft mbH & Co KG 2016); Karoline Kerber, 'The Temporary Protection Directive' (2002) 4 European Journal of Migration and Law 193.
[71] Meltem Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean' [2015] Seeking Asylum in the European Union 223; H Deniz Genç and N Aslı ŞİRİN Öner, 'Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union' (2019) 7 International Journal of Political Science and Urban Studies 1.

repeal and substitute it with a more limited emergency mechanism to grant "immediate protection" in crisis situations.[72]

The 2022 Ukrainian humanitarian crisis disproved the scepticism, highlighting the lack of political will from the Commission and the Council as the primary obstacle to activating the TPD. The protection-driven political consensus is in stark contrast with the instrumentalisation approach adopted during and after the 2021 Belarus crisis.

2.2 Temporary Protection Directive: Activation and Functioning in the Ukrainian Context

On 2 March 2024, exactly one week after the beginning of the Russian full-scale invasion of Ukraine, the Commission published the proposal for the activation of the TPD (hereafter, TPD Activation Proposal).[73] The Commission considered temporary protection "the most appropriate instrument in the current situation […] given the extraordinary and exceptional nature of the military invasion of Ukraine by the Russian Federation and the scale of the mass influx" (Recital 14, TPD Activation Proposal). According to the Commission, the number of displaced people arriving in the EU qualified as a "mass influx" according to the TPD (Recitals 5-7, TPD Activation Proposal).[74]

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[72] Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum [2020] COM/2020/613 final, Exploratory Memorandum p. 10; Chapter V. For an outline of immediate protection, see: Meltem Ineli-Ciger, 'Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?' in Daniel Thym (ed), *Reforming the Common European Asylum System* (Nomos Verlagsgesellschaft mbH & Co KG 2022); Rossana Palladino, 'The "Immediate Protection" Status under the New Pact on Migration and Asylum: Some Remarks' (2021) 6 Journal of Mediterranean Knowledge (ISSN 2499-930X) 361.

[73] Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection [2022] COM/2022/91 final.

[74] The text stresses that "as of 1 March, more than 650 000 displaced persons had arrived in the European Union through Poland, Slovakia, Hungary and Romania. These numbers are expected to increase even more" (Recital 5, COM/2022/91 final). The Commission reinforces the argument on the existence of a mass influx by forecasting that "the Union is likely to be faced with a very large number of displaced persons, potentially between 2.5 million and 6.5 million as a consequence of the armed conflict, of which it is anticipated that between 1.2 and 3.2 million would be persons seeking international protection" (Recital 7, COM/2022/91 final).

It took only two days for the Member States to unanimously agree on a Council Implementing Decision activating the TPD (hereafter, TPD Implementing Decision).[75] The Council established the existence of a mass influx of displaced persons coming from Ukraine and defined the personal scope of the temporary protection awarded (Arts. 1 and 2, TPD Implementing Decision).

To qualify for temporary protection, a person must have fled Ukraine on or after 24 February 2022, Those who escaped from Ukraine after that date are entitled to temporary protection if: (a) they are Ukrainian nationals residing in Ukraine before 24 February 2022; (b) they are beneficiaries of international protection or equivalent national protection in Ukraine before 24 February 2022; and, (c) family members of the persons referred to in points (a) and (b) (Art. 2(1), TPD Implementing Decision).[76] The category of non-Ukrainians who are entitled to temporary protection is broadened to include also third-country nationals "who can prove that they were legally residing in Ukraine before 24 February 2022 […] and who are unable to return in safe and durable conditions to their country or region of origin". This latter category can be awarded protection either according to the TPD or to national law if it awards adequate protection (Art. 2(2), TPD Implementing Decision).

The TPD Implementing Decision stresses that "Member States may also extend temporary protection to additional categories of displaced persons above and beyond those to whom this Decision applies". Member States are "encouraged to consider extending temporary protection to those persons who fled Ukraine not long before 24 February 2022 as tensions increased or who found themselves in the territory of the Union (e.g. on holidays or for work

[75] Council Implementing Decision 2022/382/EU establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71/1, Article 1.
[76] The persons considered to be part of a family are: the spouse, or unmarried partner in a stable relationship; the minor unmarried children (either biological or adopted); other close relatives who lived together as part of the family and who were wholly or mainly dependent on the beneficiary of temporary protection. A common criterion concerning family members is for the family to be already present and residing in Ukraine before 24 February 2022. (Art. 2(4), TPD Implementing Decision).

reasons) just before that date and who, as a result of the armed conflict, cannot return to Ukraine" (Recital 14, TPD Implementing Decision). Any third-country national fleeing Ukraine – regardless their status – "should in any event be admitted into the Union on humanitarian grounds without requiring, in particular, possession of a valid visa or sufficient means of subsistence or valid travel documents, to ensure safe passage with a view to returning to their country or region of origin" (Recital 13, TPD Implementing Decision).

Temporary protection entered into force on 4 March 2022 and was automatically extended by one year until 4 March 2024. Acknowledging that "the situation in Ukraine does not allow for [the] return to Ukraine under safe and durable conditions", temporary protection was prolonged until 4 March 2025 on the proposal of the Commission and agreement of the Council.[77] As the deadline for the expiration of temporary protection envisaged under the TPD approached, the Commission decided to propose a further continuation of its duration until 4 March 2026.[78]

The Commission did not consider the three-year hard deadline for the duration of temporary protection as binding. The Explanatory Memorandum broadly individuates Art. 4(2) TPD as the legal basis for the extension, which allows for a yearlong extension "where reasons for temporary protection persist". According to the Commission, "the current uncertainty and volatility in Ukraine show that there is no clear solution in sight for the beneficiaries of temporary protection currently present in the EU Member States".[79] Therefore, the extension is necessary regardless of the time limits imposed by the TPD for two reasons: one, Ukrainian refugees "still need to be protected within the Union"; two, "the risk to the efficient operation of the national asylum systems remains were temporary protection to cease soon and all these persons to

[77] Proposal for a Council Implementing Decision extending temporary protection as introduced by Implementing Decision (EU) 2022/382 [2023] COM/2023/546 final; Council Implementing Decision 2023/2409/EU extending temporary protection as introduced by Implementing Decision (EU) 2022/382 [2023] OJ L, 2023/2409.
[78] Proposal for a Council Implementing Decision extending temporary protection as introduced by Implementing Decision (EU) 2022/382 [2024] COM/2024/253 final.
[79] Ibid., Explanatory Memorandum.

request international protection at the same time".[80] Agreeing with the Commission's assessment, in June 2024 the Council adopted an Implementing Decision extending the validity of temporary protection until 4 March 2026 (hereafter, 2026 Extension Decision).[81]

As of 31 October 2024, 4.2 million persons fleeing Ukraine have been awarded temporary protection status in EU countries.[82] The Member States hosting the highest number of beneficiaries of temporary protection are Germany (1 140 million, 27,2% total) and Poland (984 thousand, 23,4% total). The highest number of persons under temporary protection in relation to the population is registered in Czechia (34.8 per 1 000 people), Poland (26.9 per 1 000 people) and Estonia (25.3 per 1 000 people), with the EU average being 9.3 per 1 000 people.[83]

The very high number of beneficiaries of temporary protection registered in the EU is a testament to the success of the instrument in providing immediate protection to persons with evident needs. At the same time, the relatively low number of asylum applications lodged by persons displaced by Ukraine (53 000, as of June 2024) prevented Member States' asylum systems from being overwhelmed.[84] The Ukrainian Temporary Protection scheme is a unicum within the landscape of EU asylum policies, demonstrating the existence of secondary law provisions designed to prevent the emergence of "migration crises" while benefiting both refugees and Member States

[80] Ibid., Explanatory Memorandum. These reasons are also encapsulated in Recitals 8 and 9 of the Proposal and Council Implementing Decision.
[81] Council Implementing Decision 2024/1836/EU extending temporary protection as introduced by Implementing Decision (EU) 2022/382 [2024] OJ L, 2024/1836.
[82] Eurostat, 'Temporary protection for persons fleeing Ukraine - monthly statistics' (3 December 2024), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary_protection_for_persons_fleeing_Ukraine_-_monthly_statistics#Source_data_for_tables_and_graphs.
[83] Ibid.
[84] Proposal for a Council Implementing Decision extending temporary protection as introduced by Implementing Decision (EU) 2022/382 [2024] COM/2024/253 final, Explanatory Memorandum.

2.3 Ukrainian Temporary Protection Scheme: Solidarity and Agency Implications

For the first time since the 2015 "migration crisis", the EU resorted to the tools provided by the CEAS to address a migration-related emergency, instead of introducing *ad hoc* solutions or derogation regimes. The main reason behind the activation of the TPD is the consensus among Member States over its necessity, which led to the political will to swiftly adopt the TPD Implementing Decision. There are many reasons behind such a consensus being formed in this specific context: the unprecedented scale of the migration inflow; the geographical proximity of Ukraine, directly bordering with the EU; the cultural heritage and whiteness of Ukrainians, similar to the European heritage and hence perceived as "less diverse"; the contextualisation of the TPD as part of the overall EU strategy to support Ukraine in opposing Russia's aggression.[85]

The EU capitalised on the special relationship between the EU and Ukraine before the war and implemented highly flexible rules at the EU-Ukraine borders to facilitate border crossings.[86] As a result, the Ukrainian temporary protection scheme successfully prevented the humanitarian crisis resulting from the war in Ukraine from escalating into a migration crisis.

