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The principle of solidarity
In the Area of Freedom, Security and Justice

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AMIF	Asylum, Migration and Integration Fund
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
EBCGA	European Border and Coast Guard Agency
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EUAA	European Union Asylum Agency
GDP	Gross Domestic Product
IBMF	Integrated Border Management Fund
MFF	Multiannual Financial Framework
NGO	Non-Governmental Organisation
SAR	Search and Rescue
SBC	Schengen Borders Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPD	Temporary Protection Directive
UN	United Nations

I. INTRODUCTION

A distinct place among the series of crises and turning points that have marked the history and evolution of the European Union[1] in an ongoing period whose beginning can be traced in the late 2000s and early 2010s belongs to the unprecedented since World War II - or more moderately, since the war conflicts in Yugoslavia[2] - challenges/violations of the EU external borders by refugee and irregular migrant flows. The magnitude of these events, combined with the responses adopted on behalf of the EU institutions and the Member States, have revealed to their full extent the structural deficits in the implementation of the Union policy in this field[3], weaknesses that have by many been associated with or even attributed to a crisis of solidarity[4] or trust[5] or common vision of fundamental EU values[6]. Indeed, the numerous invocations of solidarity accompanying or attempting to justify the actions of the EU and the Member States are indicative of the wide divergences in the perception of both the notion itself and of the ways it should be materialised. On the one hand, the coexistence and competition of different, albeit not necessarily unreasonable perspectives on the most cornerstone ideals and principles, and of the subsequently diverse practical orientations they may lead to, could be considered inherent in the functioning of any democratically organised society which becomes realised not in vacuo, but in the midst of historical processes[7]. Furthermore, this observation applies even more aptly to the

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[1] As the insightful dictum of Jean Monnet had pointed out: *"I have always believed that Europe would be built through crises, and that it would be the sum of their solutions"* (Monnet J., *Memoirs*, Garden City, NewYork: Doubleday & Company (1978), p. 417).

[2] Luyten K., *Temporary Protection Directive*, European Parliamentary Research Service Briefing, PE 729.331 (March 2022), p. 2 ; Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Journal of Refugee Studies, Vol. 11, No. 4 (1998), pp. 406-412

[3] Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Maastricht Journal of European and Comparative Law, Vol. 24, No. 5 (2017), p. 610

[4] Inter alia: Carrera S., *Tampere Programme 20 years on: Putting EU principles and individuals first*, in: Carrera S./ Curtin D./Geddes A. (eds.), *20 year anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, Florence, Italy: European University Institute (2020), p. 54; Carrozzini A./ Lonardo L., *The Many Faces of Solidarity and Its Role in the Jurisprudence of the Area of Freedom, Security and Justice*, in: Kassoti E./Idriz N. (eds.), *The Principle of Solidarity. International and EU Law Perspectives*, Global Europe: Legal and Policy Issues of the EU's External Action: Volume 2, The Hague, Netherlands: T.M.C. Asser Press/Springer (2023), p. 271; Marin L./Penasa S./Romeo G., *Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity*, European Journal of Migration and Law, Vol. 22, No.1 (2020), pp. 1, 4; Takle M., *Is the Migration Crisis a Solidarity Crisis?*, in: Grimmel A. (ed.), *The Crisis of the European Union:Challenges, Analyses, Solutions*, London: Routledge (2018), pp. 116-129

[5] Balboni M., *Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy*, in Walzenbach G./Alleweldt R. (eds.), *Varieties of European Subsidiarity: A Multidisciplinary Approach*, E-International Relations Publishing (2021), pp. 132-141; Marin L., *Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation*, Freedom, Security & Justice: European Legal Studies, No. 1 (2019), p. 66

[6] Balboni M., *Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy*, Ibid.; Lavenex S., *'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, Journal of Common Market Studies, Vol. 56, No. 5 (2018) pp. 1199, 1204

[7] Postema G.J., *Failing democracy*, in: Schwartzberg M./Viehoff D. (eds.), *Democratic failure:NOMOS LXIII*, American Society for Political and Legal Philosophy, New York: New York University Press (2020), pp. 54, 60-61

concept of solidarity, taking into account not only its abstract meaning, but also the fact that, apart from the legal considerations about it, it has been the subject of various other fields of knowledge - moral and political philosophy, economic and social sciences - whose influence and findings could hardly - and should not - be totally set aside, if an understanding of the controversy around solidarity is to be achieved. On the other hand, the inability of the EU and the Member States to reach a common ground as to the degree and the manner that solidarity should be expressed particularly in their common policy on asylum, migration and external border control is a result of the very nature of the Area of Freedom, Security and Justice (AFSJ) and the difficulty to strike a normative and practical balance between the partly incompatible demands deriving from its components[8].

The only elements which appear to be common in the variant views of solidarity are that it definitely involves multiple parties, of which at least one provides or is supposed to provide at least one other with some form of assistance or support. Anything else, although much more would be needed to adequately define the term, has so far been open to question and debate. Who is to be included among those who the work of performing actions of solidarity may be placed upon? Is it the EU, the Member States or their individual citizens as well? Who should be considered as recipients of that solidarity? Would it be exhausted among Member States or extended towards third countries and their nationals? In that regard, should solidarity be dependent on a preexisting relationship between the giver and the receiver and if so, what would be those requirements? The connection through a common identity, the pursuance of common goals or interests, the expectation of beneficial retribution, the existence of mutual trust or the creation of binding legal rules? Consequently, should solidarity be voluntary or mandatory? And finally, what would solidarity essentially entail? What form of assistance should it be translated into and who should be responsible to make those decisions? The EU or the Member States?

It is not difficult to comprehend - and the experienced reality of the last 15 years is useful on that account - that the choice of one answer over another in most of these questions can logically lead to so divergent conclusions and ideological positions, that the attempt to reach a commonly accepted definition of solidarity would prove futile. It is preferable therefore to concentrate instead on the need in the structure of the AFSJ and more specifically in the policy on border checks, asylum and immigration, which the EU legislator envisaged that solidarity could satisfy; in other words, to search for an ideal content of solidarity - what solidarity *should* mean - through the understanding of the reasons that render it necessary, and to examine how the EU institutions and Member States have in practice responded to its demands.

The combined reading of Articles 3 paragraph 2 of the Treaty on European Union[9] and 67 of the Treaty on the Functioning of the European Union[10] offers a description of the AFSJ as an area

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[8] Lavenex S., *'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, Ibid.; Lavenex S./Wagner W., *Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice*, European Security, Vol. 16, Nos. 3-4 (2007), pp. 225-226, 229

[9] Consolidated version of the Treaty on European Union, OJ C 202, 7.6.2016, p. 13

[10] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 47

without internal frontiers, in which the free movement of persons, as well as a high level of security and effective access to justice shall be ensured. The means for the realisation and maintenance of such an area - or, differently put, its counterbalance - is, along with the prevention and combating of crime, the formation of a common policy on asylum, immigration and external border control. In the conduct of that common policy, the subject matter of which is further analysed in Articles 77-80 TFEU, the EU and the Member States are bound principally by two guiding principles, which could equally be interpreted as limitations to the permitted scope of their actions:

a) the respect for fundamental rights and in particular the fair treatment of third-country nationals. This fairness applies to those legally residing in Member States' territory, according to Article 79 paragraph 1 TFEU, and those requiring international protection, including the status of refugee and beneficiary of subsidiary or temporary protection. With regard to the latter, although their treatment cannot be deemed as equal to that of Member States' own nationals, Article 78 paragraph 1 TFEU and Articles 18 and 19 of the Charter of Fundamental Rights of the European Union[11] demand that at the very least it is compatible with the Geneva Convention of 28 July 1951[12] and the Protocol of 31 January 1967[13] relating to the status of refugees and respects the principle of non-refoulement, meaning that *"[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"*[14].

b) that the common policy, in all three of its interdependent aspects, *"shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States"*. Articles 80, which is the provision enshrining the principle in the context of the AFSJ, and 67 TFEU, where even less analytically reference is also made to solidarity, explicitly point out that it is to be developed among the Member States. They provide nonetheless with no further clarification on how solidarity should be perceived or implemented, except for its connection to the fair sharing of responsibility, whose interpretation remains however vague: is it a synonym/explanation to solidarity, a different but complementary principle or one of the multiple facets solidarity may assume[15]? In either case, how should fairness be determined in the allocation of responsibilities among Member States[16]?

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[11] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389–405

[12] Convention Relating to the Status of Refugees (Geneva, 28 July 1951)

[13] Protocol Relating to the Status of Refugees (New York, 31 January 1967)

[14] Article 19 paragraph 2 CFREU

[15] Goldner Lang I., *The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity*, in: Biondi A./Dagilyte E./Küçük E. (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Cheltenham, UK: Edward Elgar Publishing (2018), pp. 133-160

[16] Küçük E., *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?*, European Law Journal, Vol. 22, No. 4 (2016), pp. 455-456

In this absence of precise conceptual directions offered by the Treaties, the role solidarity is called to perform in the relations among Member States needs to be sought in the specific qualities of the field where they are meant to be realised, namely the policy on asylum, immigration and external border control and especially its character as common. A dual explanation could justify the choice of that wording: first, since the benefits of a well functioning AFSJ are common to all Member States and their citizens and since therefore all Member States share a common goal and interest in preserving it, it is fair and rational that the burdens required in that respect are also commonly shared among them[17]; second, the effectiveness of that policy, which is commonly beneficial as a conditio sine qua non for the continuing existence of the AFSJ, requires a community of the obligations it entails among the Member States. On the one hand, this is a consequence of the fact that the external borders of the Union's territory and most importantly those in the Mediterranean Sea, the Balkan Peninsula and the North-Eastern Europe, which are in direct contact with the borders of neighbouring third countries, can no longer be considered as merely the borders of the respective frontier Member States, but, since the integration of the Schengen acquis into the framework of the EU and the abolition of internal frontiers[18], they are the borders of the whole EU[19]; anyone crossing those borders - asylum-seekers and irregular migrants included - find themselves standing not only on national, but also European ground[20]. On the other hand, last years' events taking place in the exact above mentioned borders have made clear that the pressures applied to the border management and asylum systems of the frontier Member States, due to their geographical position, can take the extent of such disproportionate burden, that it would be unrealistic to expect them to adequately deal with it on their own[21].

Accordingly, solidarity can be understood as governing the fulfillment of the collective responsibilities entrusted to the Member States with view to its effectiveness. In that context, it may call for an allocation of those responsibilities among the Member States in a fair manner

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[17] Joined Cases C-715/17, C-718/17 and C-719/17, Opinion of Advocate General Sharpston delivered on 31 October 2019, *European Commission v Republic of Poland and Others*, ECLI:EU:C:2019:917, par. 253; Sangiovanni A., *Solidarity in the European Union: Problems and Prospects*, in: Dickson J./Eleftheriadis P. (eds.), *The Philosophical Foundations of European Union Law*, Oxford: Oxford University Press (2012), p. 410; Sangiovanni A., *Solidarity in the European Union*, Oxford Journal of Legal Studies, Vol. 33, No. 2 (2013), pp. 220, 225, 228-229

[18] Agreement 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 (Schengen Agreement) (Schengen, 14 June 1985), OJ L 239, 22.9.2000, p. 13–18; 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 (Schengen Convention) (Schengen, 19 June 1990), OJ L 239, 22.9.2000, p. 19–62; Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union, OJ C 202, 7.6.2016, p. 290–292

[19] Balboni M., *Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy*, Ibid.

[20] Bauböck R., *Europe's commitments and failures in the refugee crisis*, European political science, Vol. 17, No. 1 (2018), p. 147

[21] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631, par. 128; Balboni M., *Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy*, Ibid.

which respects their equality[22] and does not place on any of them costs exceeding their capacity to respond; at the same time, solidarity may also require that support should be provided to any Member State found in need, in order to comply with its obligations, thus resembling to the principle of sincere cooperation enshrined in Article 4 paragraph 3 TEU[23].

Nevertheless, major questions remain on the legal nature of the forms and mechanisms through which solidarity could be expressed, on whether those would be obligatory or discretionary upon Member States or establish a flexible middle solution, as well as on their potentially permanent or only provisional character. Such issues are related not only to the normative effect and the binding force of solidarity, but evenly to the degree of willingness of the Member States to comply with the obligations deriving from it. Indeed, Member States may reasonably find themselves at times having to fulfill simultaneously hardly compatible duties: the commitment under EU and international law to provide refugee protection and in general respect human rights limits radically both the available means for an effective control of their - and the Union's - external borders and the flows of asylum-seekers and migrants attempting to cross them[24], and their traditionally sovereign right to choose the third-country nationals they will admit in their territory[25]. Moreover, to the extent that such admission is perceived as posing a threat to their internal security, economy and public order[26], Member States' obligation to accept it may seem to conflict with their responsibility to guarantee the well-being of their own citizens[27].

Furthermore, the TFEU provisions, apart from the requirement of fairness in Article 80, do not include any specific direction on what criteria the allocation of responsibilities among Member States should be determined upon. Especially with regard to the responsibility towards persons requiring international protection, the action of states has been eloquently paralleled with the behaviour of individuals confronted with a situation in which they would be expected to act as Good Samaritans. If, for example, a person collapsed in the street, the chances of that victim receiving assistance would be higher, if there was only one other person that happened to pass by at the time of the fall, than in the presence of several potential rescuers. The main reason is that

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[22] Carrera S., *Tampere Programme 20 years on: Putting EU principles and individuals first*, in: Carrera S./Curtin D./ Geddes A. (eds.), *20 year anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, Florence, Italy: European University Institute (2020), p. 61

[23] Goldner Lang I., *Article 80 [Solidarity and Responsibility]*, in Blanke H.-J./Mangiameli S. (eds.), *Treaty on the Functioning of the European Union – A Commentary. Volume I: Preamble, Articles 1-89*, Springer International Publishing (2021), pp. 1518-1520

[24] Lavenex S., *'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, Ibid.

[25] Gray H.L., *One for All and All for One, None for Many and Many for None: Understanding Solidarity in the Common European Asylum System*, DPhil thesis, University of Liverpool (2017), pp. 252-254; Lavenex S./Wagner W., *Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice*, Ibid., p. 233

[26] Betts A., *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint Product Model in Burden-Sharing Theory*, Journal of Refugee Studies, Vol. 16, No. 3 (2003), pp. 276-277; Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., pp. 400-401

[27] Bauböck R., *Europe's commitments and failures in the refugee crisis*, Ibid., p. 142

the higher the number of bystanders, the more diffused, instead of clearly allocated, the responsibility to help is and therefore, no one could be solely held liable, if the victim died[28]. The solution to inaction, which in the case of refugees can be also explained by states' hesitation to assume the burden of their protection, is the assignment of tasks by either a recognised authority or by mutually binding rules[29].

In the case of the measures adopted on EU level which, although not necessarily referring to solidarity, are oriented toward its implementation, both conditions are met. Since the Dublin Convention[30] and later on the Dublin II[31] and III[32] Regulations, the EU and the Member States have established binding criteria and mechanisms for the determination of a single Member State being responsible for the examination of each application for international protection lodged in a Member State by a third-country national. In addition, the EU has gradually promoted solidarity among Member States through measures falling roughly under four categories[33]: a) the harmonisation of national legislations and in particular the rules governing the reception conditions of asylum-seekers, their qualification as refugees or beneficiaries of international protection, the procedures for granting and withdrawing such status and the return of the illegally staying third-country nationals; b) the financial assistance to Member States for their effective response to the demands of the common policy on asylum, immigration and external border checks; c) the administrative support, especially through the operation of the EU agencies on asylum, European border management and law enforcement cooperation; d) the physical distribution of asylum-seekers by means of their relocation or resettlement.