The EU response to the Ukrainian crisis is deeply rooted in the principle of solidarity, which targets not only Member States but beneficiaries of temporary protection as well. The TPD is designed as a mechanism benefitting displaced persons "on the basis of solidarity between Member States".[87] Consequently, the "spirit of Community solidarity" is the guiding principle binding the Member States in activating the mechanism.

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[85] Meltem Ineli-Ciger, 'Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards' in Sergio Carrera and Meltem Ineli-Ciger (eds), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (2023).
[86] Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders [2022] OJ C 104I/1.
[87] European Council, Presidency Conclusions, Tampere European Council [1999].

Under the Ukrainian temporary protection scheme, the spirit of solidarity supports Member States in all the domains of solidarity individuated in Chapter 1 (sharing of norms, funds, people and operations). Concerning the sharing of norms, the TPD ensures the issuance of a common status for Ukrainian refugees according to common rules. In addition, shortly after the adoption of the TPD, the Commission published a 10-point plan announcing a set of measures to strengthen the European coordination on welcoming people fleeing the war from Ukraine.[88] On its basis, an EU platform was launched to support Member States in the registration of temporary protection beneficiaries and to exchange information.[89]

Furthermore, financial and operational solidarity measures were enacted. Civil protection support and financial aid of around €17 billion were mobilised to ensure that Member States had sufficient resources to meet the growing needs for housing, education and healthcare for refugees.[90] In addition, the EU agencies tackling migration issues, Frontex and the European Agency for Asylum (EUAA), have been directly involved in supporting the Member States facing the humanitarian crisis, deploying personnel, monitoring border areas and offering operational support and training.[91] Furthermore, the Solidarity Platform, established to facilitate cooperation among national authorities and relevant

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[88] Commission, The 10-Point Plan For stronger European coordination on welcoming people fleeing the war from Ukraine [2022] https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en.

[89] Commission, 'Solidarity with Ukraine: Commission launches an EU platform for registration of people enjoying temporary protection or adequate protection under national law' (31 March 2022), https://neighbourhood-enlargement.ec.europa.eu/news/solidarity-ukraine-commission-launches-eu-platform-registration-people-enjoying-temporary-protection-2022-05-31_en.

[90] For more detailed information, see: Council, 'How the EU helps refugees from Ukraine' (2024), https://www.consilium.europa.eu/en/policies/refugee-inflow-from-ukraine/.

[91] Frontex, 'Ukraine: Frontex support to Member States' (4 May 2022), https://frontex.europa.eu/media-centre/news/news-release/ukraine-frontex-support-to-member-states-PAEQqq; Frontex, 'Frontex and EUAM Ukraine strengthen cooperation' (19 February 2024), https://www.frontex.europa.eu/media-centre/news/news-release/frontex-and-euam-ukraine-strengthen-cooperation-b75OyF#:~:text=With%20over%20230%20officers%20deployed,ready%20to%20anticipate%20future%20challenges; EUAA; 'EUAA Response to the war in Ukraine' (2024), https://euaa.europa.eu/euaa-response-russian-invasion-ukraine. It is worth noting that the support from the agencies is a consequence of their increasing involvement on migration management issues: neither Frontex nor EUAA (or its predecessor EASO) are quoted in the text of the 2001 TPD.

stakeholders, played a pivotal role in ensuring the effective implementation of temporary protection across Europe (Recital 20, PTD Implementing Decision). [92] In doing so, it served as a structured forum for EU institutions and Member States to perform operational solidarity.[93]

Solidarity as sharing of people is implemented under the Ukrainian temporary protection scheme with an innovative responsibility-sharing mechanism that integrates, rather than undermines, individual agency. By agreeing to the activation of the TPD, all Member States decided to contribute to hosting the refugees arriving from Ukraine. Shifting focus from debates on burden-sharing, first country of arrival, and secondary movements, the Ukrainian temporary protection model introduced a model of practical and unprecedented inter-state refugee distribution: free choice.[94]

The free-choice system adopted is in sharp contrast with the past solidarity models adopted. The disentanglement between asylum seekers' agency and the assignation of the responsible Member State was considered as the premiss for the CEAS to function. As such, it was to be applied also in crisis situations: the relocation system adopted in the wake of the 2015 "migration crisis" was based on an automatic allocation mechanism detached from the asylum seeker's individual circumstances or choices. According to the CJEU, doing differently would have made the "adoption of a binding relocation mechanism […] impossible".[95] By contrast, the Ukrainian temporary protection model implemented free choice by leveraging Ukraine's special status regarding travel to the EU. Rather than adopting the relocation model outlined in Art. 25 TPD, Member States allowed refugees to choose where to receive temporary protection. This choice was enabled by Ukraine's status as a visa-free country,

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[92] European Commission, 'EU launches Ukraine solidarity platform' (23 March 2022), https://migrant-integration.ec.europa.eu/news/eu-launches-ukraine-solidarity-platform_en.
[93] Marco Gerbaudo, 'The Solidarity Platform: Re-designing Operational Cooperation within the EU Migration Policy' (*ADiM Blog*, 30 June 2023).
[94] Esin Küçük, 'Temporary Protection for Ukrainians: The Unexpected Renaissance of "Free Choice"' (*EU Immigration and Asylum Law and Policy*, 7 March 2022).
[95] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, para 304.

granting its nationals a 90-day period of free entry and movement within the EU.[96]

The redistribution system created by the interplay between the visa and TPD rules is not only passively accepted by Member States, but purposedly enforced: the TPD Council Implementing Decision recognises that Ukrainians enjoy visa-free travel for short stays, which should be instrumental to "*choose* the Member State in which they want to enjoy the rights attached to temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union" (Recital 16, TPD Implementing Decision, *emphasis* added).

The free-choice model extends beyond the first choice of the Member State where to enjoy protection. Although not explicitly stated in the TPD Implementing Decision, the Commission subsequently clarified that beneficiaries of temporary protection are entitled to freedom of movement after being granted such protection: they are entitled to relocate to another Member State and obtain a new residence permit under temporary protection, provided that the initial residence permit has expired and been withdrawn.[97] The conditional freedom of movement and residence model ensuing is considered "in accordance with the spirit of [Art.] 26(4) of Directive 2001/55/EC", which regulates relocations between Member States as a solidarity measure: instead of relying on a relocation procedure, transfers are managed independently by beneficiaries of temporary protection.

One last special feature of the free-choice model of the Ukrainian temporary protection scheme lies in the possibility for beneficiaries of temporary protection to make "pendular movements" back and forth from Ukraine to the

[96] Regulation 2018/1806/EU listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) [2018] OJ L 303-39, Art. 4, Annex II.
[97] Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 [2022] OJ C 1261- 1.

EU.[98] Asylum seekers – and beneficiaries of international protection as well – are barred from returning to their home country. The TPD instead leaves to Member States the discretion to authorise "exploratory visits" (Art. 21(1), TPD). Member States generally permit pendular movements of beneficiaries of temporary protection to and from Ukraine. However, given the lack of clarity in the TPD, national practices diverge on the maximum duration allowed for the visits and their qualification as short visits or returns.[99] Beneficiaries of temporary protection therefore endure intra- and extra-EU mobility rights pending and enjoying status recognition.

The Ukrainian temporary protection free-choice model is expressively implemented by the EU and Member States as a practical way to "facilitate a balance of efforts between Member States, thereby reducing the pressure on national reception systems" (Recital 16, TPD Implementing Decision). To do so, Member States decided for the non-activation of Art. 11 TPD – regulating take-back procedures of beneficiaries of temporary protection who move from the host Member State (Recital 15, TPD Implementing Decision). The non-activation of Art. 11 TPD "facilitate[ates] the possibility for persons enjoying temporary protection in one Member State to move to other Member States to enjoy temporary protection there. This enabled fluidity of onward movements in the EU that helped to lower the pressure on national reception systems of those Member States bordering Ukraine and reduced formalities regarding transfers, thereby making the instrument still easier to apply".[100]

The model has reached tangible results. Currently, beneficiaries of temporary protection are spread across all Member States, also those far from the Ukrainian border: for example, Ireland (109 000), Italy (166 000) and Spain (222 000) host well over 100 000 beneficiaries of temporary protection on their

[98] Cathryn Costello and Michelle Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' (2022) 22 International Journal of Discrimination and the Law 244.
[99] ECRE, 'Movement to And from Ukraine under the Temporary Protection Directive' (ECRE, 2023).
[100] Communication: Temporary protection for those fleeing Russia's war of aggression against Ukraine: one year on [2023] COM/2023/140 final.

territory. Agency in reaching a Member State to reunite with family or pursue employment opportunities was pivotal in redistributing temporary protection beneficiaries across the EU. Nevertheless, geography continues to significantly influence the migratory routes of Ukrainian refugees: Member States bordering Ukraine indeed remain among the ones targeted by higher migratory pressure, especially Poland, Czechia and Romania.[101] However, the establishment of a system based on a broad range of voluntary and non-monitored relocation options prevented the concentration of all incoming refugees in the Member States of first arrival. Consequently, in the three years since the war's outbreak, the existence or risk of a "migration crisis" has not been identified as one of the challenges stemming from Russia's invasion of Ukraine.

Agency-wise, the free-choice model is the first and only EU redistribution mechanism that acknowledges the existence of the migratory preferences of incoming persons, with refugees no longer labelled as a “burden” to share. For the first time since the communitarisation of the EU migration policy, the choice of country of destination is not made according to Dublin criteria nor pre-agreed redistribution quotas, but it is left in the hands of the persons seeking protection.