Concerns over the prospects and efficiency of the those measures had been expressed quite early, even by Union institutions[34] - and in certain cases, before even their adoption, in the theoretical

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[28] Kritzman-Amir T., *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, Brooklyn Journal of International Law, Vol. 34, Iss. 2 (2009), p. 357; Miller D., *The Responsibility to Protect Human Rights*, in: Meyer L.H. (ed.), *Legitimacy, Justice and Public International Law*, Cambridge: Cambridge University Press (2009), pp. 232-251

[29] Miller D., *The Responsibility to Protect Human Rights*, Ibid.

[30] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) (Dublin, 15 June 1990), OJ C 254, 19.8.1997, p. 1–12 (no longer in force)

[31] Council Regulation (EC) No 343/2003 of 18 February 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, OJ L 50, 25.2.2003, p. 1-10 (no longer in force)

[32] 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), OJ L 180, 29.6.2013, p. 31–59

[33] Bast J., *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, European Public Law, Vol. 22, No. 2 (2016), pp. 298-300; Del Monte M./Orav A., *Solidarity in EU asylum policy*, European Parliamentary Research Service Briefing, PE 649.344 (January 2023); Metsola R. MEP/Kyenge K. MEP (Co-rapporteurs), *Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue operations*, European Parliament Committee on Civil Liberties, Justice and Home Affairs, PE.564.907v01-00 (15 July 2015)

[34] European Commission, *Green Paper on the Future Common European Asylum System*, COM(2007)301 (6 June 2007)

analysis of the various potential mechanisms of responsibility-sharing[35]. It was nonetheless the so called 'refugee' or 'migration' or 'humanitarian' crisis, caused by the massive attempts of millions of asylum-seekers or irregular migrants to enter into EU territory as a result most significantly of the Arab Spring movements in North African and Middle Eastern countries, which brought to the surface all the weaknesses that the EU and the Member States had chosen in practice to turn a blind eye to until then. The inflow of third-country nationals, which reached its peak in 2015-2016, but had already started since the beginning of the decade and still continues at lower paces and numbers, exposed not only the inability of the EU to timely and adequately prevent and respond to it[36], but also the deviation of Member States from a course of solidarity, due to either their unwillingness to comply with EU rules when clashing with their national interests or those rules exceeding their capacity to implement them[37].

At the same time however, the crisis created the environment for the first authentic interpretation of solidarity in the framework of the AFSJ by the Court of Justice. The actions for annulment against the 2015 Council Decisions providing for the relocation of asylum-seekers from Greece and Italy to the other Member States as solidarity measures to relieve the burden of these two States[38] and afterwards the actions for infringement against those Member States which most limitedly - if at all - complied with the Decisions gave the opportunity to the CJEU in two landmark judgments[39] to clarify much of the doubt on the alleged content and practical scope of solidarity.

Last but not least, the collective failure in the management of the crisis rendered imperative a change in the strategy of action of both the EU and the Member States; besides, the ongoing tensions in the Mediterranean and the recent influx of third-country nationals from Belarus and Ukraine strengthen the view that there is no margin for rest and inaction. Yet, the prevailing tendencies of the last years do not leave much room for optimism either. The emerging externalisation of the EU asylum and migration policy through cooperation with third countries, though promising as a means of crises' prevention, has raised serious concerns on its

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[35] Noll G., *Sharing the Burden?*, in: Noll G., *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague: Martinus Nijhoff Publishers (2000), pp. 270-275; Noll G., *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, Journal of Refugee Studies, Vol. 16, No. 3 (2003), pp. 239-240

[36] Tsourdi E., *Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance 'crisis'?*, in *Searching for Solidarity in EU Asylum and Border Policies*, A Collection of Short Papers following the Odysseus Network's First Annual Policy Conference (26-27 February 2016), pp. 5-9

[37] Goldner Lang I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, European Journal of Migration and Law, Vol. 22, No. 1 (2020), p. 46

[38] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146–156 (no longer in force); Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, p. 80–94 (no longer in force)

[39] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631; Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, *European Commission v Republic of Poland and Others*, ECLI:EU:C:2020:257

compatibility with fundamental rights and the rule of law[40]. Moreover, the long attempts to reform the Dublin III Regulation and the Common European Asylum System reveal a persistent disagreement on how this policy should be conducted, including the role of solidarity within it[41], whereas the adoption of the New Pact on Asylum and Migration in 2024 accordingly appears to reflect a compromising solution that preserves many of the shortcomings of the so far legislative regime[42].

[40] Gkliati M./Nicolosi S.F., *External Solidarity in Integrated Border Management: The Role of EU Migration Agencies*, in: Kassoti E./Idriz N. (eds.), *The Principle of Solidarity. International and EU Law Perspectives*, Global Europe: Legal and Policy Issues of the EU's External Action: Volume 2, The Hague, Netherlands: T.M.C. Asser Press/Springer (2023), pp. 209-236

[41] Cherubini F., *The Commission Tries Again to Reform the Dublin System: Much Ado About Nothing?*, in: Russo T./ Oriolo A./Dalia G. (eds.), *Solidarity and Rule of Law: The New Dimension of EU Security*, European Union and its Neighbours in a Globalized World: Volume 9, Cham, Switzerland: Springer (2023), pp. 75-97

[42] Karageorgiou E., *Why the European Commission's Pragmatic Approach to Asylum Is Not Enough: Re-imagining Solidarity as a New Form of Conducting Regional Politics*, in: Kassoti E./Idriz N. (eds.), *The Principle of Solidarity. International and EU Law Perspectives*, Global Europe: Legal and Policy Issues of the EU's External Action: Volume 2, The Hague, Netherlands: T.M.C. Asser Press/Springer (2023), pp. 163-179

II. SOLIDARITY IN THEORY

A. INTRODUCTION

1. Different conceptions of solidarity

The appearance and the continuous relevance of the notion of solidarity in the philosophical and scientific debate can be detected long before the creation of the (nowadays called) EU and AFSJ, the legal enshrinement of the principle in various provisions of the Treaties and finally the insertion of Article 80 in the TFEU by the Lisbon reform. Fragments of that conceptual dispute - especially on the foundation and objectives of solidarity, its boundaries and the scope of its influence on human activity - can still be found in the practice and rhetoric of the Member States and the EU institutions, as well as notably in the argumentation of the CJEU, the Advocates General and the Member States involved in the cases of the actions for annulment and infringement regarding respectively the validity and implementation of the Relocation Decisions adopted in 2015[43][44]. It is appropriate therefore to refer to and search the different conceptions of solidarity, to the extent that they in essence play a part in shaping the contemporary legal considerations about it.

Starting from its source and despite the divergences in those opinions, they may well be summarised in solidarity deriving from the existence of either a common identity or common interests or a sense of reciprocity. A fourth, widely upheld potential origin is mutual trust[45], which, although frequently associated with the previous three, mainly as the result of an efficient cooperation or solidarity applied in practice, thus strengthening the preservation of that practice[46], cannot be considered as a basis of solidarity by itself. In either case, it is not rare for these causes to be in an interdependent relationship and coexist at the foundation of solidarity.

Common identity covers a field of reasons giving rise to solidarity, that extends from the most narrowly perceived homogeneity to pure altruism. The scope of common identity may include the members of a family, of a specific social/economic group, such as the residents of the same town and the participants of the same professional union, the believers of the same religious faith, the persons comprising a nation, and may expand to certain other peoples, like those forming the EU, with which there may be, for instance, historical, cultural or linguistic ties; even

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[43] Joined Cases C-643/15 and C-647/15, Ibid.; Joined Cases C-715/17, C-718/17 and C-719/17, Ibid.

[44] Joined Cases C-643/15 and C-647/15, Opinion of Advocate General Bot delivered on 26 July 2017, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:618; Joined Cases C-715/17, C-718/17 and C-719/17, Opinion of Advocate General Sharpston delivered on 31 October 2019, *European Commission v Republic of Poland and Others*, ECLI:EU:C:2019:917

[45] Habermas J., *Are We Still Good Europeans?*, available at: https://www.socialeurope.eu/are-we-still-good-europeans (13 July 2018)

[46] Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid., pp. 613, 617

further, the common human nature shared by all human beings can inspire solidarity towards the whole humanity, notwithstanding the lack of any prior relationship or bond, apart from the one created by that very nature[47]. Accordingly, the extent of the persons considered to share a common identity is inversely proportional to that of the limitations to the particular type of solidarity that emerges; the higher the number of those included, the lower the boundaries of that solidarity and vice versa. By contrast to the altruistic ideals of equality and compassion among all humans, when values like solidarity, trust and loyalty are based on a restrictively understood common identity, it is quite likely that they will be denied to non-fellow members, lying outside the boundaries of the community. Especially when perceived as threat, the "strangers" may encounter - instead of solidarity - prejudice and mistrust, indifference to their moral/legal claims and obstacles to their admission inside those boundaries[48]. On the other hand, the less inclusive the common identity is, the more easily trust and reciprocity are expected to be achieved among the members of the community and the more probable it is for their interests to converge.

Common goals and interests may consequently be a product of common values or identity, but they may also constitute an independent source of solidarity. That can happen when the convergence of interests is circumstantial or limited to (a) specific field(s), thus corresponding to or taking the form of an alliance[49], whereas the existence of unifying ideals allows for more long-term objectives to be set, requiring even higher commitments from the participants[50]. The common goals may be related to the maximisation of benefits or the minimisation of risks or the more equal redistribution of the benefits and risks among those connected by solidarity[51]. Most goals however can be seen as having both a positive and a negative aspect, so that the collective pursuance of peace and the reinforcement of the defensive capacity equally reflect the objective of preventing war conflicts and their impact; the maintenance of internal security and public order and the promotion of social policy express the interest to avoid social instability and injustice; without social integration and cohesion, it is doubtful whether communities with a high degree of diversity will hold together[52]; the same concerns pertain to the objective of financial and monetary stability. It is not paradoxical therefore that special appeals are made to solidarity in cases of failure to attain such interests, when there is unfair sharing of the benefits and responsibilities[53] or an undesired outcome posing common threat has occurred.

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[47] Takle M., *Is the Migration Crisis a Solidarity Crisis?*, Ibid.

[48] Postema G.J., *Failing democracy*, Ibid., pp. 67-68

[49] Karageorgiou E./Noll G., *Receiving Ukrainian Refugees in the EU: A Case of Solidarity*?, available at: https://www.asileproject.eu/receiving-ukrainian-refugees-in-the-eu-a-case-of-solidarity/ (7 June 2022)

[50] Habermas J., *Are We Still Good Europeans?*, Ibid.

[51] Stjernø S., *Solidarity in Europe: The History of an Idea*, Cambridge: Cambridge University Press (2005), pp. 16-19

[52] Karagiannis N., *Solidarity within Europe/Solidarity without Europe*, European Societies, Vol. 9, No. 1 (2007), p. 5

[53] Takle M., *Is the Migration Crisis a Solidarity Crisis?*, Ibid.

A third possible source of solidarity can be found in reciprocity, even though it mostly develops on the basis of preexisting ties created by common identity, values or pursuits. There is nonetheless one case where demands for solidarity may originate in reciprocity alone. That case consists of one's duty to return the benefit received from someone else[54] in the absence of any previous connection between them, as a result of which the benefit would have been given. Contrary to the reciprocal obligations attached to a shared identity or collective goals, which to a non-negligible measure have been institutionalised in legal norms, that does not apply to reciprocity born out of a benefit offered free of promise. Hence, a distinction must be drawn between a moral or ethical duty of reciprocity and legal obligations invested with a higher authority's sanctioning power[55].

In the EU legal order, reciprocity has been replaced by the principle of sincere cooperation, pursuant to which the Member States are obliged to adopt any measure appropriate for the fulfillment of their commitments under EU law, *"refrain from any measure which could jeopardise the attainment of the Union's objectives"* and, along with the Union, *"assist each other in carrying out tasks which flow from the Treaties"*[56]. At the same time nevertheless, to argue that Member States' demands for solidarity are irrelevant to expectations of reciprocity and that their incentives for compliance with their obligations are not influenced by whether they perceive those expectations as fulfilled or not would be naive. The persistent adherence of Member States to such claims - even at ethical or political level - has the potential to encourage either the application[57] or the infringement of EU legal rules on their behalf, depending on the concurrence of the actions of the EU and the other Member States with their own view[58].

Beyond its role in the functioning of the AFSJ, solidarity appears in the framework of several other provisions of the Treaties and Union policies[59]. Most importantly: it is included in the fundamental EU values of Article 2 TEU, as well as among the objectives guiding the Union's action set in Article 3 paragraphs 3 and 5 of the TEU. In the latter provision, reference is made to the promotion of solidarity *"between generations"*, *"among Member States"* and, in the context of the Union's external relations, *"among peoples"*, a commitment which is reiterated in Article 21 TEU. In addition, Articles 24 paragraphs 2 and 3, 31 paragraph 1 and 32 paragraph 1 of the TEU emphasise the need for *"mutual political solidarity"* among Member States in the conduct of the Union's Common Foreign and Security Policy. In the structure of the policy areas

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[54] Eleftheriadis P., *Fairness*, in: Eleftheriadis P., *A Union of Peoples*, Oxford: Oxford University Press (2020), pp. 214-215; Rawls J., *Justice as Reciprocity*, in: Rawls J., *Collected Papers*, edited by Freeman S., Cambridge, Massachusetts: Harvard University Press (1999), pp. 190-224

[55] Habermas J., *The Lure of Technocracy: A Plea for European Solidarity*, in: Habermas J., *The Lure of Technocracy*, Cambridge: Polity Press (2015), pp. 3-28

[56] Article 4 paragraph 3 TEU

[57] Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid., pp. 607, 610

[58] Postema G.J., *Failing democracy*, Ibid., pp. 63-64

[59] Goldner Lang I., *Article 80 [Solidarity and Responsibility]*, Ibid., pp. 1517-1518

provided in the TFEU, *"a spirit of solidarity"* among Member States is further required a) *"upon the measures appropriate"* to surmount *"severe difficulties […] in the supply of certain products, notably in the area of energy"* (Article 122 paragraph 1 TFEU); b) regarding *"the need to preserve and improve the environment" "[i]n the context of the establishment and functioning of the internal market"* (Article 194 TFEU); c) in case *"a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster"*, including the efforts for both the prevention of the threat and the offer of assistance, if it does occur (Article 222 TFEU). Moreover, although not explicitly mentioned, solidarity also underlies the granting of financial assistance to Member States with view to the proper functioning and stability of the Economic and Monetary Union (Articles 122 paragraph 2 and 136 paragraph 3 TFEU) and, *"within the framework of the principles and objectives of the external action of the Union"*, the adoption of measures of *"economic, financial and technical cooperation"* and assistance with third countries (Articles 212 and 213 TFEU) and the conduct of humanitarian aid operations (Article 214 TFEU)[60]. Lastly, Solidarity is the name of Title VI of the Charter of Fundamental Rights comprising of Articles 27 to 38, which aim to the protection of the so called 'social rights'.