Despite its undeniable success in the Ukrainian context, the selective application of the Ukrainian Temporary Protection scheme raises concerns about equal treatment, particularly regarding its personal scope and reports of racial profiling at the EU-Ukraine border. The personal scope of the temporary protection awarded in the TPD Implementing Decision enacts a selective model of solidarity and agency. The decision indeed covers three categories of displaced persons: Ukrainian nationals; refugees; and their family members. The list is notably missing third-country nationals residing for reasons other than protection in Ukraine. Third-country nationals legally residing on a long-term basis in Ukraine are covered by the TPD Implementing Decision with a big

[101] Eurostat, ‘Temporary protection for persons fleeing Ukraine - monthly statistics’ (3 December 2024), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary_protection_for_persons_fleeing_Ukraine_-_monthly_statistics#Source_data_for_tables_and_graphs.

caveat: first, they can access temporary protection only insofar as they are unable to return safely to their country of origin; secondly, Member States can decide to award them either the EU protection or an "adequate protection under their national law".[102] Third-country nationals residing on a non-permanent basis in Ukraine – like asylum seekers, students and workers with temporally limited residence permits – are not included: the TPD Implementing Decision pushes Member States to provide more favourably solutions also to categories not explicitly covered. Nonetheless, this suggestion is not legally binding and under the full discretion of Member States.

Temporary protection for non-Ukrainian nationals is applied inconsistently across the EU, raising the risk of discriminatory treatment by Member States during the implementation phase.[103] The Commission acknowledges the risk of differential treatment in the protection afforded to Ukrainian and non-Ukrainian beneficiaries of temporary protection: the Operational Guidelines on the implementation of the TPD state that national protection awarded to third-country nationals fleeing Ukraine "does not have to entail benefits identical to those attached to temporary protection" but must extend to certain minimum rights to ensure a dignified standard of living, notably residency rights, access to means of subsistence and accommodation, emergency care and adequate care for minors.[104]

The mixed personal scope of temporary protection in the TPD Implementing Decision is compliant with international law as everybody fleeing

[102] Such a choice is not available for refugees, who are automatically awarded EU temporary protection.
[103] Sergio Carrera and others, 'The EU Grants Temporary Protection for People Fleeing War in Ukraine' (2022) 9 CEPS Policy Insights.
[104] Communication on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 [2022] OJ C 1261/1. The risks of differential treatment are concrete in some Member States: in Poland, for example, access to aid for beneficiaries of temporary protection is restricted to Ukrainian nationals. Janine Prantl, 'Generous, but Equal Treatment? Anti-Discrimination Duties of States Hosting Refugees Fleeing Ukraine' (*EJIL: Talk!*, 2 May 2022).

Ukraine is at the very least allowed entry into the EU.[105] Furthermore, Member States are not bound to offer protection to non-Ukrainian nationals, if they can safely return to their country of origin. Whilst non-discriminatory per se, the system might lead to unfair treatment of non-Ukrainian nationals if coupled with discriminatory practices from Member States' authorities.[106]

Discriminatory practices have been reported in the immediate months after the full-scale invasion of Ukraine in the exit and entry policy at the EU-Ukraine border: several incidents have been reported on both sides of the EU-Ukraine border with non-Ukrainian nationals (especially non-white and Roma people) being subjected to longer waiting times and occasionally prevented exit from Ukraine and entry into the EU.[107] The discriminatory treatment through racial, ethnic, and national profiling prompted the UN Special Rapporteur on contemporary forms of racism to express worry and to push the EU and its Member States "to ensure the protection of all individuals and groups facing racially and ethnically discriminatory treatment as they attempt to flee Ukraine".[108] Such incidents have been accompanied by worrisome statements by EU leaders, especially from the Member States most affected by the inflow of

[105] Achilles Skordas, 'Temporary Protection and European Racism' [2023] EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy 419.
[106] ibid.
[107] Lighthouse, 'Ukraine Exodus' (23 March 2022), https://www.lighthousereports.nl/investigation/ukraine-exodus/; IOM, 'Discrimination and Racism Against Third Country Nationals Fleeing Ukraine Must End: IOM Director General' (3 March 2022), https://www.iom.int/news/discrimination-and-racism-against-third-country-nationals-fleeing-ukraine-must-end-iom-director-general; Human Rights Watch, 'Ukraine: Unequal Treatment for Foreigners Attempting to Flee' (4 March 2022), https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee; Human Rights Watch, 'Moldova: Romani Refugees from Ukraine Face Segregation' (25 March 2022), https://www.hrw.org/news/2022/05/25/moldova-romani-refugees-ukraine-face-segregation; Monika Pronczuk and Ruth Maclean, 'Africans Say Ukrainian Authorities Hindered Them From Fleeing' (*New York Times*, 1 March 2022), https://www.nytimes.com/2022/03/01/world/europe/ukraine-refugee-discrimination.html.
[108] OHCHR, 'Ukraine: UN expert condemns racist threats, xenophobia at border' (3 March 2022), https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-expert-condemns-racist-threats-xenophobia-border.

persons fleeing the conflict, reiterating the racialisation of the refugees inflow from Ukraine.[109]

Despite the concerns regarding discriminatory practices, the Ukrainian temporary protection scheme stands out in the EU migration management for its agency-compliant solidarity approach. This approach stands in stark contrast to the heavily securitised migration policies that have defined the EU's response since the 2015 "migration crisis". As outlined in the previous Chapters, the New Pact on Migration and Asylum codified the securitised policies adopted by the EU in the past years. In particular, the instrumentalisation approach is now predominant in the EU narrative surrounding crisis management tackling migration. Despite their clear contrast, the Instrumentalisation approach and the Ukrainian temporary protection model coexist under the current EU asylum policy. This coexistence is enabled by the conceptualisation of the Ukrainian crisis as an exceptional situation requiring very specific and unrepeatable actions. The TPD is labelled a one-off solution, specifically tailored to the Ukrainian context and not applicable to the EU general migration management.

It is undeniable that numerous factors render the Ukrainian crisis distinct and exceptional:[110] in particular, the immediate political consensus behind the activation of the TPD is more unique than rare in the field of the EU asylum policy. Furthermore, the free-choice model adopted relies on the special status of the EU-Ukraine relation, both legally – with the inclusion of Ukraine in the visa-free list – and pragmatically – with the presence of an integrated Ukrainian

[109] Céline Paré, 'Selective Solidarity? Racialized Othering in European Migration Politics' (2022) 1 Amsterdam Review of European Affairs 42. Most infamously, Bulgarian Prime Minister Kiril Petkov declared that "These [Ukrainians] are not the refugees we are used to… these people are Europeans…These people are intelligent, they are educated people.... This is not the refugee wave we have been used to". Benjamin Bathke, 'Ukraine, Eastern EU States Accused of Discriminating against Non-Ukrainian Refugees' (*InfoMigrants*, 28 February 2022) https://www.infomigrants.net/en/post/38831/ukraine-eastern-eu-states-accused-of-discriminating-against-nonukrainian-refugees.

[110] Meltem Ineli Ciger, '5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022' (*EU Immigration and Asylum Law and Policy*, 7 March 2022).

community in many Member States before the beginning of the war.[111] Nonetheless, the success of the temporary protection model in managing an unprecedented migratory flow without the need for lengthy negotiations on new ad hoc solutions suggests its suitability for future replication. In her 2022 State of the Union, Commission President Von der Leyen stated that "our actions towards Ukrainian refugees must not be an exception. They can be our blueprint for going forward".[112] However, no concrete actions towards the incorporation of the TPD in the EU crisis management framework were taken. The Commission simply refrained from repealing the TPD as it has "proven to be an essential instrument to provide immediate protection in the EU and the Commission".[113]

2.4 Ukrainian Temporary Protection Scheme Three Years After: Future Implications

The adoption of the instrumentalisation approach in 2021 had a clear impact on the development of new legal tools (i.e. introduction of derogation regimes as standard crisis management mechanisms, and the codification of instrumentalisation). This is not yet the case for the temporary protection framework, in relation to which there is no clear transitioning-out strategy from the temporary protection scheme after March 2026.

When proposing the 2026 extension, the Commission stated that the Russian war of aggression continued "unabated", with "deliberate and indiscriminate attacks directly affect[ing] the civilian population across the whole country". Consequently "displaced persons from Ukraine are still unable to return to Ukraine in safe and durable conditions" and the TPD must "be prolonged as a

[111] Ihor Markov, 'Contemporary Ukrainian Migration to EU Countries: Trends and Challenges' in Ilkka Liikanen, James W Scott and Tiina Sotkasiira (eds), *The EU's Eastern Neighbourhood* (Routledge 2016).
[112] Commisison, '2022 State of the Union Address by President von der Leyen' (14 September 2022), https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5493.
[113] Communication: Temporary protection for those fleeing Russia's war of aggression against Ukraine: one year on [2023] COM/2023/140 final.

necessary and appropriate response to the current situation".[114] Forced returns to Ukraine in the current situation would most likely amount to a breach of the principle of non-refoulement.[115] The extension of the TPD therefore is compliant with the overarching obligation for Member States to offer protection to those in need. At the same time, the extension raises some legal concerns.

The Commission's proposal to extend temporary protection until 2026 is grounded in a broad interpretation of Art. 4(2) TPD, de-linking it from the rest of Art. 4 TPD. Taken alone, the provision provides for a one-year extension "where reasons for temporary protection persist". According to the Commission, the extension is justified by the ongoing presence of the triggering reasons rather than by the timeframe specified in Art. 4(1) TPD.[116] This interpretation is the most straightforward way to maintain the protection currently awarded to persons fleeing Ukraine. Furthermore, it does not require any legislative change nor impose any administrative burden on Member States.[117] However, as pointed out by Ineli-Ciger, the 2026 prolongation pushes the application of the TPD to its limits.[118]

The TPD does prescribe at Art. 4 a hard three-year maximum duration limit to temporary protection. Such a duration is in line with the necessity to ensure the temporariness of the protection awarded and reflected in the Directive preparatory works.[119] With the 2026 extension, the EU adopted a broad interpretation that appears inconsistent with the wording of the relevant provisions of the TPD and potentially in conflict with the Geneva Convention.

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[114] Proposal for a Council Implementing Decision extending temporary protection as introduced by Implementing Decision (EU) 2022/382 [2024] COM/2024/253 final, Explanatory Memorandum.

[115] According to the UNHCR, "safety and security concerns currently prevent most refugees and IDPs from returning to their places of origin in Ukraine". UNHCR, 'Lives on hold: Intentions and Perspectives of Refugees, Refugee Returnees and IDPs from Ukraine' (19 November 2024).

[116] Art. 4(1) TPD outlines the two-year standard duration of temporary protection: one year with automatic extensions "by six monthly periods for a maximum of one year".

[117] Viktoryia Vaitovich, 'Op-Ed: The EU Is Stretching the Limits of the Temporary Protection Directive beyond 2025, but Is It Enough?' (*ECRE*, 14 June 2024).

[118] Meltem Ineli Ciger, 'Legal Landmine: The Risky Proposition of Extending the Application of the EU Temporary Protection Directive beyond March 2025' (*EU Law Analysis*, 31 May 2024).

[119] Skordas (n 74).

Temporary protection indeed remains a substandard status when compared to international protection: it is limited in time and grants a restrictive set of rights. The derogation to the Geneva protection can be justified in case of mass influxes only insofar as it is necessary, proportional and appropriate.[120] It can be argued that the prolongation until 2026 is still justified according to these criteria, given the general unsafe situation in Ukraine.[121] However, further extensions beyond the time limit expressly set by the Directive raise concerns about the proportionality and adequacy of the TPD in effectively addressing the protection needs of individuals fleeing Ukraine amid a prolonged and regrettably ongoing conflict.

The 2026 Extension Decision also impacts its beneficiaries' agency. They are free to move across the EU, but they cannot retain the temporary protection status while asking for international protection: asylum applications are permitted, but their processing is suspended until the cessation of the TPD activation.[122] The postponement of asylum assessments is reasonable only insofar as there is a predictable end of the temporary protection scheme. The broad interpretation of Article 4(2) in the 2026 Extension Decision raises concerns about the feasibility of further annual extensions of the TPD beyond 2026. Against this background, the limited access to asylum for beneficiaries of temporary protection puts refugees in front of a difficult choice: either enjoy immediate temporary protection or renounce the privileged status to ask for asylum.

Regardless of concerns about its legality, the continuation of the Ukrainian temporary protection scheme until 2026 is welcomed from a humanitarian perspective. At the same time, the Union must acknowledge the changing

[120] Ineli Ciger (n 122).
[121] According to the UNHCR, at the end of 2024 "the situation is expected to become protracted" and "security concerns remain paramount, along with access to basic services, housing, and livelihoods. UNHCR, '2024 situation overview' (2024) https://reporting.unhcr.org/ukraine-situation-global-appeal-2024.
[122] Upon arrival in the EU, people escaping Ukraine remain free to decide whether to apply for asylum or obtain temporary protection. Once obtained temporary protection, they cannot have their asylum application processed until the cessation of the TPD.

pattern in the migratory flow from Ukraine to the EU, which is increasingly losing its temporary nature: the proportion of displaced persons planning or hoping to return to Ukraine in the future is decreasing, with a growing number of beneficiaries of temporary protection integrating into the host Member States and planning to remain, if given the possibility.[123] The maintenance of the TPD for a total of (until now) 5 years is likely to increase the state of anxiety of its beneficiaries concerning the prospects of their permanence in the EU. The lack of a long-term strategy is therefore becoming a pressing challenge for both beneficiaries of temporary protection and Member States.[124]

Member States have started to adopt diverging policies offering beneficiaries of temporary protection options based on national law to regularise their stay in their territory de-linking it from the TPD. Member States such as Poland, Czechia, Italy and France have introduced work permit alternatives to beneficiaries of temporary protection.[125] These models are in a way unprecedented, enabling holders of temporary protection status to transition into a highly regulated category such as labour migrants. At the same time, they do not offer a systematic and comprehensive solution, leaving behind unemployed beneficiaries of temporary protection.

The EU must identify a post-2026 common TPD-succession model, moving away from temporary protection and offering its beneficiaries an accessible and stable legal status in the EU. Many models have been proposed by NGOs and academics: The granting of international protection, despite the challenges posed by individually assessing an exceptionally high volume of claims, could be facilitated by the recently adopted "expedited procedure" under the CFM

[123] The Commission cites a UNHCR report showing a decrease in the proportion of temporary protection beneficiaries intending to return home, when possible, from 77% in 2023 to 64% in 2024. In contrast, an EUAA report reveals that 53% of respondents expressed an intention to return to Ukraine after the war, while a significant proportion (30%) remains undecided, and 17% do not plan to return. Proposal for a Council Implementing Decision extending temporary protection as introduced by Implementing Decision (EU) 2022/382 [2024] COM/2024/253 final, Explanatory Memorandum.
[124] Vaitovich (n 117); ECRE, 'Transitioning Out of the Temporary Protection Directive' (ECRE 2024).
[125] Vaitovich (n 117).

Regulation, which, however, will not take effect until July 2026;[126] the use of national humanitarian statuses, which would, however, worsen the fragmentation of the protection framework; the granting of a migration status independent of protection, most notably long-term resident status, could be administered more efficiently by national authorities but may not be accessible to all beneficiaries of temporary protection;[127] the creation of a new protection status specifically for Ukrainians, such as the 10-year "reconstruction permit" proposed by the EU Special Adviser for Ukraine, would extend the special treatment granted to beneficiaries of temporary protection. However, it could prove politically unfeasible and risk prolonging the legal limbo created by temporary protection.[128] The pros and cons of these models have been addressed in the literature.[129] To implement the most effective exit strategy, the Commission should conduct a thorough impact assessment of each viable option, ensuring better preparation for the upcoming 2026 deadline. At that point, a further extension of the TPD would be difficult to justify without an amendment to the Directive.

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[126] Art. 14, CFM Regulation. For its functioning, see Chapter 6.4

[127] Access to long-term residence is not automatically granted upon reaching the five-year residence threshold. Third-country nationals must satisfy several conditions, foremost among them demonstrating stable and sufficient resources. Kees Groenendijk, Elspeth Guild and Robin Barzilay, 'The Legal Status of Third Country Nationals Who Are Long-Term Residents in a Member State of the European Union' 120; Behnam Balali, 'Long-Term Residents Directive: Can It Achieve the Tampere Programme's Objectives?'. The recast of Long-Term Residents Directive is currently under negotiation, with the Commission proposing to include beneficiaries of temporary protection in its personal scope. See: ECRE, 'The Potential of the EU's Long-Term Residence Directive' (ECRE, October 2023).

[128] Lodewijk Asscher, 'Integration of People Fleeing Ukraine in the EU' (European Commission, May 2023), https://ec.europa.eu/social/BlobServlet?docId=26894&langId=en.

[129] For an overview of the proposed models see, inter alia: ECRE (n 128); Luyten Katrien, 'When EU Temporary Protection for Displaced People from Ukraine Ends: Possible Scenarios' (EPRS 2024); Elspeth Guild and Cornelis A Groenendijk, 'Temporary Protection and the Future of Ukrainians in the EU' in Sandra Mantu, Karin Zwaan and Martina Hermina Antonia Strik (eds), *The Temporary Protection Directive. Central Themes, Problem Issues and Implementation in Selected Member States* (Nijmegen: Centrum voor Migratierecht, Radboud Universiteit Nijmegen 2023); Elspeth Guild and Kees Groenendijk, 'The Impact of War in Ukraine on EU Migration' (2023) 5 Frontiers in Human Dynamics; Martin Wagner, Justyna Segeš Frelak and Caitlin Katsiaficas, 'Responding to Displacement from Ukraine: Options to Remain When EU Temporary Protection Ends' (ICMPD 2023); Meltem Ineli-Ciger, 'When Temporary Protection Ends: Longer-Term Solutions for Refugees from Ukraine' (SIEPS 2023); Marco Gerbaudo, 'Temporary Protection: Which Future in The EU Migration Policy?' (2023) 1 Quaderni AISDUE 249.

Despite the uncertainties regarding its termination, the Ukrainian temporary protection scheme influenced the negotiations surrounding the New Pact on Migration and Asylum. Its influence is not on par with that of the instrumentalisation approach, which has dominated the EU migration debate since the 2021 Belarus crisis. The main accomplishment of the Ukrainian temporary protection scheme is the repeal of the proposal to abrogate the TPD. The "immediate protection" – envisaged to substitute the TPD – did not have the same potential since it had a narrower scope and did not entail any form of solidarity measure between Member States.[130] Its primary advantage – the more streamlined activation mechanism – proved to be redundant, as the obstacles to triggering the TPD were political rather than procedural in nature.