The majority of these references to solidarity in EU primary law reveal an understanding of it as primarily focused on inter-state relations, in contrast to the way the term is more often used in domestic legal orders[61], which bears more resemblance to the above provisions of the Charter. That observation applies no less to the common policy on asylum, immigration and external border control, where Articles 67 paragraph 2 and 80 TFEU only mention solidarity among Member States. The state-centric approach can be interpreted as putting emphasis exclusively on the interests of the Member States, rather than those of the asylum-seekers[62]. An explanation is that, since third-country nationals lack the bonds of shared identity with EU citizens, reciprocity to the granted benefits cannot be expected of them and therefore such benefits and socio-economic entitlements cannot easily be extended to them[63]. Yet, the position of individuals and especially asylum-seekers is not to be deemed as entirely irrelevant, but framed within the context of rules protecting human rights[64] that are binding the action of Member States and for the effective implementation of which solidarity is required among them. It is subsequently reasonable that the absence of solidarity among Member States may be interpreted as - and actually lead to - lack of solidarity with refugees[65].

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[60] Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid., p. 608

[61] Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid.

[62] Mitsilegas V., *Solidarity and Trust in the Common European Asylum System*, Comparative Migration Studies, Vol. 2, No. 2 (2014), pp. 186-187

[63] Bell M., *Irregular migrants: Beyond the limits of solidarity?*, in: Ross M./Borgmann-Prebil Y. (eds.), *Promoting Solidarity in the European Union*, Oxford: Oxford University Press (2010), pp. 151-165

[64] Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid.

[65] Takle M., *Is the Migration Crisis a Solidarity Crisis?*, Ibid.

2. What do States want? Benefits and burdens of providing refugee protection and managing external borders

In order to understand and assess the attitude of the Member States in the law-making procedure shaping the common asylum, migration and border checks policy, their response in terms of compliance with the adopted legal measures and ultimately the regulatory impact and efficiency of such measures, it is necessary to delve into the underlying (political) motivations of their action. With regard to the course of that reasoning, a preliminary note is required: that the use of terms like 'incentives', 'interests', 'willingness', 'ideological orientations' and factors calculated for the determination of states' 'behaviour' implies the attribution to them of anthropomorphic qualities. Although metaphorical, the choice of such wording is useful for two mainly reasons: a) the position of Member States in the process of decision-making within the EU presents empirical similarities to the motives and action of individuals when participating in a group or organisation, particularly in their interaction with their fellow-members; b) the decisions directing the action of states are made by individuals or groups of individuals, namely the members of national governments, who ex officio represent the will and interests of other individuals, their people or supporters.

Each Member State's objective is to increase the benefits accrued to it and limit the burdens entailed by the provision of refugee protection and the control of the Union's external borders. As was previously argued, the two facets of that objective are usually the opposite sides of the same coin; the prevention or mitigation of a risk would accordingly be considered as a profit and the reduction of a benefit as a cost.

Member States' interests may be EU or state-related. The preservation and development of the Schengen acquis[66], the abolition of internal frontiers, the free movement of persons within the AFSJ and the unhindered operation of the Internal Market are goals shared by all Member States, whose fulfillment depends on the coordination of their action[67]. Furthermore, each state aims at the fundamental for its existence protection of its domestic political, social and economic stability and maintenance of its national security and public order.

The most severe limitation to the means Member States are lawfully allowed to employ for the safeguarding of their interests[68] and, equally, the perceived as most dangerous threat to their attainment, is the obligation to provide international protection to third-country nationals. First, the mere presence and mobility of asylum-seekers in a state's territory means that one of the cardinal aspects of national sovereignty and security, the power to control whose entry is

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[66] Preamble to Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union, Ibid.

[67] Chetail V., *The Common European Asylum System: Bric-à-brac or System?*, in: Chetail V./De Bruycker P./Maiani F. (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Immigration and asylum law and policy in Europe: Volume 39, Leiden: Brill Nijhoff (2016), pp. 4-9; Thielemann E.R., *Between Interests and Norms: Explaining Burden-Sharing in the European Union*, Journal of Refugee Studies, Vol. 16, No. 3 (2003), pp. 268, 270

[68] Noll G., *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, Ibid., pp. 239-240

permitted, has been set aside, as their admission is forced upon the host state[69]. Second, the obligation to satisfy their survival needs necessitates the expense of material, financial and human/administrative resources, which, to the extent that they are not covered by EU assistance (funds and agencies' personnel) and Non-Governmental Organisations/volunteers, are assumed by the state and burden the public finances and administration[70]. Moreover, the fact that third-country nationals, after they have been granted a status of international protection, require their inclusion in the host society[71] puts under question the ability of a community of persons to define itself within specified territorial boundaries and decide who may be accepted as its members[72]. The difficulty of assimilation is further amplified in cases where asylum-seekers are compelled either by EU law to remain or be transferred in countries they share few social and cultural bonds with, or by domestic law to stay within restricted areas (hotspots) in the national territory, and such decisions meet their objections[73], sometimes extending to violence or absconding. Reactions are also likely to occur on behalf of the citizens of the host state, especially when mass inflows coincide with its already exhausted capacity to absorb them, due to financial crisis for instance, as was the case with Greece and Italy in the past decade. In addition, public discontent and rage against the presence of third-country nationals may be a result of concerns over national security, including in particular a possible terrorist attack and the orchestrated expulsion of such groups of people by neighbouring non-EU countries intending to destabilise the receiving state[74]. These types of security threats are not extraneous to the recent European experience either; they remind of the fear accompanying the reception of Middle Eastern asylum-seekers during the 'refugee crisis' because of the emergence in the same period of terrorist organisations like ISIS in their countries of origin, as well as in the last few years the large flows of third-country nationals arriving at the Greek and at the Polish, Latvian and Lithuanian borders directed respectively by Turkey in 2020 and Belarus in 2021[75]. Finally, the combined effect of the above costs may logically lead to political pressure and public demands of the people, to whom the accountability

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[69]Acharya A./Dewitt D.B., *Fiscal burden sharing*, in: Hathaway J.C. (ed.), *Reconceiving International Refugee Law*, The Hague: Martinus Nijhoff Publishers (1997), pp. 111-145; Gray H.L., *One for All and All for One, None for Many and Many for None: Understanding Solidarity in the Common European Asylum System*, Ibid., pp. 252-254; Lavenex S./Wagner W., *Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice*, Ibid., p. 233

[70] Miller D., *The Responsibility to Protect Human Rights*, Ibid.

[71] Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., p. 399

[72] Gray H.L., *One for All and All for One, None for Many and Many for None: Understanding Solidarity in the Common European Asylum System*, Ibid., pp. 252

[73] Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., pp. 400-401

[74] Acharya A./Dewitt D.B., *Fiscal burden sharing*, Refuge, Vol. 15, No. 1 (1996), p. 8; Weiner M., *The Global Migration Crisis: Challenge to States and to Human Rights*, New York: HarperCollins College Publishers (1995)

[75] Del Monte M./Luyten K., *Emergency measures on migration. Article 78(3) TFEU*, European Parliamentary Research Service Briefing, PE 698.851 (December 2021)

of governments lies and on whom their legitimacy and reelection depends[76], that refugee protection be reduced or even denied.

Nevertheless, although the burdens the host states are obliged to undertake and subsequently the political and people's responses to them may reach such extreme levels, whether or not they will is uncertain, as it depends on several factors. To begin with, the extent of the impact of asylum-seekers' flows is proportionate to the number of persons and the frequency of their arrival; when they are limited, in contrast to the generalised idea of constant crises, the cost is expected to be easily manageable by the state[77]. Similarly, if a short-term perspective is followed, as it usually is, the costs outweigh the benefits; but in the long-term, especially if placed in a society that favours their integration, the activity of refugees might prove beneficial[78]. The possibility of their smooth assimilation however and the behaviour they encounter upon their entry may differ radically depending on their ethnic, religious and cultural characteristics and their resemblance to those of the native residents of the host state. The 'open arms' reception and protection of the people fleeing Ukraine in 2022 after the Russian invasion in comparison to the suspicious and even hostile treatment of North African and Middle Eastern refugees a few years earlier - but also to this day - convincingly manifests the limits of that solidarity[79]. A state's willingness to accept the burdens of refugee protection depends lastly on its capacity to do so, which mostly requires the establishment of a scheme of fair responsibility sharing, and on the depth of its citizens' and, by extension, of its government's commitment to human rights[80].

Having briefly presented the potential effect that the presence of asylum-seekers may have in national legal orders, it is safe to claim that the Member States have consistently perceived and treated them as a threat, which the abolition of internal borders has rendered realistic across the whole Union[81], not anymore limited to the frontier Member States. Consequently, they are faced with two conflicting incentives: on the one hand, to comply with the obligations EU and international law have imposed, thus contributing to the maintenance of international stability and order through the operation of a refugee protection regime, and on the other hand, to minimise the number of third-country nationals on their territory and reduce the threat they entail

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[76] Bauböck R., *Europe's commitments and failures in the refugee crisis*, Ibid., p. 142; Miller D., *The Responsibility to Protect Human Rights*, Ibid.

[77] Acharya A./Dewitt D.B., *Fiscal burden sharing*, Ibid.

[78] Noll G., *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, Ibid., p. 237

[79] Inter alia: Carrera S./Ineli Ciger M./Vosyliute L./Brumat L, *The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy*, CEPS Policy Insights (March 2022); Esposito A., *The Limitations of Humanity: Differential Refugee Treatment in the EU*, Harvard International Review, Vol. 43, No. 3 (Summer 2022), pp. 12-17; Wamsley L., *Race, culture and politics underpin how — or if — refugees are welcomed in Europe*, National Public Radio (3 March 2022), available at: https://www.npr.org/2022/03/03/1084201542/ukraine-refugees-racism

[80] Thielemann E.R., *Between Interests and Norms: Explaining Burden-Sharing in the European Union*, Ibid., p. 258

[81] Mitsilegas V., *Solidarity and Trust in the Common European Asylum System*, Ibid., p. 185

for the prosperity of their citizens[82]. The means that would enable Member States to both fulfill their commitments and promote their national interests is solidarity in the form of a binding, permanent and predictable mechanism for the allocation of asylum-seekers among them, which would lower the transaction/negotiation costs in case of emergency, such as a sudden massive inflow, and would allow them to respond to those circumstances in a faster and more efficient way. However, the uncertainty in the magnitude and frequency of future refugee flows and therefore in the calculation of their costs have led to the hesitation of Member States to assume long-term obligations[83]. Instead, aiming to the prevention of asylum-seekers from moving freely within the AFSJ[84], filing multiple asylum applications ('refugees in orbit') and searching for the state providing the most favourable conditions for the assessment of their application ('asylum/ forum shopping')[85], the Member States have expressed this interest in legal measures allowing their immobilization[86]. With respect to cross-border mobility, the attribution of the responsibility to examine each asylum application to a single defined Member State (through the Dublin system) has made the movement of third-country nationals to other States, if not prohibited, then probably pointless, since they will be transferred back to the responsible State[87]. Furthermore, within that State, the risk of an asylum-seeker absconding during the assessment of his/her application may constitute legal ground for that person's detention[88][89].

The method selected by Member States, in order to ensure both compliance with their obligations and the protection of their national interests against the threats posed by the presence of third-country nationals in their territory, is in theory a reasonable compromise between those two motivations and pursuant to the principle of solidarity, since it provides for an allocation of responsibility among them. As will be made clear nonetheless, the hierarchical criteria for the determination of the responsible Member State in the Dublin Regulations and their preservation

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[82] Bauböck R., *Europe's commitments and failures in the refugee crisis*, Ibid.; Betts A., *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint Product Model in Burden-Sharing Theory*, Ibid., pp. 276-277; Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., p. 400

[83] Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., pp. 398, 402

[84] Chetail V., *The Common European Asylum System: Bric-à-brac or System?*, Ibid., p. 11

[85] Mitsilegas V., *Solidarity and Trust in the Common European Asylum System*, Ibid.

[86] Tsourdi E./Costello C., *The Evolution of EU Law on Refugees and Asylum*, in Craig P./de Búrca G. (eds.), *The Evolution of EU Law* (3rd ed.), Oxford: Oxford University Press (2021), pp. 797-798, 805-806

[87] The only exception, in which further movement of an asylum-seeker to a Member State other than the responsible one is legally allowed and significant, is when the transfer back to the responsible Member State is prohibited, due to systemic deficiencies in the asylum system of that Member State, resulting in a risk of inhuman or degrading treatment. (See: Article 3 paragraph 2 of Regulation 604/2013; CJEU judgment in Joined Cases C-411/10 and C-493/10)

[88] Tsourdi E./Costello C., *The Evolution of EU Law on Refugees and Asylum*, Ibid., p. 797

[89] See, for instance, Article 28 of Regulation 604/2013; Article 15 of Directive 2008/115.

in the new Regulation on Asylum and Migration Management[90] lack the fundamental element of fairness in that allocation. The distributional inequalities they have caused led the Member States on multiple occasions, in their effort to safeguard their national interests, to the choice to sacrifice refugee protection.

B. THE COLLECTIVE CHARACTER OF REFUGEE PROTECTION AND BORDER CONTROL

1. The effectiveness of a common policy on asylum, migration and border control as a collective problem and a collective good

The collective character of the problems caused by the mandatory admission of (large numbers of) asylum-seekers in states' territories and, by extension, the necessity for solidarity among states in their treatment has been recognised since the first international legal instruments on refugee protection after World War II. The preamble to Resolution 319 (IV) on Refugees and Stateless Persons, adopted by the United Nations General Assembly on 3 December 1949[91], explicitly made reference to *'the problem of refugees [as] international in scope and nature'*, whereas the Geneva Convention of 1951 reiterated more emphatically in its preamble *"that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation"*. More accurately, what states cannot be expected to achieve through unilateral action is to offer refugees the level of protection they are entitled to, while also serving their national interests. The principal reason, applying to both the EU and international field, is that certain states, due to their geographic proximity or even direct neighbourhood with areas of regional instability, including the refugees' countries of origin, may receive extensive inflows of third-country nationals, exceeding their material, financial, social and political capacity to treat them on their own in an appropriate and lawful manner[92].

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[90] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ L, 22.5.2024

[91] United Nations General Assembly Resolution 319(IV) on Refugees and Stateless Persons (3 December 1949)

[92] European Commission, *Green Paper on the Future Common European Asylum System*, COM(2007)301 (6 June 2007); Balboni M., *Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy*, Ibid.; Goldner Lang I., *The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity*, Ibid., pp. 133-160; Schmalz D., *Fences, Fiction, and the Magic Mountain. Responsibility- sharing for Refugees in Europe*, in: Iovane M./Palombino F.M./Amoroso D./Zarra G. (eds.), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, Oxford: Oxford University Press (2021), p. 365

The difference between the international and the EU framework of responses to the need of those states on behalf of the others lies not only in the deeper and more complete institutionalisation of the relations among Member States within the EU legal order, but in the intensity of their rational interest to contribute as well. In the international sphere, burden-sharing incentives of the states, which are not initially affected and are less likely to experience massive refugee inflows on their territories in the future, mostly rely on bilateral external relations and the will to provide humanitarian aid. In contrast, the very structure of the AFSJ makes possible the mobility from one Member State to another of any person stepping into the EU external frontiers, without being subject to internal border controls, and in this way exposes all of them to the pressure faced by any one of them. Hence, since the external borders of the frontier Member States are shared in essence with the rest of the Union, in order for the other Member States to shield security and stability in the AFSJ and in their domestic territories from the arrival of third-country nationals of unspecified number and origin, it is in their interest to assist in the effective management of those common borders and in the control of the entering asylum-seekers and irregular migrants[93]. The latter conclusion is further supported by the fact that the frontier Member States, which are logically and almost exclusively the States of first entry, are usually not the final destination of refugees and immigrants, who wish to move even deeper inside Europe, towards the central and northern countries[94].

The collective character of the problem appears consequently to be justified on two grounds: a) that no Member State is capable of providing a *"satisfactory solution"* by itself and thus a collective response is required; b) that, because of the abolition of internal borders, no Member State can consider itself immune to a potential diffusion of the problem within the AFSJ. Differently put, cooperation in accordance with the principle of solidarity is a fundamental condition for the long-term effectiveness of the common policy on asylum, immigration and external border control.

In that regard, solidarity among the Member States in the form of a permanent burden-sharing arrangement has been paralleled with the logic of an insurance scheme: each Member State, faced with the uncertainty of future refugee/migration crises and the burdens likely to be placed upon it, may prefer in advance to share them. Its underlying assumption would be that the costs of cooperation will be less than the costs of non-participating in the arrangement and in any case, that it will evade the possibility of having to deal with them on its own. All Member States' common incentive and profit from participating would be to avoid the malfunction of the AFSJ and the loss of their benefits from it, due to the lack of coordination in their action[95].

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[93] Balboni M., *Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy*, Ibid.; Goldner Lang I., *The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity*, Ibid.

[94] Schmalz D., *Fences, Fiction, and the Magic Mountain. Responsibility- sharing for Refugees in Europe*, Ibid.

[95] Noll G., *Sharing the Burden?*, Ibid., p. 266; Thielemann E.R., *Between Interests and Norms: Explaining Burden-Sharing in the European Union*, Ibid., pp. 255-256, 268, 270; Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., p. 398

Yet, that danger is not related only to the collective approach required of Member States for the effective provision of refugee protection, the management of migratory flows and the control of external borders. It is equally a consequence of the public nature of the goods/benefits produced by the effective conduct of that common policy and in general the orderly operation of the AFSJ and of the way it incentivizes non-cooperative behaviour of the Member States.

According to the most widely accepted definition, public goods have two cumulative characteristics, non-excludability and non-rivalry[96] (or, to use a different terminology, they satisfy the conditions of open access and basic availability[97]). Non-excludability of a good means that, once it has been produced, it is impossible to prevent others from enjoying its benefits[98], even if they have not contributed to its production[99]. Accordingly, non-rivalry implies common enjoyment of that good, in the sense that one's consumption of it does not curtail others' ability to enjoy it[100].

The smooth functioning of the AFSJ, due to an effective asylum, immigration and border checks policy, produces benefits which fulfill those conditions. Security and stability at regional/ European and national level, free movement of persons across the Union and the associated operation of the Internal Market, are goods available to all Member States and their citizens, irrespective of whether they assumed any cost necessary for their production and protection. One State's enjoyment does not preclude or diminish the others' and if at least one State is able to enjoy such benefits, it means that they all are[101].

It has been argued however that there may also be another, 'partial'[102] or 'joint-product'[103] model of goods which share elements of both public and private goods, having a different effect depending on the recipient; some benefits may be public to some and private to others[104]. Indeed, the successful management of refugee and migrant flows and the adequate provision of asylum protection may create private benefits for specific Member States, attributed to their special importance to those States in comparison to the others. Such benefits could be, for instance: the

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[96] Reiss J., *Public Goods*, in: Zalta E. N. (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition)

[97] Kallhoff A., *Why Democracy Needs Public Goods*, Lanham, Maryland: Lexington Books (2011), pp. 13-28

[98] Reiss J., *Public Goods*, Ibid.

[99] Olson M., *The logic of collective action: Public Goods and the Theory of Groups* (2nd ed.), Cambridge, Massachusetts: Harvard University Press (1971) [1965], pp. 14-15; Thielemann E.R., *Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU*, Journal of Common Market Studies, Vol. 56, No. 1 (2018), p. 69

[100] Samuelson P. A., *The Pure Theory of Public Expenditure*, The Review of Economics and Statistics, Vol. 36, No. 4 (1954), pp. 387–389

[101] Thielemann E.R., *Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU*, Ibid., p. 70

[102] Reiss J., *Public Goods*, Ibid.

[103] Betts A., *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint Product Model in Burden-Sharing Theory*, Ibid., pp. 277-280

[104] Olson M., *The logic of collective action: Public Goods and the Theory of Groups*, Ibid., p. 14

safeguarding of national security in States where the presence of third-country nationals created even greater threat, because of their high number or the States' limited capacity to respond; the good reputation accrued to States which actively take part, spend resources and assume responsibilities in humanitarian efforts[105]; the enhanced bargaining power in inter-state relations through the use of refugee protection as leverage in other fields of collective decision-making[106]. The value of distinguishing those excludable, state-specific benefits lies in the reasonable assumption that the Member States enjoying them have increased motives to participate in cooperative solidarity mechanisms for their maintenance, rather than resort to unilateral or arbitrary action[107].

2. Demands for solidarity as originated in distributive and corrective justice

The indiscriminate enjoyment by all Member States participating in the AFSJ of the collective goods produced through its existence and development creates to each one of them an expectation that they will all contribute to the maintenance and reproduction of those goods. That expectation does not derive from the necessity of their coordinated action alone; it is based on moral/ethical demands, which are not always expressed in the form of legally binding and enforced obligations, that reciprocity govern the allocation of the required burdens[108]. However, whereas the benefits are public in nature, the costs of their production are private[109]. This means that one the one hand, the burdens can be divided among the Member States, but the benefits cannot be split into shares, the enjoyment of which will be contingent upon the assumption of a corresponding (or any) proportion of the costs. The unwillingness of some Member States to share a piece of the burdens - either in the absence of relevant legal obligations, or by violating such obligations whose enforcement is not effectively applied, or by taking advantage of legal rules whose cost allocating criteria lead to their own relief and other States' overburdening - can force those other States to carry also the burden of the non-contributors. Conditions of systematic

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[105] Thielemann E.R., *Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU*, Ibid., p. 70

[106] Betts A., *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint Product Model in Burden-Sharing Theory*, Ibid., pp. 279, 286

[107] Thielemann E.R., *Between Interests and Norms: Explaining Burden-Sharing in the European Union*, Ibid., pp. 257-258

[108] Joined Cases C-715/17, C-718/17 and C-719/17, Opinion of Advocate General Sharpston delivered on 31 October 2019, *European Commission v Republic of Poland and Others*, ECLI:EU:C:2019:917, par. 253; Sangiovanni A., *Solidarity in the European Union: Problems and Prospects*, in: Dickson J./Eleftheriadis P. (eds), *The Philosophical Foundations of European Union Law*, Oxford: Oxford University Press (2012), p. 410; Sangiovanni A., *Solidarity in the European Union*, Oxford Journal of Legal Studies, Vol. 33, No. 2 (2013), pp. 220, 225, 228-229

[109] Betts A., *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint Product Model in Burden-Sharing Theory*, Ibid., pp. 276

inequality are thus created. Two facets of equality are specifically threatened raising issues concerning respectively two forms of justice, distributive and corrective, whose distinction can be traced back to Aristotle[110].

Distributive justice, according to the traditional perception of it, seeks to attain equality among citizens in the distribution of certain goods or benefits[111]. In the case in question though, it is not the benefits of the effective management of refugees, immigrants and external border control that need to be equally distributed among the Member States, as they are after all indivisible and common; it is the necessary burdens for the production of those goods that are the subject matter of the allocation. The type of equality that the distribution needs to achieve in order to be just cannot be satisfied by the assignment of the same, arithmetically equal shares of the costs to each Member State. Equality should be understood as "geometric" proportionality or "equality of ratios", which takes into account the differences of the parties among which the allocation must be made in such a manner, that each one receives a proportionate/symmetrical share to their specific qualities[112]. A criterion needs to be established therefore to assess those characteristics. Aristotle calls that criterion "merit" ("ἀξία"), but points out that it has not a generally defined content and depends on the belief and evaluation systems of different political societies[113]. In the context of the AFSJ, with regard to its efficient operation, a criterion on the distribution of burdens among Member States could rationally be based on their capacity to bear them. The difficulty in the assessment of that capacity would be in the consideration of elements which cannot be measured under a single mathematical unit, including inter alia public finances, social cohesion and population density. A variety of sub-criteria would have to be used consequently in the measurement of both the Member States' capacity and the different potential impact of each kind of burden, especially the reception of refugees and the long-term provision of protection. In that regard, for instance, Relocation Decision 2015/1601[114], adopted to relieve Greece and Italy from the pressures their asylum systems were experiencing, determined how many asylum-seekers each other State was obliged to receive based on: a) the size of the population (40%); b) the total GDP (40%); c) the average number of asylum applications and resettled refugees per 1 million inhabitants over the period 2010-2014 (10%) (as it reflected the efforts made by the Member States in the recent past); d) the unemployment rate (10%)[115]. Once a single distributive

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[110] Aristotle, *Nicomachean Ethics*, Translated by W. D. Ross, Kitchener, Ontario: Batoche Books [1999], Book 5, Chapters 3-5, 1131a10-1134a17

[111] Sourlas P. K., *Philosophy of Law: A historical introduction. Volume A: Antiquity*, Athens: Ant. N. Sakkoulas (2002)

[112] Aristotle, *Nicomachean Ethics*, Ibid., 1131b13-1131b17

[113] Aristotle, *Nicomachean Ethics*, Ibid., 1131a25-1131a32

[114] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Ibid.

[115] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending 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*, COM(2015) 450 final (9 September 2015)

criterion has been decided, the shares of each Member State must be calculated. What needs to be ensured is that the ratio of each State's share of the burdens to its measured capacity is equal to the ratio of all the other Member States' individual shares to their respective capacity[116]. Hence, to allocate equal shares of costs to Member States with different capacities would lead to injustice, disproportionately light or heavy burdens and ultimately ineffectiveness; *"this is the origin of quarrels and complaints - when either equals have [...] unequal shares, or unequals equal shares"*[117]. Furthermore, in contrast to the original concept of distributive justice as governing the proper rewarding of citizens and thus reaffirming and increasing the already established difference in their "merit"[118], the application of this form of justice in the sharing of burdens rather than goods contributes to the redistribution of costs among Member States and in the limitation of the gap separating them.

The second kind of justice that is affected by the refusal of certain Member States to contribute to the implementation of the common policy on asylum, migration and safekeeping of the Union's external borders is corrective justice. The requirement for the activation of corrective justice is that an injustice has already been made in the context of a relationship involving at least two parties, one of which has unfairly gained a profit by causing another a loss. The fundamental assumption is that in their original position, before the action that inflicts damage to one and gain to the other has taken place, the parties are equal. In this case however equality is not perceived as geometric, but as "arithmetical proportion"[119]. This means that the measurement of gain and loss does not rely on any other qualities of those profiting and suffering; they are realised in absolute, not relative terms[120]. *"For it makes no difference whether a good man has defrauded a bad man or a bad man a good one [...]; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it."*[121] The work of corrective justice is to provide redress of the injustice, by restoring the original position of the parties, through the compensation of those who were unfairly burdened by those who profited by the others' cost[122]. As far as the functioning of the AFSJ is concerned, it is evident that the refugee/migrant problems faced by some Member States are at least in part connected with the lack of assistance in sharing the burden on behalf of other States and that at the same time the security and stability

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[116] Aristotle, *Nicomachean Ethics*, Ibid., 1131b4-1131b12

[117] Aristotle, *Nicomachean Ethics*, Ibid., 1131a20-1131a25

[118] Kouvakas T./Bougas N./Pournara E. (eds.), *Encyclopedia Papyrus Larousse Britannica: Volume 21*, Athens: Papyros Publishing Organisation (1992), p. 61

[119] Aristotle, *Nicomachean Ethics*, Ibid., 1131b33-1132a2

[120] Sourlas P. K., *Philosophy of Law: A historical introduction. Volume A: Antiquity*, Athens: Ant. N. Sakkoulas (2002)

[121] Aristotle, *Nicomachean Ethics*, Ibid., 1132a2-1132a8

[122] Eleftheriadis P., *Fairness*, Ibid., p. 204; Miller D., *Justice*, in: Zalta E. N./Nodelman U. (eds.), *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition)

of those non-cooperating States is up to a point ensured by the disproportionate costs paid by the rest[123]. The determination nonetheless of whether that situation is a result of unfairness that needs to be corrected depends on how broadly the concepts of gain and loss are defined. At whichever point in time the original position of Member States is placed since each one's agreement to become part of the EU and the AFSJ, when its relationship with the other Member States in the EU legal framework began, probably all of them would claim that their profits outweigh their costs. Yet, in the words of Aristotle, *"the gain and the loss are respectively greater and less in contrary ways; more of the good and less of the evil are gain, and the contrary is loss"*[124]. Therefore, the prevention of the increase of a State's profit from its membership in the AFSJ, due to the placement of excessive burdens upon it, equals to a loss corresponding to the prevention of the increase of other States' burdens, which equals to a gain. According to a similar opinion, which combines the reasoning of both distributive and corrective justice, if a cooperation arrangement - taking into consideration the already existing inequalities in the (financial) capacities of Member States - creates asymmetrical possibilities of profit and risks of loss and thus favours certain Member States while overburdening others, then it is unfair[125].

Applied in the context of the common policy on asylum, immigration and border checks, distributive and corrective justice aim respectively at the prevention and the correction of the unfair and unequal allocation of excessive burdens to some Member States, because of others' unwillingness to share them. Furthermore, to the extent that cooperation among the Member States in pursuance of the demands of solidarity can be deemed necessary for the effectiveness of that common policy, it may also be deduced that solidarity encompasses both a distributive and a restorative aspect and implies both the prevention and the rectification of actions which are likely to put the stability of the AFSJ into jeopardy.

3. Consequences of the collective nature of refugee protection and border control

a) States' non-contribution incentives

The above established facts a) that public goods, such as those emanating from the development of the AFSJ and the Schengen Area, are available without exception to all Member States, irrespective of their contribution, b) that the attainment of those benefits requires the assumption of burdens and c) that all States have an objective to maximise their gains and minimise their losses in that process, lead unsurprisingly to the temptation of Member States to evade their cost-inducing responsibilities. The enjoyment by a State of the collective benefits without paying the

[123] Goldner Lang I., *The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity*, Ibid.

[124] Aristotle, *Nicomachean Ethics*, Ibid., 1132a15-1132a18

[125] Eleftheriadis P., *Fairness*, Ibid., pp. 213-214

cost, that either the law or a moral/ethical expectation of reciprocity demands, leaves the required sacrifices for their preservation to be made by its fellow Member States ('free-riding')[126]. In this way it both increases its individual gain and reduces its burdens, predominantly by denying or restricting the admission of refugees on its territory[127], by providing them protection below the standards imposed by EU and international law and by hindering their access to the national labour market, the welfare and healthcare systems[128], as well as to legal aid usually offered by humanitarian NGOs.