Under the New Pact framework, the TPD remains a tool to react to crisis situations. The TPD is now supplemented by the CFM Regulation, which introduces supplementary measures that may be implemented alongside temporary protection.[131] Besides the maintenance of the TPD in the reformed framework, no good practice concerning the solidarity agency-enhancing model has been codified: the Dublin criteria are retained in the AMMR and the solidarity mechanism introduced functions in disregard of asylum seekers' agency. Beyond hard law provisions, certain coordinating elements of the Ukrainian temporary protection scheme – most notably the Solidarity Platform – could be preserved as part of the EU's increasingly comprehensive emergency response toolkit.[132] Against this background, there is a tangible risk of the TPD becoming "fossilised": a successful but singular instrument that, once deactivated, may be left to gather dust while awaiting another exceptional circumstance to justify its reactivation.

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[130] Meltem Ineli-Ciger, 'What a Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration' (*EU Immigration and Asylum Law and Policy*, 11 November 2020).
[131] Recital 3, CFM Regulation. In particular, CFM responsibility offsets are not applicable when the TPD is activated and Art. 11 TPD is not applied (Art. 9, CFM Regulation).
[132] Gerbaudo (n 93). See: European Commission, 'EU Solidarity with Ukraine: one year of temporary protection for people fleeing Russian aggression against Ukraine' (9 March 2023), https://neighbourhood-enlargement.ec.europa.eu/news/eu-solidarity-ukraine-one-year-temporary-protection-people-fleeing-russian-aggression-against-2023-03-09_en.

The outcomes of the future exit strategy from the TPD will be pivotal for fully understanding the extent of the Ukrainian temporary protection scheme's influence over EU migration management. In the meantime, the Ukrainian crisis and the EU response demonstrated an alternative model for addressing migration-related emergencies, now retained in the New Pact framework: a solidarity approach upheld by Member States and functioning concurrently and not in contrast with refugees' agency.

3 Conclusion

The interconnection between solidarity and agency becomes evident when the EU is confronted with crisis situations. In such instances, the EU has traditionally responded by adopting ad hoc measures that disregarded asylum seekers' agency in favour of addressing the emergency from the Member States' perspective, often with a focus on curbing arrivals. This was notably the case during the Belarus crisis, when the concept of instrumentalisation first entered the EU political and legal discourse. In stark contrast, the Ukrainian crisis demonstrated that an alternative approach, based on a solidarity model that benefits both Member States and protection seekers, is possible.

The instrumentalisation approach is one of the key novelties introduced by the New Pact on Migration and Asylum. Once confined to the domain of political science, the term was first politicised and subsequently codified within the EU asylum acquis. The codification of instrumentalisation is inherently problematic, as its definition is exceedingly vague and more closely tied to the domains of security and external relations than to migration and asylum. The measures triggered by instrumentalisation involve both physical and legal restrictions on access to EU territory and asylum procedures, raising concerns about potential conflicts with the effective enjoyment of the right to asylum as enshrined in Art. 18 Charter and interpreted by the CJEU.

The measures prescribed in situations of instrumentalisation are applied automatically, without regard to the individual circumstances of the asylum

seekers that are instrumentalised. Asylum seekers are dehumanised and presented as agency-less paws in the hands of hostile actors. The solidarity via derogation approach jeopardises the sharing of norms underpinning the principle of solidarity in the field of asylum: the normalisation of derogations risks arbitrary implementation of asylum rules by Member States, thereby lowering protection standards across the EU.

It can be argued that the introduction of EU rules to regulate unilateral national derogations could be beneficial: It brings such measures within the scope of the Charter and under the Commission's oversight, subjecting them to proportionality standards.[133] However, the effectiveness of such a vision is questionable: the EU's ongoing efforts to regulate instrumentalisation have been undermined by Member States, who have implemented measures of questionable legality without facing any repercussions from the Commission.

The instrumentalisation approach is the most concrete example of the "crisification" of EU migration management and highlights the criticalities of such an approach. By adopting the instrumentalisation narrative, the EU does not seek to address the structural causes behind the exploitation of migration flows by hostile actors. Instead, it uses the emergency as a pretext to implement measures that restrict the right to asylum, which would not be deemed acceptable under normal circumstances.

The instrumentalisation approach reinforces the view that solidarity and agency within the CEAS are mutually exclusive. The Ukrainian temporary protection scheme challenges this dogma. With Russia's full-scale invasion of Ukraine in February 2022, The EU faced a historic challenge with the sudden influx of millions of refugees directly into its territory and demonstrated unprecedented responsiveness: the TPD has proven to be the most appropriate instrument to prevent a humanitarian crisis from escalating into a migration crisis.

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[133] Goldner Lang (n 57).

The Ukrainian Temporary Protection model operationalises solidarity and agency complementarily. In terms of solidarity, all domains involved in the operationalisation of solidarity are engaged: the harmonisation of protection recognition among Member States, alongside the provision of both financial and operational support from the Union to its Member States. The most innovative contribution of the scheme to the operationalisation of solidarity is through sharing of people, achieved with the recognition and mobilisation of protection seekers' agency.

The Ukrainian temporary protection free-choice model is a win-win for both protection seekers and Member States: the first are enabled to relocate to the Member States they prefer, and the latter can enjoy the redistributive effects of free movement to facilitate a balance of efforts. The results are not perfectly balanced, as most beneficiaries of temporary protection remain in the Member States bordering Ukraine. Nonetheless, the Ukrainian temporary protection scheme avoided the concentration of millions of protection seekers in the first country of arrival under the application of the Dublin rules.

Despite concerns regarding equal treatment arising from the limited personal scope of the TPD Implementing Decision, the Ukrainian temporary protection scheme represents an unprecedented and successful agency-compliant solidarity framework for responding to migration emergencies. Given its success, the TPD has been retained as one of the instruments of the EU crisis management toolkit as reformed by the New Pact. However, its replicability in future scenarios is questioned by the EU narrative of the Ukrainian crisis as exceptional and the activation of the TPD as a one-off.

The lack of a clear and common long-term transition plan challenges the evaluation of the overall impact of the Ukrainian temporary protection scheme and its replicability in the future. The EU must devise a feasible alternative to allow beneficiaries of temporary protection to stay if the war in Ukraine remains unresolved and a safe, durable return cannot be guaranteed. Until then, Member States’ national alternatives will substitute Union action, undermining the

common approach achieved so far by the Ukrainian temporary protection scheme.

The Ukrainian temporary protection scheme is in stark contrast with the instrumentalisation approach. The functioning of the two models revolves around two opposite visions concerning solidarity and agency. The New Pact codified the instrumentalisation approach. However, The Ukrainian temporary protection scheme demonstrated that a crisis response mechanism based on free entry and movement within the EU, as well as immediate access to protection, rights, and services, is not only possible but also pragmatically achievable and beneficial.

Concluding Remarks

It is argued that the EU is in a state of permacrisis.[1] In the past 15 years, the Union have encountered a consecutive series of emergencies, from the financial crisis to Brexit and the COVID-19 pandemic. In this period, only one state of crisis has never left the public and political debate: migration management. Throughout the thesis, it has been consistently argued that the core issue in EU migration management is not the existence of migratory phenomena itself, but rather the failure of EU actions to effectively address and respond to them. The EU has struggled to adapt its migration policy to the ever-changing migratory patterns targeting the Continent. Efforts to align its action with the principles of solidarity, fair sharing of responsibilities, and fairness towards third-country nationals, as mandated by primary law, have faced persistent challenges.[2]

The Common European Asylum System (CEAS) exemplifies this enduring state of permacrisis. The EU asylum policy has been reformed multiple times since its communitarisation, with no satisfactory solution. Consequently, the CEAS is affected by non-compliant attitudes from the actors participating in it: Member States contend that the system fails to sufficiently uphold both solidarity and responsibility. Asylum seekers view its rules as unfair, resisting its prescriptive framework and lack of agency in determining their country of asylum through irregular onward movements.

Against this background, the research questioned which is the role of agency in the operationalisation of solidarity under the CEAS. In particular,

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[1] Stella Ladi and Laura Polverari, 'Reconceptualising the EU-Member States Relationship in the Age of Permanent Emergency'; Virginia Volpi, 'To Have or Not to Have Competence: EU Integration by Stealth through Permacrisis' (IAI 2024) Text; Fabian Zuleeg, Janis Emmanouilidis and Ricardo Borges De Castro, 'Europe in the Age of Permacrisis' (*EPC*, 11 March 2021).
[2] Arts. 67(2) and 80 TFEU.

it investigated which changes have been introduced by the New Pact on Migration and Asylum in the implementation of solidarity and the incorporation of agency-enhancing or -denying provisions: the Von der Leyen Commission affirmed the New Pact finally "sets in balance the principles of fair sharing of responsibility and solidarity" and introduces a "human and humane" approach to migration.[3] The thesis critically challenged this statement through a detailed analysis of the reforms recently adopted.

The research conceptualised the CEAS as an "island of solidarity," where solidarity serves as a guiding principle obliging Member States to implement solidaristic measures agreed upon at the Union level when necessary (Chapter 1). Conversely, the choice of the country of asylum is not a legal obligation stemming from the right to seek and enjoy asylum prescribed in international and EU refugee law. Allowing or denying such a choice is a normative decision taken by States in shaping their asylum policies, constrained by the overarching duty to ensure protection for those in need and respect the principle of non-refoulement (Chapter 2).