The fulfillment of the tasks of asylum provision, irregular migration control and external border protection has been compared to a 'zero-sum game'[129], a condition described by game theory as involving at least two competing parties, where each one's profit is equivalent to the others' loss[130]. Similarly, it may be regarded as necessitating a certain level of burdens to be carried and that the more Member States have a share in the efforts to reach it, the less are the costs that fall on each of them; conversely, the lowest the cooperation, the greater the encumbrance upon those assuming the responsibility. Based on this line of thinking, Member States consider therefore that unilateral, non-cooperative action can both ensure the enjoyment of the benefits and save them of the costs[131] which the remaining States will continue to bear, in order to maintain the common good. Nevertheless, if all or most Member States adopt such 'behaviour', then the rest will have a stronger incentive to stop contributing, either because they lack the resources to keep facing their disproportionate burdens, or because their costs exceed the benefits of the collective good[132], or finally because they no longer tolerate the asymmetry/unfairness/inequity of their treatment in comparison to that of the 'free-riders'. Consequently, unless there is coordinated action of a sufficient number of Member States, then the essential existence of the AFSJ - even if it continues to exist typically - will be seriously jeopardised and so will all the polymorphic fruit it provides the Member States with ('tragedy of the commons'). The 2015-2016 crisis, when even its foundations were put into question, reflects indeed an extreme result of numerous Member States' non-cooperative choices. Aiming to the prevention of that possibility that would mean a loss for all Member States from occurring, it is in their medium and long-term interest to commit themselves and adhere to more permanent burden-sharing arrangements allowing all of

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126 Karampatzos A., *Private autonomy and consumer protection - A contribution to behavioral economic analysis of law*, Athens: P. N. Sakkoulas Publishers (2016), pp. 67-68

127 Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., p. 400

128 Thielemann E.R., *Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU*, Ibid., p. 71

129 Thielemann E.R., *Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU*, Ibid., p. 69

130 Ross D., *Game Theory*, in: Zalta E. N./Nodelman U. (eds.), The Stanford Encyclopedia of Philosophy (Spring 2024 Edition)

131 Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., p. 399

132 Olson M., *The logic of collective action: Public Goods and the Theory of Groups*, Ibid., p. 31

them to gain, even to a less degree but more steadily future-wise than by unilateral burden-shifting[133].

Since the interests of the Member States are not entirely competing, as the 'zero-sum game' presupposes, but partly shared and partly conflicting, it is possible for 'win-win' or 'lose-lose' outcomes to eventuate. In that respect, it has been argued that the application of the 'prisoner's dilemma'[134] would be more suitable to interpret the interaction of motives and practices of the Member States. In spite of the dissimilarities between the experiment and the AFSJ - in particular the involvement of many more than two players, the capacity for negotiation among the Member States, the repetitive character of the collective decision-making and the simultaneous pursuance of multiple goals of divergent importance to each State - the hierarchy of the potential courses of action under the criterion of preference appears unchanged. The most desirable option for a Member State, meaning the one ensuring the highest benefits and the lowest costs possible, remains its own non-contribution combined with the other States' fulfillment of their responsibilities; the second most preferred combination is joint action and burden-sharing, followed by mutual non-cooperation and lastly the State's own overburdening due to others' 'free-riding'[135].

The inability of Member States to calculate the extent of the future refugee inflows, the severity of their threat and the reciprocal response of the other States has made them reluctant towards long-term binding agreements of responsibility-sharing and on the contrary it has enhanced the attractiveness of safe short-term gains through unilateral action[136]. In order for the hierarchy of incentives to be reversed, the profits of such burden-shifting need to be decreased and its cost to be amplified[137]; for that reason, the regulatory intervention of law is required, along with the effective enforcement of its provisions.

b. Requirement for legal regulatory intervention and enforcement

In the closing statements of her Opinion in the cases of infringement against Poland, Hungary and the Czech Republic for their exiguous implementation of the 2015 Council Decisions on

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[133] Karampatzos A., *Private autonomy and consumer protection - A contribution to behavioral economic analysis of law*, Ibid., p. 69-71

[134] Rapoport A./Chammah A. M., *Prisoner's dilemma: A study in conflict and cooperation*, Ann Arbor: The University of Michigan Press (1965)

[135] Noll G., *Prisoners' Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union*, German Yearbook of International Law, Vol. 40 (1997), pp. 423-428; Noll G., *Sharing the Burden?*, Ibid., pp. 337-344

[136] Karampatzos A., *Private autonomy and consumer protection - A contribution to behavioral economic analysis of law*, Ibid., p. 69-71; Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., p. 402

[137] Noll G., *Prisoners' Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union*, Ibid., p. 430; Noll G., *Sharing the Burden?*, Ibid., p. 346

relocation[138], AG Sharpston criticises the cost-benefit motives governing the action of Member States[139]. She argues that, instead of measuring what membership in the EU earns and costs them, they should accept the collective responsibilities and burdens that necessarily accompany the common benefits. To do otherwise equals to "the antithesis of being a loyal Member State" and "a betrayal of the founding" vision and values of the Union.

However, it would probably be too idealistic and impractical to expect that the political decisions made by the national governments of the Member States would not measure in such a way the impact of the Union's policies in the interests of their people whom they represent and who they are accountable to and that, when in conflict, they would not prefer to serve their closest national priorities over the general and more distant European good. In addition, it is questionable whether the moral assessment of such decisions and of the persons making them should be based on the same criteria applying to individual behaviour[140] and therefore whether the use of morally charged terms, like betrayal, disloyalty or hypocrisy, is suitable. To the extent nonetheless that they intend to portray the gap between the espoused values and goals of the EU and the actual deeds of its Member States (and subsequently the EU itself), their use is certainly justified[141].

Taking the above into account, it is essential that legal measures be adopted, which will force Member States to adjust their incentives and actions in a manner aligning them with the attainment of the Union's objectives or that will at least prevent or mitigate their motives to deviate from that common path[142]. Specifically, the EU rules directing the conduct of the common policy on asylum, immigration and external border control and the obligations of the Member States within its framework need to adequately encompass the principle of solidarity, in both its distributive and corrective aspect.

First, in an environment where no Member State is willing to bear the costs of that common policy, unless there is assurance that the others will do their part as well, voluntary contributions cannot be expected, at least not to a sufficient level for the (re)production of the collective benefits[143]. It follows that legal rules binding indiscriminately upon all Member States need to be

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[138] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, Ibid.; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Ibid.

[139] Joined Cases C-715/17, C-718/17 and C-719/17, Opinion of Advocate General Sharpston delivered on 31 October 2019, *European Commission v Republic of Poland and Others*, Ibid., pars. 247-254

[140] Nagel T., *Ruthlessness in Public Life*, in: Nagel T., *Mortal Questions*, Cambridge: Cambridge University Press (1979), pp. 75-91

[141] Lavenex S., *'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, Ibid.

[142] Hatzis A., *Law in Books and Law in Action: The Decline of Legal Formalism and the Economic Analysis of Law*, in: *Volume in Honor of Petros Gemtos*, Athens: Ant. N. Sakkoulas (2012), pp. 744-746

[143] Olson M., *The logic of collective action: Public Goods and the Theory of Groups*, Ibid., pp. 13-16

adopted[144]. These rules should establish a fair allocation of the burdens among them relying on objective and proportionate criteria, which a) will respect the differences among Member States, primarily - but not exclusively - with regard to their financial capacity and geographical size and position, b) will express a long-term commitment of the Member States, in order to avoid the cost of constant negotiations, but open to provisional measures of more extensive burden-sharing in case of emergency and c) will be adopted after an estimation has been made of the potential future consequences of their application, under circumstances that may substantially differ from the existing ones at the time of their creation.

The enactment of such legislation though is not enough by itself; it is equally vital that its implementation is ensured by effective enforcement mechanisms that will hold Member States liable for their violations. Since the 'selfish' motives implied by the cost-benefit calculations of each Member State do not leave much room for trust in one another's integrity and reciprocity[145] and as the absence of an institutional response to infringements would increase the incentives of repeating them, thus further weakening the violated rule[146], the role of restorative justice cannot be neglected. The answer to the already committed transgressions forms the basis for the prevention or proliferation of the future ones, particularly the efficiency of the coercion/ sanctioning system[147]. The violations of the international and EU asylum provisions are generally the outcome of well-thought decisions, which means that the expected profit exceeds the expected cost. The calculation of the cost depends on a series of variables[148], notably including: the possibility of the other Member States or the European Commission finding out; the possibility of the Commission setting in motion the infringement procedure of Article 258 TFEU; the average duration of the procedure in comparable cases; the possibility of the CJEU determining that the Member State in question has indeed failed to fulfill its obligations; the capability of continuing the violation during the judicial process; the possibility that the CJEU will impose a lump sum or penalty payment, according to Article 260 paragraphs 2 and 3 TFEU; the amount of that sanction; the severity of the cost in the violator's bilateral and multilateral relations with its fellow Member States and in the international field. It is the degree of probability of those variables that determines to a large extent how attractive the option of non-contribution is for Member States and ultimately whether solidarity may reasonably be expected among them.

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144 Rawls J., *A theory of justice* (rev. ed.), Cambridge, Massachusetts: The Belknap Press of Harvard University Press (1999) [1971], pp. 236-238

145 Rawls J., *A theory of justice* (rev. ed.), Ibid.

146 Postema G.J., *Failing democracy*, Ibid., pp. 71-72

147 Olson M., *The logic of collective action: Public Goods and the Theory of Groups*, Ibid., pp. 44-45; Rawls J., *A theory of justice* (rev. ed.), Ibid., p. 238

148 Becker G. S., *Crime and Punishment: An Economic Approach*, Journal of Political Economy, Vol. 76, No. 2 (1968), pp. 169-217; Hatzis A., *The Economics of Crime*, in: *Volume in Honor of Calliope Spinellis*, Athens: Ant. N. Sakkoulas (2010), pp. 455-467

C. THE NORMATIVE EFFECT AND BINDING NATURE OF SOLIDARITY, AS EXPRESSED IN THE TFEU AND THE JURISPRUDENCE OF THE CJEU

1. Solidarity considered as a value, a principle and a rule: Can precise legal obligations be deduced solely from Article 80 TFEU?

So far, it has been established, through a teleological approach, that, with view to the effective control of refugee and migrant flows and the protection of the Union's external borders, solidarity is a necessary means to that end, including cumulatively its expression as fair distribution of responsibilities among the Member States and as correction of the disproportionate overburdening of one or more of them[149]. It has not yet been clarified what the legal nature of solidarity is within the framework of the AFSJ, based on its formulation by the EU legislator in the TFEU and its treatment in the jurisprudence of the Court of Justice. Most importantly, the question persists whether in practice it is interpreted as creating distinct legal obligations and if so, what is their scope, who they are addressed to and what they require of them. A persuasive answer cannot be given without examining where in the classic taxonomy of legal norms solidarity should be placed: is it a value, a principle or a rule? Or does it combine qualities of all three and the distinction is only a matter of form?

The most well known reference to solidarity as a value comes from the Schuman Declaration of 9 May 1950 which recognised that *'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'*[150]. Article 2 TEU ranks solidarity among the foundational values common to all Member States upon which the EU and the European society as a whole are built. Similarly, Advocates General Bot and Sharpston emphasise the significance of solidarity as a 'cardinal' and 'existential' EU value, a 'pillar'[151] and 'the lifeblood of the European project'[152] in their respective Opinions in the cases concerning the validity and implementation of the 2015 Relocation Decisions. That conception is associated with the theoretical sources of solidarity, the common identity uniting the European peoples and their common goal to create one inclusive society integrating all of them[153]. In that sense, it may play a role in the shaping of the Union's policies, but, even though Member States by agreeing to enter the EU have assumed the commitment to respect the values

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[149] Karageorgiou E., *The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value*, SIEPS European Policy Analysis, Issue 2016:14 (November 2016)

[150] Schuman R., *Declaration* (Paris, 9 May 1950)

[151] Joined Cases C-643/15 and C-647/15, Opinion of Advocate General Bot delivered on 26 July 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 17-20

[152] Joined Cases C-715/17, C-718/17 and C-719/17, Opinion of Advocate General Sharpston delivered on 31 October 2019, *European Commission v Republic of Poland and Others*, Ibid., pars. 247-253

[153] Carrozzini A./Lonardo L., *The Many Faces of Solidarity and Its Role in the Jurisprudence of the Area of Freedom, Security and Justice*, in: Kassoti E./Idriz N. (eds.), *The Principle of Solidarity. International and EU Law Perspectives*, Global Europe: Legal and Policy Issues of the EU's External Action: Volume 2, The Hague, Netherlands: T.M.C. Asser Press/Springer (2023), pp. 265-266

of Article 2 TEU[154], hence solidarity as well, the term as included in that provision has neither the purpose nor a sufficiently specified content to produce obligations, at least not of legal nature. Nevertheless, to the extent that solidarity is given practical effect through the Union budget and therefore the direct and significant impact of rule-of-law violations by Member States on that budget may compromise long-term solidarity within the Union[155], it could indirectly be a criterion for the imposition of sanctioning measures to the Member States that committed such violations[156], pursuant to the EU Budget Conditionality Regulation[157]. Even in that case though, the value of solidarity does not result in clear obligations beyond those the Member States are already bound to.

Article 80 TFEU enshrines solidarity and fair sharing of responsibility as a principle governing the EU policies on border checks, asylum and immigration (Articles 77-80 TFEU) and their implementation. The characterisation of solidarity ex lege as a principle is reflected in the drafting of the provision in a way that, even if the word "principle" was absent, such would be the interpretation of Article 80 and not as containing a rule. Whereas legal rules set factual conditions which, when met, are followed by a defined consequence, legal principles point towards a direction, but do not explicitly dictate the adoption of a certain measure or decision[158]. The variety of mechanisms through which solidarity and the fair allocation of burdens among Member States can be materialised reinforces the argument that it is difficult to deduce precise legal obligations from Article 80[159]. As its second sentence implies, the demands of solidarity need to take a concrete legal form by *"Union acts adopted pursuant to [the other provisions of] this Chapter"*, specifically, as far as asylum is concerned, paragraphs 2 and 3 of Article 78 TFEU. Article 80 cannot therefore serve as an autonomous legal basis for the adoption of such measures of solidarity and burden-sharing, but only in combination with a rule included in a different provision[160].

That does not mean however that the normative effect of solidarity is exhausted in offering guidance in the conduct of the EU policy in question or being used as a tool for the interpretation of other Treaty and secondary law provisions. The character of solidarity as a legal principle places upon the EU legislature the obligation to take it into consideration when shaping and implementing that policy and to adopt the measures necessary for its realisation to the highest

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154 See Article 49 TEU.

155 Case C-156/21, Judgment of the Court (Full Court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, pars. 27, 127, 129, 232

156 Küçük E., *Solidarity in the EU: What is in a name?*, Nordic Journal of European Law, Vol. 6, No.2 (2023), p. 18

157 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1–10

158 Dworkin R., *Taking Rights Seriously*, London: Bloomsbury Academics (1997) [1977], pp. 38-45

159 Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid., p. 611

160 Karageorgiou E., *The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value*, Ibid.

degree possible depending on each circumstances[161]. Accordingly, the EU institutions have a wide margin of discretion on whether, when and how they give practical effect to solidarity[162] and their action can only be judicially reviewed, if there has been a manifest error in their assessment, especially with regard to its compatibility with the principle of proportionality[163]. It continues to be debatable though whether their inaction may also be subject to the control of the CJEU, in light of the Court's own tendency to abstain from interfering in problems originated in the EU legislative and political process[164].

Having said that, when measures of solidarity and distribution of responsibility are enacted - on a joint legal basis or potentially without even reference to Article 80, despite its underlying influence - they can be either voluntary or obligatory upon their addressees. Remarkably, the judgment of the CJEU establishing the infringement of Council Decisions 2015/1523 and 2015/1601 by Poland, Hungary and the Czech Republic[165] gave rise to an argument supporting the binding character of solidarity, as it can be a criterion for the judicial review of the legality of Member States' (in)action[166]. It should be clarified nonetheless that, despite the principle's impact on the drafting of the relevant EU policy within the limits set by the Union's discretion, the criterion for the determination that an infringement had been committed was not solidarity itself, but the Member States' non-compliance with the violated Decisions, which besides had been adopted not on the basis of Article 80 alone, but combined with Article 78 paragraph 3 TFEU.

2. Preactive and reactive solidarity: The complementary relationship with sincere cooperation, fair allocation of burdens and support of Member States in need

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[161] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., par. 252; Bast J., *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, Ibid., p. 293; Karageorgiou E., *The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value*, Ibid.; Labayle H., *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)*, available at: https://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/ (11 September 2017)

[162] Karageorgiou E., *The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value*, Ibid.; Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid., pp. 611-612

[163] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 92, 96, 123, 124, 133, 207, 213, 221, 222, 242, 245, 246, 253

[164] Goldner Lang I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, Ibid., pp. 4-5

[165] Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, Ibid.

[166] Epiney A./Hunziker E., *Jurisdiction of Luxembourg Concerning Dublin, and Distribution and Solidarity*, in: Cremades J./Hermida C. (eds.), *Encyclopedia of Contemporary Constitutionalism*, Cham, Switzerland: Springer (2022)

The only guidance offered by Article 80 TFEU on how solidarity may be realised in practice is its connection to the fair sharing of responsibilities among the Member States. The interconnectedness of the national territories and asylum systems deriving from the abolition of internal frontiers necessitates moreover that the inequalities in the existing distribution of burdens be rectified, in order to prevent one or more States' incapacity to comply with the excessive obligations fallen upon them from jeopardising the security and stability of the whole AFSJ[167]. Furthermore, this dual form of action needs to be applied both in emergency situations and in the shaping and implementation of the EU policy under regular conditions[168]. This requirement is affirmed not only by the teleological interpretation of Article 80, but the Union acts already adopted in that direction and the gradually evolving jurisprudence of the CJEU as well.

The complementarity of measures ensuring the long-term and short-term effectiveness in particular of the common asylum policy defines the relationship between the second and third paragraph of Article 78 TFEU, which constitute the usual legal bases for the expression of solidarity in concrete legal rules, whether those clearly refer to it or not. Paragraph 2 aims at the creation of a permanent common European asylum system, whilst paragraph 3 at the timely and efficient EU response to the sudden inflow of third-country nationals experienced by one or more Member States through the adoption of provisional measures. In the context of the action for annulment against Council Decision 2015/1601, the CJEU seized the opportunity to clarify the interplay of the two provisions. According to the Court, in order for the Union to be able to provide swift and effective assistance to the Member State(s) in need in case of an emergency, it is essential that the Council have the discretion to take all necessary measures, without being bound by a requirement that they only accompany or supplement those adopted on the basis of paragraph 2; it is permitted that, when appropriate and necessary, they may also derogate from them. An opposite interpretation would be contrary to the wording of paragraph 3 and it would weaken the efficiency of the provision and of the Union's response. That discretion is not without limits though: since the acts provided in paragraph 2 are adopted in accordance with the ordinary legislative procedure and those based on paragraph 3 pursuant to a non-legislative procedure, the former are legislative acts and the latter non-legislative; as such, the provisional measures are precluded *"from having either the object or effect of replacing legislative acts or amending them permanently and generally, thereby circumventing the ordinary legislative procedure provided for in Article 78(2) TFEU"*. They must be therefore of sufficiently circumscribed material and temporal scope, which is a matter of the Council's assessment and limited judicial control may be exercised upon it[169].

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[167] Goldner Lang I., *The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity*, Ibid.

[168] Goldner Lang I., *Article 80 [Solidarity and Responsibility]*, Ibid., p. 1519

[169] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 57-84, 89-103

The Court thus recognised the extent of the Union's competence to intervene in emergency situations in support of Member States facing a sudden refugee/migrant inflow, by enacting temporary measures beyond those already in place. Reversely formulated, the conclusion is that solidarity should govern not only the adoption of emergency measures, but also the creation of permanent mechanisms being in force under normal conditions. In yet another reading, solidarity is equally oriented towards both preventing the assignment of disproportionate responsibilities to the Member States and correctively reacting, should a State find itself confronted with unfairly heavy burdens compared to the others, resulting in its incapacity to handle them effectively.

The logically preceding stage is the determination of the tasks which are incumbent upon each Member State and the assurance of its fairness. Yet, this distribution does not only refer to the fixed long-term responsibilities for the effectiveness of the common asylum, immigration and border control policy; it covers in addition the burdens that may arise from the need to apply provisional measures. Although the fair sharing of responsibilities among the Member States is the only specified form of solidarity included in the legal framework of the AFSJ, no further explanation is provided by the Treaty, leaving its content vague and open to variant approaches. The allocation criteria of the Dublin system, nearly unchanged for more than 30 years, are based on a typical and absolute understanding of equality of the Member States and could hardly stand at a longer conceptual distance from the idea of "geometric" equality which, as earlier analysed, takes into account the differences of the Member States and leads to a symmetrical adjustment of each one's burdens. To the contrary, Council Decision 2015/1601, providing for the mandatory relocation of asylum-seekers, as well as the argumentation of the CJEU in its relevant judgments seem to be closer to the Aristotelian notion of distributive justice. As pointed out by the Court, the fact that the burdens, whose removal from Greece and Italy was necessitated, were divided among all the other Member States, except for the two beneficiaries, showed that the Decision respected the principles of solidarity, proportionality[170] and equality[171]. The use of a distribution key evaluating in particular the economic robustness and the pressure on the national asylum system of each Member State justified that reasoning as well[172].

Nevertheless, either because the allocation of responsibilities was deficient in the first place, or because the occurrence of events extraneous to the organisation of the AFSJ, such as a large inflow of third-country nationals, have added incalculable burdens, or due to a combination of both, a Member State may face difficulties in complying with its legal duties, to a degree that it is impossible for it to respond by itself. The principles of sincere cooperation and of solidarity require then the EU and the other Member States to assist it in the fulfillment of its obligations. In that case solidarity would operate as a special version of sincere cooperation. However,

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[170] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 290-292

[171] Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, Ibid., par. 81

[172] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 299-301

unless/until that assistance is provided, as the CJEU ruled in its judgment in the *Jafari* case[173], the Member State in question is still obliged to perform its duties under EU law. The case concerned the transfer from Austria to Croatia based on the criteria of the Dublin III Regulation of two Afghans who had reached Austrian ground by crossing the borders of multiple Balkan EU and third states, which, in order to evade responsibility for them, had allowed their transit without registering or fingerprinting them or initiating asylum procedures. The Court's ruling was that the practice of those Member States constituted a violation of the Dublin III Regulation and the Schengen Borders Code and that the transit of the third-country nationals had to be regarded as irregular crossing. The exceptional nature of the situation, due to *"the arrival of an unusually large number of third-country nationals seeking international protection"*, was not sufficient to make the Court alter these conclusions[174], neither in the *Jafari*, nor in the factually comparable *A.S.* judgment[175], issued on the same day[176]. Therefore, the only legal option a Member State in need of support has is to report its inability to do so and expect the EU institutions and Member States to comply as well with their obligation to help, in accordance with the principle of sincere cooperation[177]. Unilateral action circumventing EU legal rules, even if these rules are problematic or the Member State is unable to implement them, cannot be justified.

The CJEU maintained the same perspective in the case of the action for infringement of the 2015 Relocation Decisions against Poland, Hungary and the Czech Republic. In response to the Czech Republic's argument claiming the malfunctioning and ineffectiveness of the relocation mechanism established in the two Decisions, the Court emphasised that no *"unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning, of the relocation mechanism"* could relieve a Member State from its obligations provided therein[178]. If there were indeed practical difficulties in its application, those were not inherent in it and should have been *"resolved [...] in the spirit of cooperation and mutual trust between the authorities of the Member States"*[179]. Lastly, as the Czech Republic argued in its defence that it had provided Greece and Italy with different kinds of aid, other than relocation, the Court answered that

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[173] Case C-646/16, Judgment of the Court (Grand Chamber) of 26 July 2017, *Proceedings brought by Khadija Jafari and Zainab Jafari*, ECLI:EU:C:2017:586

[174] Case C-646/16, Judgment of the Court (Grand Chamber) of 26 July 2017, *Proceedings brought by Khadija Jafari and Zainab Jafari*, Ibid., pars. 92-93

[175] Case C-490/16, Judgment of the Court (Grand Chamber) of 26 July 2017, *A.S. v Republic of Slovenia*, ECLI:EU:C:2017:585

[176] Goldner Lang I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, Ibid., pp. 4-5, 7-8

[177] Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid., pp. 614-615

[178] Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, Ibid., par. 180

[179] Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, Ibid., par. 182

compliance with a mandatory form of contribution cannot be unilaterally replaced by other measures of assistance, as that would compromise the binding character of the relocation mechanism[180].

It was thus reaffirmed that, even though distinct and precise legal obligations cannot be deduced solely from Article 80 TFEU, when solidarity assumes a concrete character through the adoption of measures on a joint or another legal basis, then compliance with such measures is subject to the demands of sincere cooperation, irrespective of their fairness in the distribution of burdens or their efficiency in the provision of support to Member States in need.

D. CRITERIA AND MECHANISMS OF RESPONSIBILITY SHARING

1. Criteria for determining responsibility sharing

The plethora of divergent conceptions of solidarity and fairness in the sharing of responsibilities has inevitably led to the implementation or proposal of numerous criteria for its specific determination, both in primary and in corrective distribution measures. These criteria may be the consequence of different ideological directions on justice and equity among the Member States or on the optimal way to achieve an effective policy on asylum, immigration and external border protection; most notably however, they may result from the convergence of interests of a sufficient number of States, which, by representing the majority in the legislative process, are able to insert in the allocation mechanism such rules that ensure the limitation of their own responsibilities and their shifting to the other States. Whatever the case may be, their evaluation depends on the short-term and long-term practical efficiency of their application.

The sharing of burdens is defined by criteria, which can be classified under three categories relating to a) the capacity of Member States to fulfill the obligations assigned to them; b) the special bonds of solidarity that may exist between Member States and asylum-seekers; c) the factual responsibility of a State for the creation, the extent or the ineffective management of refugee and irregular migrant flows.

a) The assessment of a State's capacity to comply with its obligations involves a variety of factors, associated mostly with the degree of its ability to endure the presence and survival needs of asylum seekers in its territory, while respecting their rights, to absorb them after protection has been granted and, with regard to the frontier Member States, to protect the Union's and their own external borders from irregular crossings. The determinants that could be taken into account are the financial prosperity, indicated by each State's GDP, the unemployment rate and the relevant employment demand of the national labour market, the population density and the availability of land for the asylum-seekers' stay, the average life

[180] Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, Ibid., par. 187

expectancy and the general demographic situation[181]. The sufficiency of those national resources is not absolute, but contingent upon the number of arriving third-country nationals, which is further influenced by the geographic proximity of the host state to the states of origin and by its desirability as a destination state. If there are, for instance, historical or cultural ties between the residents of the Member State in question and the asylum-seekers, it is more probable that a significant number of them may seek protection in that State[182]; on the other hand, it would be easier for the receiving State to smoothly assimilate them in that case.

b) Special bonds may also justify a greater expectation of solidarity and serve therefore as criteria for the allocation of responsibilities, including the reception of the protection-seekers with whom such relations exist. As mentioned directly above, these bonds may have been developed, due to common language or cultural background, as well as the existence of communities of the same ethnic origin or religion in the host state. Geography is not necessarily the underlying reason, although quite likely so without a doubt; solidarity bonds could be found between more distant countries, owing to a historical connection, mainly of a colonial nature[183]. On an individual basis, the relationship between certain third-country nationals and a Member State may derive from the presence in that State of those persons' family members, whose reunification as a humanitarian duty could be expressed in the responsibility-sharing criteria. Another person-specific argument is the recent granting of visa or residence permit to a non-EU citizen by a Member State. Besides, the last two, individualised connections have been the primary hierarchical criteria in the Dublin system's mechanism and they will remain in the new Regulation on Asylum and Migration Management.

c) Finally, the allocation of burdens could be used as a mechanism of penalty imposition upon those states deemed responsible for the creation or diffusion of the problems caused by the mobility of migrants and refugees. In the international field, in the absence of a central enforcement authority, it would be unrealistic to make a state compensate for the costs incurred by other states, due to its own potentially inhuman or degrading practices. In the EU legal order though, the infamous state-of-first-entry rule, which has been the predominant in essence criterion for the determination of responsibility, could be interpreted as a type of punishment of the frontier Member States for non-efficiently protecting the Union's borders and "allowing" the entry of third-country nationals.

2. Forms and mechanisms of responsibility sharing

[181] Kritzman-Amir T., *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, Ibid., p. 372

[182] Thielemann E.R., *Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU*, Ibid., pp. 67-69

[183] Kritzman-Amir T., *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, Ibid., p. 373

The complexity of the problems posed by the massive movement from state to state of populations requesting protection demands not only a collective approach in the spirit of solidarity, but also that a wide range of measures be adopted to respond to as many aspects of those problems as possible. Indicatively, depending on their scope, such measures can:

I) be preventive or corrective and similarly aim at the distribution or redistribution of burdens;

II) provide assistance to Member States and indirectly to those on their territory (internal solidarity) or extend to third countries and people in need outside the EU (external solidarity)[184];

III) seek to prevent or mitigate i) the conditions creating the expatriation and mobility of refugees or ii) their arrival in the EU or iii) the destabilisation and insecurity possibly caused by their presence and the requirements of their reception[185].