Despite the differences in status, both solidarity and agency play pivotal roles in shaping the EU asylum policy and are deeply interconnected in the Union's responses to crisis situations: the common understanding, as shared by EU legislators and the CJEU, is that solidarity measures involving the redistribution of asylum seekers among Member States can be binding and effective only if they are not contingent on the asylum seekers' preferred choices.[4]

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[3] European Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity' (23 September 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

[4] Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection [2024] OJ L, 2024/1346, Recital 14; Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:631, para 304.

This thesis challenged the dogmatic vision of solidarity and agency as mutually exclusive. It has been argued that an agency-recognition model is not only feasible within the EU legal framework but also normatively desirable to strike a balance between solidarity and responsibility while promoting asylum seekers' compliance with established rules.

The Models of Agency and Solidarity under the CEAS and the New Pact on Migration and Asylum

The research argued that the ambiguity within international refugee law concerning asylum seekers' agency has been exploited by Global North countries to promote "protection elsewhere" policies, thereby deflecting responsibility for processing asylum claims and adopting a burden-shifting model along migratory routes. Under the EU legal acquis, such a model was implemented with the Dublin system (Chapter 2). Through "fair and objective" criteria, the Dublin system introduced a responsibility-allocation mechanism among its Member States which does not recognise the possibility for incoming asylum seekers to choose where to have their claim assessed and enjoy protection. Any attempt to challenge the rules by moving to a different Member State is labelled a "secondary movement" and sanctioned. At the same time, the Dublin system is not governed by a spirit of solidarity, as the allocation of responsibilities among Member States is structured independently from any fair sharing of responsibilities or solidaristic aim. Under the Dublin system, solidarity and agency are simply neglected. Such a model proved to be incredibly fragile, as evidenced by the 2015 "migration crisis". Since then, both the CJEU and the EU legislators have recognised the need to systematically change the system to address its systemic failures.

The CJEU case law addressed the redistributive imbalances and the role of asylum seekers under the Dublin system from multiple perspectives (Chapter 3). Through the "systemic deficiencies" doctrine and its subsequent developments, the Court reaffirmed the absolute prohibition of

breaches of Art. 4 Charter in the context of Dublin transfers. In doing so, it limited the mutual trust-based automatism inherent in the Dublin system, albeit with some fluctuations regarding the conditionality for breaches of Art. 4 Charter to involve systemic deficiencies.

This approach introduced a model of judicial relocation, prohibiting transfers back to Member States with dysfunctional asylum systems and effectively legitimising asylum seekers' movements when fleeing undignified conditions. Moreover, the Court progressively recognised individual circumstances, such as vulnerabilities or the breach of procedural rights, as valid grounds to suspend a Dublin transfer. The research identified a *corpus* of judgments in the CJEU case law that indirectly recognise solidarity and agency. This multi-layered case law is embedded within the overall passivist judicial approach of the Court in addressing EU migration and asylum policies. The CJEU consistently maintained a strict statutory interpretation approach, avoiding adopting a constitutionally driven perspective in its judgments. Consequently, the Dublin system continues to operate through quasi-automatic procedures, largely disregarding asylum seekers' desires and the solidaristic needs of Member States.

The study of the New Pact on Migration and Asylum addressed the main question of the thesis: the legal analysis of the legislative instruments examined the changes introduced by the reforms in the operationalisation of the principle of solidarity and fair sharing of responsibility, as well as the involvement of asylum seekers in the various phases of asylum procedures (screening, protection needs assessment, appeal, and return). The reform of the Dublin system under the Asylum and Migration Management Regulation (AMMR) is very limited when it comes to responsibility and agency, while it introduces more extensive changes in the area of solidarity (Chapter 4). The responsibility-allocation mechanism remains largely unchanged, albeit with some agency-enhancing provisions which are likely to have limited practical impact. At the same time, the new Regulation designates the fight against secondary movements as one of its primary

objectives, expanding Member States' responsibilities in policing onward movements and expediting the transfers and returns of individuals moving irregularly. Concurrently, asylum seekers who engage in onward movements are targeted by a harshened punitive approach.

The solidarity mechanism introduced to mitigate the inevitable imbalances maintained (and reinforced) in the AMMR responsibility-allocation mechanism is a ground-breaking novelty: the Solidarity Pool is a pragmatic attempt to operationalise the principle of solidarity as interpreted by the CJEU in its relocation case law. The system is however vitiated by several flaws in its design which hinders the efficient operationalisation of solidarity and the protection of asylum seekers' fundamental rights. The real impact of solidarity under the AMMR is ultimately dependent on the political will of the Member States to take part in it in a spirit of solidarity.

While not directly related to the operationalisation of solidarity, the research outlined the new rules on asylum procedures due to their significant impact on asylum seekers' agency (Chapter 5). The Asylum Procedures Regulation (APR) broadens the scope and application of special procedures that derogate from standard rules, limiting asylum seekers' agency and participation in the decision-making process. The choice of the applicable procedure is not merely procedural and has wide-ranging substantive consequences: special asylum procedures entail limited freedom of movement, reduced timelines and restricted procedural safeguards. The compliance of these procedures with the obligation of fair treatment for all asylum seekers stemming from EU primary law is contested. In particular, the new seamless border procedure – grouping the screening, asylum, and return processes – transforms the EU's external border into a non-territory. Its application relies on arbitrary and automatically applied criteria, mandating the confinement of asylum seekers at the border without the opportunity to challenge the choice of the applicable procedure. The reinforced external dimension of the EU "protection elsewhere" policy further embeds automaticity in the application

of asylum procedures: the notions of safe countries are not only retained but their definitions are broadened, facilitating the increased application of substandard asylum procedures. Lastly, the APR, like the AMMR, adopts a harsher punitive approach towards secondary movements, introducing provisions that may jeopardise access to a merit-based asylum assessment for applicants who engage in unauthorised onward movements.

The outline of the AMMR and APR provisions is instrumental in grasping the impact of the new emergency mechanism introduced by the Crisis and Force Majeure Regulation (CFM Regulation) (Chapter 6). Reacting to crisis situations, Member States can enjoy enhanced access to the AMMR solidarity measures. At the same time, the CFM Regulation codifies a practice increasingly adopted by Member States faced with migration-related emergencies: the derogation from secondary EU law provisions to retain greater legal flexibility to address the situation. Such derogations directly impact asylum seekers, entailing inter alia the extension of the registration time of their asylum applications and either expanding or restricting the application of border procedures. The introduction of flexibility may be effective in allowing Member States to tailor their emergency response to specific situations. However, the framework needs to be specific, well-defined, and carefully monitored to ensure that any changes to the functioning of the CEAS are proportionate and necessary to address the emergency. The CFM Regulation fails to meet these safeguards, endangering the harmonisation of the CEAS and the protection of asylum seekers' rights.

The CFM Regulation highlights the intrinsic interrelation between solidarity and agency in the EU crisis control mechanism. However, its actual impact can be fully understood only upon activation. The analysis nonetheless highlighted the emergence of a renewed conceptualisation of solidarity, achievable not only via collaborative attitudes but also through derogations, and the associated commodification of asylum seekers.

The research closed with an empirical study of two diverging solidarity mechanisms and their relationship with agency: the instrumentalisation approach and the Ukrainian temporary protection scheme (Chapter 7). The thesis drew a connection between these two models, which due to their novelty are understudied in EU legal studies: they are opposite outcomes of the process of "crisification" of the EU asylum policy, centred on very different views on how to operationalise solidarity and agency in crisis situations. The instrumentalisation approach allows Member States to adopt the solidarity-derogations mix outlined in the CFM Regulation, retaining its main criticalities. Additionally, this approach applies in situations loosely defined by socio-political variables rather than objective criteria. It frames solidarity as a blind-eye approach: Member States are allowed to take whatever measures they deem necessary when faced with instrumentalisation. Concurrently, people on the move are framed as a security threat. Despite their clear roots in external relations and security policies, instrumentalisation situations are targeted exclusively through migration control measures, restricting asylum seekers' physical and legal access to the Union territory and to asylum procedures.

The Ukrainian temporary protection scheme adopts a wholly different approach: faced with the biggest inflow of protection seekers since the Second World War, the EU acted swiftly and cohesively with the activation of the Temporary Protection Directive. The resulting scheme implements a relocation model following a free-choice approach: beneficiaries are allowed to move in the EU to choose where to obtain and enjoy temporary protection. Such agency recognition is explicitly considered an operationalisation of intra-state solidarity: Member States do not have to apply Dublin rules, and they can enjoy the redistributive effects of free movement. While the final results are not perfectly balanced, the free-choice model avoided the emergence of a new migration crisis in the EU: The concentration of millions of refugees in frontline Member States would

likely have triggered unauthorised onward movements on a scale large enough to challenge the resilience of the entire Schengen system.

Both the instrumentalisation approach and the Ukrainian temporary protection scheme have influenced the reforms of the New Pact. Ultimately, the instrumentalisation approach has been codified (and recently expanded) under EU law. This highlights Member States' preference for adopting this model, rather than the agency-enhancing Ukrainian temporary protection scheme, as the standard crisis control mechanism in EU asylum policy. Nonetheless, the comparison between the two case studies demonstrated the feasibility of an alternative model for the interaction between solidarity and agency.

The Case for Agency Recognition

This thesis did not sustain that there is a legal obligation under international and EU law to recognise asylum seekers' agency. However, it advocates for leveraging the ambiguity of international refugee law to reshape and introduce agency recognition provisions in the CEAS.

Under the current (and future) framework, the EU has made the normative decision not to recognise asylum seekers' agency, neither as a fair and objective criterion within the responsibility-allocation mechanism nor as a mobility right to enjoy once granted protection. The thesis has outlined the main criticalities of this decision, arguing that, on a normative level, agency can serve as a tool for interstate transnational solidarity.

The shape of the future EU asylum policy will be determined by how the New Pact is implemented: despite the increased harmonisation achieved with the adoption of directly applicable Regulations, many New Pact measures – in primis the AMMR solidarity mechanism and the CFM Regulation crisis control framework – are dependent upon their

enforcement by Member States.[5] Future research will therefore monitor the implementation process of the reforms, which is expected to be finalised by mid-2026, and assess their practical enforcement.[6] In particular, the correct and cohesive implementation of the New Pact depends on preventing a cherry-picking attitude from Member States: the new legal texts are closely interrelated, meaning that implementation must be comprehensive and in compliance with EU primary law, international refugee law, and the case law of the CJEU and the European Court of Human Rights.[7]

While awaiting the final implementation of the New Pact, the legal analysis of its solidarity and agency implications must be further developed. The thesis has addressed possible venues of incompatibility of the Screening Regulation, AMMR, APR and CFM Regulation with the Charter. In particular, the agency denial provisions raise questions concerning the compatibility with the right to asylum (Art. 18 Charter) and the right to an effective remedy (Art. 47 Charter). Given the extensive and intricate set of provisions impacting these rights and the novelties introduced, further legal analysis will follow this research to support the normative argument for a more agency-compliant EU asylum policy with additional legal reasoning.

The research claimed that the integration of some agency recognition under the EU asylum policy might be beneficial for the overall effectiveness of the EU asylum policy, especially under crisis situations. However, the thesis does not argue that the best solution forward is a free-for-all model entitling asylum seekers to enter and move freely within the EU before

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[5] Philippe De Bruycker, 'Genealogy of and Futurology on the Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy' (*EU Immigration and Asylum Law and Policy*, 6 May 2024).

[6] In June 2024, the Commission published the Common Implementation Plan for the Pact on Migration and Asylum, providing guidelines to support Member States in putting in place the legal and operational capabilities required to successfully start applying the new legislation by mid-2026. By the end of 2024, Member States must submit their National Implementation Plans to the Commission outlining their strategy to give effect of the New Pact reforms. Commission Communication on the Common Implementation Plan for the Pact on Migration and Asylum [2024] COM/2024/251 final.

[7] Catherine Woollard, 'Do's and Really Just Don'ts on Asylum and Migration' (*ECRE*, 5 December 2024).

choosing where to seek and enjoy protection. Instead, EU legislators should assess the feasibility of developing different avenues for agency recognition across two parallel scenarios: standard and emergency migration management.

Looking at standard migration management, a free choice model is neither feasible nor desirable, at least until true uniformity between national asylum systems is achieved. The research outlined that national systems are affected by great disparities in both protection needs assessments and reception conditions. Against this background, asylum seeker movements, if allowed, would risk developing a phenomenon of systemic "asylum shopping".[8] Such a phenomenon would critically undermine the mutual trust governing the CEAS and would be ultimately detrimental also for asylum seekers: Member States might engage in a race to the bottom, reducing the safeguards and guarantees of their asylum systems to disincentivise movements into their territory.

The current system, however, is equally inadequate: no solidarity measures have been effectively implemented to address the imbalances of the Dublin system, and while secondary movements are legally sanctioned, they remain widespread in practice.[9] It was argued that the CEAS should be equipped with a responsibility-allocation mechanism which operationalises solidarity and incorporates some degree of asylum seekers' agency. Under the New Pact framework, some efforts have been made to move in this direction, particularly through the solidarity mechanism introduced under the AMMR. The Solidarity Pool, if properly implemented, will serve as a forum for genuine interstate solidarity, where asylum seekers are actively involved by highlighting meaningful links that may influence the

[8] "Asylum shopping" refers to the practice of asylum seekers engaging in onward movements to select their country of asylum based on the likelihood of obtaining protection, as well as lodging applications in multiple EU Member States to increase their chances.
[9] Judith Kohlenberger, 'A Competition in Undercutting without Any Winners: Why European Solutions Are Needed for Asylum' (EPC 2024).

selection of the relocation country. However, the operationalisation of solidarity lies solely in the hands of Member States. Asylum seekers cannot derive from meaningful links any right to choose their country of asylum, nor can they appeal the relocation decision.

The solutions identified in the New Pact are not the only option available, especially concerning agency recognition. As highlighted in the research examining the CJEU case law, there are several ways in which agency can emerge within the decision-making processes related to the allocation of responsibility and the examination of asylum claims. The broad interpretation and application of procedural rights, along with the assessment of individual circumstances as grounds for not executing a Dublin transfer, stand out as the most significant examples.

Additionally, scholars have identified agency-compliant policies specifically designed to take into account asylum seekers' preferred choices regarding where to seek and enjoy asylum. First, agency can be introduced as a standard migration management tool via the visa policy without changing the current framework: EU institutions could consider adopting a collective solution by abolishing visa requirements for countries that are significant sources of refugees. Alternatively, visas with limited territorial validity, as prescribed by the Visa Code, can be used to grant individuals in need of protection entry on humanitarian grounds.[10] Second, the EU asylum

[10] Regulation 2018/1806/EU listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) OJ L 303/39; Regulation 810/2009/EC establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1, Art. 25. For an overview of these options, their limitations and agency implications, see: Violeta Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward' (EU Red Cross 2016); Alice Massari, *Visual Securitization: Humanitarian Representations and Migration Governance* (Springer International Publishing 2021); Sílvia Morgades-Gil, 'Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power to Issue Humanitarian Visas?' (2017) 2017 2 European Papers - A Journal on Law and Integration 1005; Elspeth Guild and others, 'Enhancing the Common European Asylum System and Alternatives to Dublin' (LIBE Committee 2015) Study 83; Violeta Moreno Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law' in Marleen Maes, Marie-Claire Foblets and Philippe De Bruycker (eds), *The External Dimensions of EU Asylum and Immigration Policy* (Bruylant 2011).

policy could integrate agency among the rights granted to beneficiaries of international protection through the mutual recognition of positive asylum decisions—currently absent from both the existing CEAS framework and the New Pact reforms.[11] Third, the EU migration policy could be reformed to accommodate the agency requests from beneficiaries of international protection: on the one hand, access to statuses such as long-term residence and the Blue Card could be made more accessible for protection holders. On the other hand, the mobility rights associated with these statuses could be expanded, allowing holders not only to travel within the Union but also to change their Member State of residence under reasonable conditions.[12]

All the above agency recognition venues are scholarly understudied and legally underdeveloped. Future research could combine the normative stance presented in this thesis with a systemic study of the legal feasibility of alternative models for agency recognition.

Under emergency migration management, the Ukrainian temporary protection scheme demonstrated the potential to implement a crisis control system in which agency plays a crucial role in fostering solidarity. The mix of solidarity and agency introduced is an innovative solution never envisaged by scholars but implemented by EU institutions thanks to the

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[11] For more details, check Chapter 2.3 and Guild and others (n 10); Chiara Favilli, 'Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'Unione Europea' (2015) 98 Rivista di Diritto Internazionale 701; Alberto-Horst Neidhardt, 'Beyond Relocations and Secondary Movements: Enhancing Intra-EU Mobility' (EPC 2023); Sergio Carrera and others, 'When Mobility Is Not a Choice: Problematising Asylum Seekers' Secondary Movements and Their Criminalisation in the EU.' (CEPS 2019).

[12] For more information on intra-EU mobility rights in the EU migration policy see, inter alia: Daniel Thym, 'Secondary Movements: Lack of Progress as the Flipside of Meagre Solidarity' (*EU Immigration and Asylum Law and Policy*, 3 October 2024); Neidhardt (n 11); Behnam Balali, 'Long-Term Residents Directive: Can It Achieve the Tampere Programme's Objectives?'; Lucia Della Torre and Tesseltje de Lange, 'The "Importance of Staying Put": Third Country Nationals' Limited Intra-EU Mobility Rights' (2018) 44 Journal of Ethnic and Migration Studies 1409; Peter Scholten and Mark van Ostaijen (eds), *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement* (Springer International Publishing 2018); EMN, 'Intra-EU Mobility of Third-Country Nationals' (European Commission 2013); Yves Pascouau, 'Intra-EU Mobility: The "second Building Block" of EU Labour Migration Policy' (EPC 2013) 74.

political will of the Member States and the legal flexibility of the instruments adopted.

The thesis argued that the Ukrainian model efficiently defused the risk of a "migration crisis" on two levels: first, through immediate collective protection, Member States are relieved from conducting individual asylum assessments, preventing the overburdening of their asylum systems. Second, the free movement provisions eliminate the need for negotiating – and, more importantly, implementing – relocation plans to redistribute beneficiaries of temporary protection among Member States. The research acknowledged the peculiarities of the Ukrainian situation which enabled the adoption of the agency-recognition model: the migration flow originated directly at the EU external border, making impractical any attempts to externalise migration control and halt the inflow of protection seekers. Furthermore, Ukraine holds a special status in its relations with the EU, due to the EU's active engagement in opposing the Russian invasion and negotiating Ukraine's potential EU membership, and to the relaxed migration rules for Ukrainian nationals entering the EU. Nonetheless, the Ukrainian temporary protection model unveiled the possibility of fabricating an agency-enhancing alternative in EU emergency migration control: the comparison with the instrumentalisation approach, both in the way solidarity is operationalised and in the achieved results, is useful to advocate for the normative opportunity to replicate the model in the future.