With respect in particular to the internal solidarity mechanisms that are available to the EU legislator, they could be classified as follows:

a) Approximation of the national legislations on the substantive and procedural requirements of the granting and withdrawal of refugee status and on the standards of reception conditions. The perception of legislative acts promoting harmonisation as solidarity measures is related to the will of Member States to minimise the number of third-country nationals on their territory and the burdens of hosting them. In order to achieve that, they have the incentive of adopting more and more restrictions on their admission, the level of their protection and staying conditions and their access to domestic markets and services. Hence, in the lack of common legal standards, they could engage in a regulatory competition, trying to influence asylum-seekers' preferences into choosing another State to file their application[186]. By forcing Member States to maintain at least a certain quality of protection, harmonising measures prevent distributional inequalities as an outcome of such policies and ensure a minimum compliance with human rights[187].

b) Financial support of excessively burdened Member States. Solidarity measures of this type, mainly through the operation of a centrally managed Union fund, are intended to restore existing asymmetries in the allocation of responsibilities and the costs they produce among the Member States. Their concept is that those States that have been unequally relieved by the application of the distribution criteria should compensate those that were assigned with disproportionate burdens. The challenges in the effectiveness of such mechanisms is to not

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184 Metsola R. MEP/Kyenge K. MEP (Co-rapporteurs), *Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue operations*, Ibid., pp. 3-4

185 Noll G., *Sharing the Burden?*, Ibid., p. 268

186 Thielemann E.R., *Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU*, Ibid., p. 71

187 Noll G., *Sharing the Burden?*, Ibid., pp. 270-271; Noll G., *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, Ibid., pp. 239-240

measure the costs in absolute terms, but in relation to the socio-economic capacity of the States incurring them, and to provide adequate support, so that its recipient States will manage to properly fulfill their obligations[188].

c) Administrative aid. Member States with limited personnel and increased duties may experience difficulties in carrying them out, as is usually true for those entrusted with the safeguarding of the Union's external frontiers. In such cases, the EU agencies can contribute by providing staff to assist the national administrative and enforcement authorities, inter alia in the examination of asylum applications, the prevention of illegal entries from the external borders and the conduct of Search and Rescue operations at sea.

d) Physical distribution of asylum-seekers. Given that under EU law responsibility for asylum-seekers entails responsibility for the examination of their applications and for their stay during that process and potentially after it has been concluded with a positive decision, the presence of a large number in a single State demands significant resources, the insufficiency of which may bring the national asylum system to collapse. The sharing of that responsibility means therefore the sharing of all the associated financial, social and political costs as well. The establishment of an allocation mechanism, which could be either permanent or a temporary corrective measure, would have to be based on distribution criteria[189], such as those previously analysed.

e) Trading of quotas. After a physical distribution of asylum-seekers has been decided in the form of quotas corresponding to each Member State, then these quotas could be the object of transactions among the States. Each Member State could buy off all or part of its initially assigned share of responsibilities and prevent those asylum-seekers, the responsibility for whom it traded with the other States, from entering its territory. The implementation of that regime would thus enable Member States to protect at a financial cost their national homogeneity from the alleged threat of third-country nationals[190]. However, unless such trades were subject to the supervision and approval of a central EU authority, some States could take advantage of their greater financial robustness and evade their responsibility without substantial to them cost; on the other side, the Member States with lower financial capacity would be in danger of becoming the Union's 'repositories' of refugees. In any case, the application of a trading system would lead to a serious objectification of asylum-seekers and even imperil their human dignity.

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[188] Bast J., *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, Ibid., p. 298; Kritzman-Amir T., *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, Ibid., pp. 381-382

[189] Metsola R. MEP/Kyenge K. MEP (Co-rapporteurs), *Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue operations*, Ibid., pp. 4-7; Noll G., *Sharing the Burden?*, Ibid., pp. 273-275

[190] Schuck P. H., *Refugee Burden-Sharing: A Modest Proposal*, Yale Journal of International Law, Vol. 22 (1997), pp. 82-88

f) Attachment of mobility rights to protection status. The recognition of any status of international protection is accompanied by a permit to reside in the Member State which has granted the protection. As it has consistently been proposed though in academic literature[191], it could also create an entitlement to move freely within the EU and settle in another Member State. Especially when, due to a malfunctioning responsibility allocation mechanism, a Member State is confronted with a disproportionate number of asylum-seekers in its territory, the fact that it would not be obliged to provide protection by itself for a long period after the end of the asylum proceedings would relieve it from that heavy fiscal and social burden. Furthermore, it would diminish its incentive to reject asylum applications, in the fear that it would have to endure the presence of the beneficiaries for years.

[191] Inter alia: Bast J., *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, Ibid., pp. 301-302; Mitsilegas V., *Solidarity Beyond the State in Europe's Common European Asylum System*, in: Karakoulaki M./Southgate L./Steiner J. (eds.), *Critical Perspectives on Migration in the Twenty-First Century*, Bristol, England: E-International Relations Publishing (2018), pp. 196-210; Morgese G., *Dublin system, "Scrooge-like" solidarity and EU law: Are there viable options to the never-ending reform of the Dublin III Regulation?*, Diritto, Immigrazione e Cittadinanza, No. 3 (2019), pp. 97-100

III. SOLIDARITY IN THE PRACTICE OF EU MEMBER STATES AND INSTITUTIONS

A. THE ACTION OF EU INSTITUTIONS AND ITS IMPACT ON THE IMPLEMENTATION OF SOLIDARITY

1. The effects of the Dublin scheme of responsibility allocation and the jurisprudence of the CJEU on Member States' incentives

The sustainability of the AFSJ and the completion of the Internal Market within an area free of internal borders has required - from the moment these objectives started to influence and shape the EU policies until nowadays - that an effective control system be established on the third-country nationals who are allowed to cross the Union's external borders and on the treatment of their presence and movement once they have entered, either legally or irregularly. The pillars upon which the EU has founded this pursuit are two: first, the respect and protection of the fundamental rights of any person on Union territory, in compliance with the provisions of the EU Charter, the European Convention on Human Rights[192], the 1951 Geneva Convention and the 1967 New York Protocol; second, to the extent that third-country nationals - whether refugees or irregular migrants - are perceived as threatening the security and stability of the AFSJ, that strict conditions and limitations govern their admission and mobility in the EU[193].

Choosing at first the context of intergovernmental coordination, several Member States signed in 1985 the Schengen Agreement on the gradual abolition of checks at their common borders[194], in 1990 its implementing Convention[195] and in the same year, just four days earlier, the Dublin Convention on the determination of the Member States' responsibility for the examination of asylum applications[196]. Within a few years all three international documents were integrated into the EU legal order and substituted by EU legal acts. The common rules on the crossing of external borders, the abrogation of internal border checks and their temporary reintroduction in

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[192] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14 (Rome, 4 November 1950)

[193] Chetail V., *The Common European Asylum System: Bric-à-brac or System?*, Ibid., p. 11

[194] Agreement 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 (Schengen Agreement) (Schengen, 14 June 1985), OJ L 239, 22.9.2000, p. 13–18

[195] 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 (Schengen Convention) (Schengen, 19 June 1990), OJ L 239, 22.9.2000, p. 19–62

[196] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) (Dublin, 15 June 1990), OJ C 254, 19.8.1997, p. 1–12 (no longer in force)

exceptional circumstances are currently codified by the Schengen Borders Code[197], whilst the Dublin Convention was succeeded by Regulations 343/2003 (Dublin II)[198] and 604/2013 (Dublin III)[199].

Regardless of whether their entry in the EU was in accordance with the Schengen Borders Code or not, all asylum-seekers are subject to the rules of the Dublin system of responsibility allocation. These rules provide that a single Member State is responsible for examining each asylum application filed within the EU and for hosting the person who lodged it during the relevant proceedings. Single responsibility serves both as a maximum and a minimum limit, meaning that no more or less than one Member State is under obligation towards each one asylum-seeker. The functioning of this mechanism aims at excluding secondary movements of asylum-seekers and the successive filing of multiple applications in more Member States - thus preventing the phenomena of "refugees in orbit" and "asylum/forum shopping" - through their legal immobilisation within the boundaries of the Member State determined as responsible by the Dublin rules[200]. At the same time, it is guaranteed that no asylum-seeker is deprived of the rights enshrined in international and EU law, because no Member State is willing to assume responsibility; in essence, what is achieved is the transformation of the responsibility for human rights protection from general and diffused into concrete and automatically determined.

Despite the calls for *"a common asylum procedure and a uniform status for those who are granted asylum throughout the Union"*[201], the Dublin mechanism is built and relies on the operation and interaction of national asylum systems[202]. It is through inter-state communication that transfers of asylum-seekers from the Member State where they are found to the one responsible for them take place; even more fundamentally, the assessment of the asylum

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[197] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23.3.2016, p. 1–52; as lastly amended by Regulation (EU) 2024/1717 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, OJ L 2024/1717, 20.6.2024

[198] Council Regulation (EC) No 343/2003 of 18 February 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, OJ L 50, 25.2.2003, p. 1-10 (no longer in force)

[199] 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), OJ L 180, 29.6.2013, p. 31–59

[200] McDonough P./Kmak M./Van Selm J., *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, European Council on Refugees and Exiles (2008), p. 9; Mitsilegas V., *Solidarity and Trust in the Common European Asylum System*, Ibid., p. 185 ; Tsourdi E./Costello C., *The Evolution of EU Law on Refugees and Asylum*, Ibid., pp. 797-798, 805-806

[201] Council Presidency Conclusions, Tampere European Council (15-16 October 1999), par. 15; see also: European Commission, *Communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen*, COM(2009) 262 final (10 June 2009), pars. 27-28; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an open and secure Europe: making it happen*, COM(2014) 154 final (11 March 2014), par. 8

[202] Mitsilegas V., *Solidarity and Trust in the Common European Asylum System*, Ibid., pp. 185-186

applications is performed by following national proceedings which may lead accordingly to the granting of national protection status. The underlying presumption is the mutual trust that all Member States' treatment complies with a minimum qualitative threshold set by harmonising EU rules on the qualification criteria for asylum and subsidiary protection, the examination procedure, the reception conditions and the return procedure in case of a rejecting decision. Yet, only those negative decisions of each State's national authorities enjoy mutual recognition by the other Member States; the same does not apply when the national administrative process ends with the affirmation of asylum-seekers' claims[203]. Hence, even when recognised as a refugee by the responsible Member State, a person has very limited rights to move and reside elsewhere in the Union[204]: they can remain in the territory of another Contracting Party to the European Agreement on the Abolition of Visas for Refugees for a maximum three-month period[205] and in another Schengen Member State for no more than 90 days in any 180-day period, pursuant to additional requirements as well[206]; furthermore, the acquisition of long-term resident status and of the right to move and settle freely in other Member States requires a legal and continuous residence in the Member State that has granted them residence permit for five years[207] (the period between the lodging of the asylum application and its approval being included in the calculation)[208]. Consequently, the determination of a Member State's responsibility for an asylum-seeker means potentially much more than providing protection to that person during the examination of his/her application, which may already be a heavy burden depending on the circumstances. It entails that the responsible Member State and its people are forced, in case of a positive decision, to accept or at least endure for quite a few years their socio-economic coexistence with the refugees assigned to that State by the Dublin allocation mechanism, not necessarily because those refugees want to remain there, but because they are not allowed to seek their fortune in other places within the EU. Taking the magnitude of such cost into account, not only in financial/social/political terms, but also concerning the living conditions of the people who have been recognised as being entitled to international protection, it would be expectedly vital that the distribution criteria of the mechanism respect the principle of solidarity and ensure a fair sharing of responsibility among the Member States.

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[203] Mitsilegas V., *Solidarity Beyond the State in Europe's Common European Asylum System*, Ibid.

[204] Morgese G., *Dublin system, "Scrooge-like" solidarity and EU law: Are there viable options to the never-ending reform of the Dublin III Regulation?*, Ibid., p. 98

[205] European Agreement on the Abolition of Visas for Refugees Strasbourg (Strasbourg, 20 April 1959), Article 1 paragraph 1

[206] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Ibid., Article 6 paragraph 1

[207] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53; as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132, 19.5.2011, p. 1–4 , Article 4 paragraph 1

[208] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Ibid., Article 4 paragraph 2

Nevertheless, it is precisely this part where the Dublin system is considered to have failed the most. In the hierarchy of criteria, the ones preceding associate State responsibility either with the legal presence in a Member State of family members of the asylum-seeker in question or the previous granting to that applicant of a valid residence permit or visa by a Member State[209]. Regulation 2024/1351 on the Asylum and Migration Management, whose application will start in July 2026, determines as directly following criteria the possession of a diploma or qualification issued by an education establishment in a Member State, the entry in EU territory through a Member State in which the need for a visa is waived and the lodging of the asylum application in the international transit area of an airport of a Member State[210]. All these cases however function essentially as exceptions to the truly dominant rule that assigns responsibility to the Member State whose external border the asylum-seeker crossed irregularly from a third country by land, sea or air, in order to enter into the EU[211]. The state-of-first-entry criterion, which is by far the most frequently applied, although drafted in a seemingly objective manner, places in practice the responsibility for the vast majority of third-country nationals seeking protection in the EU and all the burdens it involves to a very limited number of specific Member States. It appears to target the Member States in the periphery of the Union, based on the random event of the entry point "chosen" by a possibly desperate asylum-seeker, without any evaluation of whether those States have sufficient resources to prevent irregular crossings and of the fact that such prevention may occasionally even violate human rights - when denying admission for example to people rescued at sea. The criterion disregards as well any comparison between the frontier and the interior Member States concerning their capacity to examine with due diligence and speed the asylum applications, to ensure appropriate reception standards and to harmoniously absorb refugees for years. Therefore, it goes against both proportional equality, as it creates asymmetrical burdens for the Member States, and typical/arithmetic equality, which would require that same shares of responsibilities be allocated among the States; but this distribution mechanism assigns tremendous obligations to States with in principle poor receptive capacities and almost no responsibility to States with much greater resources. Instead of a fair burden-sharing, the Dublin system thus results in widening the existing inequalities among Member States and creates the conditions for the inefficiency of the policy on asylum, immigration and external border control.

These weaknesses had been observed soon enough to avoid the 2015-2016 crisis, if there was political will towards an actual reform of the distribution regime. As early as in 2007, the

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[209] Council Regulation (EC) No 343/2003, Ibid., Articles 6-9; Regulation (EU) No 604/2013, Ibid., Articles 8-12; Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ L, 2024/1351, 22.5.2024, Articles 25-29

[210] Regulation (EU) 2024/1351, Ibid., Articles 30-32

[211] Council Regulation (EC) No 343/2003, Ibid., Article 10; Regulation (EU) No 604/2013, Ibid., Article 13; Regulation (EU) 2024/1351, Ibid., Article 33

European Commission in its Green Paper on the Future Common European Asylum System[212] acknowledged that the Dublin system was not designed to serve as a burden-sharing instrument and that its implementation might de facto lead to disproportionate burdens *"on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location"*. The Commission recommended that such factors should be taken into consideration, in order to achieve a more balanced allocation of burdens, and that it might be necessary to complement the Dublin system with corrective burden-sharing mechanisms, such as a physical distribution among the Member States of the third-country nationals *"after they had been granted protection status"*.

Within an environment of such systemic inequalities in the treatment of the Member States by the law, those that found themselves at the wrong side of the allocation sought to lighten their burdens by evading responsibility according to the first-entry criterion. The basic methods were to prevent asylum-seekers' entry in the first place and, if they managed to cross the borders, to allow their transit to the next EU Member State (as the destination was usually the Central, Western or Northern Europe) without registering and fingerprinting them, as the Eurodac Regulation provides[213], so that there would be no evidence of their presence and irregular crossing into each transit State. In addition, owing to either incapacity or unwillingness to fulfill the unfair and excessive obligations the Dublin system imposed, the overburdened Member States tried to reduce the expenses of their compliance, by limiting the level of protection they offered and mainly the quality of the applicants' reception conditions[214].

That situation gave rise in 2011 to a landmark judgment of the European Court of Human Rights in the *M.S.S.* case[215]. The facts concerned an Afghan national who applied for asylum in Belgium, but the national authorities identified Greece as the responsible Member State to examine the application, based on the criteria of the Dublin II Regulation, because Greece was the state whose external borders the claimant crossed irregularly to enter the EU. The asylum-seeker argued against being transferred back to Greece, on the ground that there was a risk of being arbitrarily detained, suffering degrading treatment and facing inability to satisfy even the basic human needs. The ECtHR ruled that the deficiencies in the asylum procedure in Greece

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[212] European Commission, *Green Paper on the Future Common European Asylum System*, COM(2007)301 (6 June 2007)

[213] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 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), OJ L 180, 29.6.2013, p. 1–30

[214] Armstrong A.B., *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, Chicago Journal of International Law, Vol. 20, No. 2 (2020), p. 360; Bast J., *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, Ibid., p. 296; Tsourdi E./Costello C., *The Evolution of EU Law on Refugees and Asylum*, Ibid., pp. 805-808

[215] ECtHR, *M.S.S. v Belgium and Greece*, Application no 30696/09, Judgment of 21 January 2011 (Grand Chamber)

justified the existence of such a risk and found that not only Greece had violated Article 3 of the ECHR on the prohibition of inhuman/degrading treatment, but Belgium as well by issuing a return decision in disregard of those conditions.