Currently, there is no common strategy for transitioning out of the Ukraine temporary protection scheme, which will remain in effect until March 2026. Future research will offer a comprehensive assessment of the EU's success in managing the stay and integration of millions of beneficiaries of temporary protection. In the meantime, the Temporary Protection Directive has proven crucial in ensuring an organised legal entry channel during crisis situations involving mass arrivals. The replicability of this system in the future remains an open question. To what extent can the Ukraine temporary protection model be extended from collective to

individual protection recognition? In this regard, the expedited asylum procedure introduced by the CFM Regulation could play a critical role, despite its weak prescriptive nature, which leaves its implementation dependent on the discretion of Member States. Ultimately, this was also the case for the Ukrainian temporary protection scheme: it was the political will of the Member States to collectively address the emerging crisis that enabled the adoption of innovative legal solutions.

Future Perspectives and Agency Implications

Despite the existence of normative venues to introduce some forms of agency recognition in the CEAS, the prospects for a policy change incorporating agency-enhancing provisions in the near future remain bleak. As the New Pact reforms are under implementation, EU leaders' efforts are now focused on the fight against irregular entries in the EU and on the increase of return rates. Both priorities are closely interlinked with the asylum policy, as most asylum seekers enter the Union irregularly, and those whose claims are rejected are subject to return decisions.

On irregular entries, the Commission recently endorsed the Italy-Albania Protocol as an innovative solution to counter "illegal migration".[13] The Protocol provides for the processing of asylum applications through border procedures conducted in designated areas within Albanian territory, which are placed under Italian jurisdiction.[14] It is the first model of asylum

[13] Commission, 'Migration letter' (14 October 2024), https://www.politico.eu/wp-content/uploads/2024/10/15/October-2024-EUCO-Migration-letter.pdf. Notwithstanding the narrative shift promoted by both EU and national leaders, unauthorised entry into the EU cannot be categorised as illegal. The case of asylum seekers serves as a notable example: even if they enter the Union irregularly, their stay is lawful, as they are seeking international protection. Upon making their asylum application, they are entitled to a residence permit pending the determination of their protection needs. Stylianos Kostas, 'Irregular vs. Illegal Immigration': (2017) 65 Slovenský národopis 420.

[14] Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria (6 November 2023) https://www.esteri.it/wp-content/uploads/2023/11/Accordo-Italia-Albania_compressed.pdf; Legge del 21/02/2024 n. 14, Ratifica ed esecuzione del Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, fatto a Roma il 6 novembre 2023, nonché norme di coordinamento con l'ordinamento interno.

processing outside the EU established under national law, and it raises significant questions concerning its compliance with EU asylum law.[15] The Italian-Albania Protocol takes the agency denial model of the New Pact's seamless border procedure to its extreme. A complex chain of legal fictions is employed: a "fiction of entry" is invoked to treat asylum seekers who disembark in Albania as if they were on Italian territory. At the same time, the application of the border asylum procedure invokes the "fiction of non-entry", as applicants are not granted legal entry into Italy pending the assessment of their protection needs. The Protocol caused great political and scholarly turmoil, despite being so far void of effectiveness: after the centres were officially opened on 13 October 2024, the first transfers there were annulled by Italian courts in light of the incorrect application of the country of origin notion which triggers the border procedure, as recently interpreted by the CJEU.[16] Since then, the centres have been closed, pending a new ruling from the CJEU to determine the conformity of the Italian list of safe countries of origin with the 2013 Asylum Procedures Directive.[17]

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[15] The Protocol has received extensive attention from Italian scholars. See, inter alia: ASGI, 'L'analisi giuridica del Protocollo Italia - Albania' (*Asgi*, 22 November 2023); ASGI, 'L'Europa elogia il Patto Italia-Albania, ma le criticità a Shengjin e Gjadër sono molto chiare' (*Asgi*, 24 July 2024); Andreina De Leo and Eleonora Celoria, 'Il Protocollo Italia-Albania e Il Diritto Dell'Unione Europea: Una Relazione Complicata' [2024] Diritto, Immigrazione e Cittadinanza 1; C Favilli, 'Gli ostacoli all'accesso al diritto d'asilo e la nozione di Paese sicuro: prime prove di applicazione del Protocollo Italia-Albania' (*Diario di Diritto Pubblico*, 3 November 2024); Giada Grattarola, 'Il disegno di legge di autorizzazione alla ratifica del Protocollo Italia-Albania: profili di (in)compatibilità con il diritto dell'Unione europea' (*SIDIBlog*, 13 February 2024); Eleonora Testi, 'Profili di illegittimità del Protocollo Italia-Albania' (*Questione Giustizia*, 28 November 2023).

[16] C-406/22, *Ministerstvo vnitra České republiky, odbor azylové a migrační politiky*, EU:C:2024:841.

[17] C-759/24, *Canpelli*, Request for a preliminary ruling (4 November 2024). A selected list of Italian cases on border procedures and its implications for the Italy-Albania Protocol is available here: ASGI, 'Una raccolta della giurisprudenza nell'ambito delle procedure di frontiera attuate a Porto Empedocle, Pozzallo e in Albania' (19 November 2024) https://inlimine.asgi.it/una-raccolta-della-giurisprudenza-nellambito-delle-procedure-di-frontiera/. More information on the matter: Andrea Natale and Fabrizio Filice, 'Nota ai provvedimenti di rigetto delle richieste di convalida dei trattenimenti disposti dalla Questura di Roma ai sensi del Protocollo Italia-Albania, emessi dal Tribunale di Roma, sezione specializzata nella protezione internazionale, il 18 ottobre 2024' (*Questione Giustizia*, 22 October 2024); Mario Savino, 'Se i giudici tornassero a occuparsi del caso concreto? L'impasse sui Paesi terzi sicuri e una possibile via di uscita' (*ADiM Blog*, 30 November 2024).

Denial of agency is a key feature of the Italian-Albania Protocol: under the model, asylum seekers would be systematically detained at a border area which is geographically and legally imaginary. While the Italy-Albania Protocol remains stalled, future research will examine how the Italian model interacts with the New Pact and whether the systemic detention of asylum seekers caught under the Protocol contravenes the Charter and the European Convention on Human Rights.

Concurrently, the EU is committed to enhancing the efficiency of the EU return system. Despite the several soft law initiatives undertaken, the Return Directive is the only CEAS legal text not modified by the New Pact on Migration and Asylum.[18] However, the system remains notoriously inefficient, with the number of returns executed consistently falling below 40% of the return orders issued.[19] The Commission recently endorsed the proposal of creating "return hubs" outside the EU as a component of the future EU return policy.[20] The rationale behind return hubs mirrors the Italia-Albania Protocol: the containment of people on the move who either seek protection or are not entitled to remain outside of the geographical

[18] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98. The EU return strategy has been addressed by a number of soft law measures: Communication on a New Pact on Migration and Asylum [2020] COM/2020/609 final; Communication on the EU strategy on voluntary return and reintegration [2021] COM/2021/120 final; Communication on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy [2021] COM/2021/56 final. See: Madalina Moraru, 'The New Design of the EU's Return System under the Pact on Asylum and Migration' (*EU Immigration and Asylum Law and Policy*, 14 January 2021).

[19] Quarterly data on return are available here: Eurostat, 'Returns of irregular migrants - quarterly statistics' (6 December 2024) https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Returns_of_irregular_migrants_-_quarterly_statistics. More information on the EU return policy here: EPRS, 'Common Approach on Return Policy' (European Parliament 2024); Philipp Stutz and Florian Trauner, 'The EU's "Return Rate" with Third Countries: Why EU Readmission Agreements Do Not Make Much Difference' (2022) 60 International Migration 154; Peter Slominski and Florian Trauner, 'Reforming Me Softly – How Soft Law Has Changed EU Return Policy since the Migration Crisis' (2021) 44 West European Politics 93.

[20] European Commission, 'Migration letter' (14 October 2024), https://www.politico.eu/wp-content/uploads/2024/10/15/October-2024-EUCO-Migration-letter.pdf; Jennifer Rankin and Lorenzo Tondo, 'EU considers offshore centres for deportees as it hardens on migration' (*The Guardian*, 17 October 2024) https://www.theguardian.com/world/2024/oct/17/clashes-expected-at-eu-summit-as-migration-return-hubs-top-agenda.

borders of the Union, whilst under EU jurisdiction. Although it is impossible to predict whether, when and how return hubs will become a reality, their proposal signals the enhanced agency-denial approach adopted by the new Commission. This thesis can provide the theoretical and normative framework to develop in-depth research on the future shape of the everchanging EU asylum policy in the field of solidarity and agency.

In conclusion, the direction the Union is taking with its asylum policy is quite clear: a policy of filtering and exclusion executed at the margins of the EU territory and before the beginning of asylum procedures. Out of sight, out of mind. Against this background, advocating for major agency recognition might sound naïve and irrelevant. However, the Ukrainian temporary protection scheme demonstrated that there are legal and normative venues to factor protection seekers' agency also under the most critical circumstances. The challenge for academic research on agency is to spark a new debate over the role of asylum seekers within the CEAS, especially as the implementation period of the New Pact reforms and the application of the Ukrainian temporary protection scheme are coming to an end.

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