Later in the same year, in the factually similar joined cases *N.S.* and *M.E. and Others*[216], the CJEU shared the view that the transfer of an asylum-seeker to the Member State determined as responsible, by applying automatically the provisions of the Dublin Regulation, despite the risk of being exposed to inhuman or degrading treatment, is precluded by Article 4 of the Charter of Fundamental Rights of the EU. It set however a higher threshold for rebutting the assumption of mutual trust to each Member State's protection of fundamental rights, which underpins the architecture of the Dublin system. It requires, in order for a deviation from the Dublin rules to be both allowed and necessary, that systemic deficiencies exist in the asylum procedure and reception conditions of the responsible Member State, which create a substantial risk of the asylum-seeker incurring treatment contrary to Article 4 of the CFREU. In such a case, the Member State that would otherwise carry out the transfer should re-examine the Dublin criteria, until it identifies another Member State as responsible.

That jurisprudence of the CJEU and the ECtHR, which was reaffirmed in the Courts' judgments in the *Abdullahi*[217] and *Tarakhel*[218] cases respectively, was subsequently incorporated in Article 3 paragraph 2 of Regulation 604/2013 and recently maintained in Article 16 paragraph 3 of Regulation 2024/1351. Notwithstanding the good, human rights-oriented intentions of that judicial and then legislative approach, the preservation of the Dublin system did not allow it to have any positive impact on the Member States' incentives and actions to avoid responsibility for the asylum-seekers and to worsen their reception conditions. In contrast, the banning of transfers to Member States with systemic flaws in their national asylum systems does not function as a penalty to those States that would prevent them from continuing and repeating their illegal practice, but it actually boosts their non-compliance motives by releasing them from their burdensome obligations[219]. Moreover, its contribution to the protection of fundamental rights is limited for another reason as well: because only those who manage to escape such inhuman/ degrading living conditions and move to another Member State can benefit from the prohibition of their return to the in principle responsible State[220]. Besides, the assessment of whether the asylum system of that Member State fulfills the legal and humanitarian standards further complicates and prolongs the overall asylum proceedings, as it burdens the administrative and

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[216] Joined Cases C-411/10 and C-493/10, Judgment of the Court (Grand Chamber) of 21 December 2011, *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*, ECLI:EU:C:2011:865

[217] Case C-394/12, Judgment of the Court (Grand Chamber) of 10 December 2013, *Shamso Abdullahi v Bundesasylamt*, ECLI:EU:C:2013:813

[218] *Tarakhel v Switzerland*, Application no 29217/12, Judgment of 4 November 2014 (Grand Chamber)

[219] Goldner Lang I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, Ibid., p. 14

[220] Schmalz D., *Fences, Fiction, and the Magic Mountain. Responsibility- sharing for Refugees in Europe*, Ibid., pp. 376-379

judicial system of the State where the asylum application is finally lodged with the duty to search and examine even more evidence and broadens the legal grounds for appeal against wrongful return decisions[221].

The pressures on the asylum systems of the frontier Member States, particularly those at the Mediterranean borders, had started to increase since the early 2010s and so did inevitably their illegal behaviour. The structural disadvantages as an outcome of the state-of-first-entry criterion and their geographical position rendered the violation of the obligations imposed on them as the only means to effectively protect their national interests. The peak of that foreseeable, yet unresolved sequence was reached in 2015 when a monumental number of asylum-seekers arrived at the Greek and Italian shores. More than 1.2 million third-country nationals applied for international protection in the EU in 2015, trying to escape war and security threats in the Middle Eastern and North and Central African regions of their origin, especially the Syrian Civil War and the military conflicts in Afghanistan and Iraq (the asylum-seekers fleeing those three countries represented in fact over 50% of the whole)[222]. Of those exceeding 1.2 million asylum-seekers, at least 850,000 first arrived in Greece and more than 150,000 in Italy[223]. Evidently the consistent application of the Dublin criteria was impossible and that would be the case even if the national asylum systems of the two Member States were not already dysfunctional[224]. As earlier mentioned though, in the absence of either a legislative amendment or provisional derogating measures, the CJEU refused to accept the occurrence of exceptional circumstances as justifying unilateral actions circumventing the Dublin III Regulation[225].

Until this day, the Dublin system of responsibility allocation governs the way the EU asylum policy and by extension the Union's external border control is shaped. Its impact on Member States' incentives and on the relations among them within the AFSJ remains the loose ground on which solidarity needs to be realised. It is not therefore an exaggeration, when it is argued that most solidarity measures adopted so far by the EU have been meant essentially as compensatory for the structural and implementation weaknesses created by the Dublin system[226].

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[221] McDonough P./Kmak M./Van Selm J., *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, Ibid., pp. 11-12

[222] European Asylum Support Office, Annual Report on the Situation of Asylum in the European Union 2015 (2016); Eurostat, News Release 44/2016 (4 March 2016)

[223] United Nations High Commissioner for Refugees, Operational Data Portal - Mediterranean Situation, available at: https://data.unhcr.org/en/situations/mediterranean

[224] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631, par. 128

[225] Case C-646/16, Judgment of the Court (Grand Chamber) of 26 July 2017, *Proceedings brought by Khadija Jafari and Zainab Jafari*, Ibid.; Case C-490/16, Judgment of the Court (Grand Chamber) of 26 July 2017, *A.S. v Republic of Slovenia*, Ibid.

[226] Monar J., *The AFSJ two decades after Tampere: Institutional balance, relation to citizens and solidarity*, in: Carrera S./Curtin D./Geddes A. (eds.), *20 year anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, Florence, Italy: European University Institute (2020), pp. 36-37; Thym D./Tsourdi E., *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, Ibid., p. 610

2. The adoption of solidarity measures and their (in)effectiveness

a. Harmonisation of national legislations on asylum and reception conditions standards

The adoption of EU legal acts for the approximation of national legislations aims at the development of a Common European Asylum System ensuring that those entitled to international protection can actually enjoy it within the Union, in accordance with demands of EU and international refugee law, especially the principle of non-refoulement[227]. The establishment of common rules on the functioning of the national asylum systems sets common limits to the means the Member States are lawfully allowed to use in the treatment of asylum-seekers in their territory. The goal is not only to provide directly appropriate protection, but also to create a level playing field among the Member States, by preventing rights-downgrading policies with a view to shifting asylum-seekers' preferences towards other States.

The initial method promoted by the EU legislator was principally that of minimum harmonisation through the adoption of a number of Directives. The latest versions of these Directives, which remain still in force, are Directive 2011/95/EU[228] establishing common substantial requirements for the qualification of third-country nationals as beneficiaries of international protection, Directive 2013/32/EU[229] on common procedures for granting and withdrawing international protection, Directive 2013/33/EU[230] providing minimum standards for the asylum-seekers' reception conditions, Directive 2008/115/EC[231] on the rules governing the return of illegally staying third-country nationals and Council Directive 2001/55/EC[232] on the provision of temporary protection in the event of a mass influx of displaced persons. Not all common rules nevertheless were set by Directives, but it was deemed appropriate and necessary that certain fields be covered by Regulations and not left to any Member States' discretion. This category comprises of the Dublin Regulations[233] on the determination of the Member State

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[227] Article 78 paragraphs 1 and 2 TFEU.

[228] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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), OJ L 337, 20.12.2011, p. 9–26

[229] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60–95

[230] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96–116

[231] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107

[232] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12–23

[233] Council Regulation (EC) No 343/2003, Ibid.; Regulation (EU) No 604/2013, Ibid.

responsible for examining each asylum application, Regulation (EU) No 603/2013[234] establishing the Eurodac fingerprint database for the effective implementation of the Dublin system and the support of law enforcement on national and EU level and finally, the Schengen Borders Code[235] codifying the rules governing the cross-border movement of persons.

The adoption of the package of measures included in the New Pact on Asylum and Migration - whose application, with the exception of specific provisions, will start in June 2026 - marks a change in the legislative approach from minimum to maximum harmonisation. Only the standards for the reception of asylum-seekers remain outside the form of a Regulation, but in the recast 2024/1346 Directive[236]. All the other common rules were contained in Regulations, in particular:

i) Regulation (EU) 2024/1347[237] on the standards for the qualification of third-country nationals as beneficiaries of international protection, which repealed Directive 2011/95/EU;

ii) Regulation (EU) 2024/1348[238] establishing a common procedure for granting and withdrawing international protection and repealing 2013/32/EU;

iii) Regulation (EU) 2024/1349[239] establishing a return border procedure applying to the third-country nationals whose asylum application has been rejected[240];

iv) Regulation (EU) 2024/1351[241] on asylum and migration management, repealing Regulation (EU) 604/2013;

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[234] Regulation (EU) No 603/2013, Ibid.

[235] Regulation (EU) 2016/399, as last amended by Regulation (EU) 2024/1717, Ibid.

[236] 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 (recast), OJ L, 2024/1346, 22.5.2024

[237] Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 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, OJ L, 2024/1347, 22.5.2024

[238] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L, 2024/1348, 22.5.2024

[239] Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, OJ L, 2024/1349, 22.5.2024

[240] According to Recital 9 of the Preamble to Regulation (EU) 2024/1349, *"certain provisions of Directive 2008/115/EC [shall continue to] apply, as they regulate elements of the return border procedure that are not set out in this Regulation"*.

[241] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ L, 2024/1351

v) Regulation (EU) 2024/1356[242] introducing the screening of third-country nationals at the external borders, which complements with regard to specific situations the Schengen Borders Code;

vi) Regulation (EU) 2024/1358[243] on the operation of Eurodac, repealing Regulation (EU) 603/2013.

b. Administrative solidarity measures

A part of the reasons why the effectiveness of the common policy on border checks, asylum and immigration demands a collective involvement of both the Member States and the EU can be attributed to the limited administrative and human resources of single States to respond practically to the extent and complexity of the problems. Due to either insufficiency of their personnel, or the lack of necessary technical expertise, or the difficulty of acting in coordination with the authorities of other Member States and third countries, or because objectively the pressures applied by large flows of asylum-seekers and irregular migrants could exceed the capacity even of a well-functioning administrative mechanism, it cannot be expected from Member States to properly carry out on their own all of the tasks assigned to them, much more to also respect fundamental rights in that process. In the case of the Member States, whom the combination of legal and geographical conditions render responsible for the examination of the majority of asylum applications as states-of-first-entry and for the safeguarding of external borders, this inability takes its most manifest shape. The EU has established several agencies which may contribute to different aspects of the work of national authorities and ensure that it is appropriately performed. They include inter alia the European Union Asylum Agency (EUAA), the European Border and Coast Guard Agency (EBCGA), the European Union Agency for Fundamental Rights, Europol and Eurojust, the former two of which are the most field-related and potentially beneficial in the assistance they offer.

The statutory objective of the EUAA is to *"contribute to ensuring the efficient and uniform application of Union law on asylum in the Member States"*[244]. For that purpose, it is entrusted

[242] Regulation (EU) 2024/1356 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, OJ L, 2024/1356, 22.5.2024

[243] Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 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, OJ L, 2024/1358, 22.5.2024

[244] Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468, 30.12.2021, p. 1–54, Article 1

with tasks covering a variety of that policy's facets. Within its competence and responsibility, it monitors and analyses the effectiveness of the application of the CEAS, it coordinates the exchange of information among Member States and develops operational standards, guidelines and best practices on how EU asylum law should be implemented. It assists Member States through the provision of expert training to their administrative and judicial personnel, by sharing information on the situation in the asylum-seekers' countries of origin, by deploying liaison officers and support teams to facilitate the fulfillment of their obligations, including the relocation or transfer of applicants within the Union, and by offering operational and technical/ scientific support especially when national asylum and reception systems face disproportionate pressure. Moreover, it strengthens the cooperation of Member States' national authorities with each other, as well as with third countries, whenever necessary[245].

On the other hand, the EBCGA aims at ensuring the efficient integrated management of the Union's external borders by addressing present and future threats to it[246]. Similarly to the EUAA within its respective mandate, the EBCGA monitors migratory flows, the operational needs of Member States, the effectiveness of the external border control and its compliance with fundamental rights; taking these parameters into account, it then conducts assessments of the vulnerability, capacity and preparedness of Member States against potential challenges at the EU external borders. Accordingly, it provides increased technical and operational support in situations demanding the organisation of joint operations or rapid interventions at the external borders, in particular when the circumstances involve humanitarian emergencies or rescues at sea. Furthermore, the EBCGA contributes to the training of national border guards, the lawful performance of all the stages of the return procedure for the third-country nationals whose protection application was dismissed and to the cooperation with other EU agencies and with third countries[247].

The two agencies have a significant role not only in the resolution of emergency and crisis situations, but equally in their prevention in the context of an early warning, preparedness and crisis management mechanism. Article 33 of the Dublin III Regulation provides the existence of such a mechanism, whose activation depends on information gathered by the Asylum Agency's predecessor, the European Asylum Support Office (EASO), indicating that a Member State's asylum system presents serious malfunction or could likely face substantial pressure[248]. The Member State in question may, at its discretion, either upon a Commission's recommendation or on its own initiative, draw up a preventive action plan, of which the EU institutions are subsequently informed. If the Commission determines, based on the EASO's analysis, that the

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[245] Regulation (EU) 2021/2303, Ibid., Article 2

[246] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14/11/2019, p. 1–131, Article 1

[247] Regulation (EU) 2019/1896, Ibid., Article 10

[248] See also Article 9 of the repealed Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132, 29.5.2010, p. 11–28.

preventive action plan is not sufficient to remedy the identified deficiencies or to avert the risk of a crisis in the national asylum system, it may request the Member State to submit a crisis management plan. That request is mandatory and accompanied by the State's duty to report regularly on its implementation to the Commission and the EASO, which are responsible for the monitoring of its progress.

Article 9 of Regulation 2024/1351 on Asylum and Migration Management, whose application according to Article 85 of the same Regulation started from June 2024, provides that *"[t]he composition and mode of operation of the EU mechanism for preparedness and management of crisis related to migration shall be as set out in Recommendation (EU) 2020/1366"*[249][250]. This mechanism, which will be implemented in two stages, is based on the cooperation of the Member States, the Council, the Commission, the European External Action Service, the EUAA, the EBCGA, Europol, the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) and the European Union Agency for Fundamental Rights. The first stage, *"which should be activated permanently"*, includes the exchange of timely and sufficient information among the actors involved, in order to establish the efficient monitoring and awareness of the current migratory developments and an early warning/forecasting system that will allow preparedness and reinforce endurability to possible migration crises[251]. The preventive measures against the risk of migratory pressure included in the national strategies on asylum and migration[252], as well as the assessment of the asylum, reception and migratory situation over the previous 12 months contained in the Commission's European Annual Asylum and Migration Report, are related to the implementation of that first stage[253]. The second stage of the mechanism concerns the capacity to provide a swift, effective and coordinated EU response to any present or foreseeable conditions that could result in crisis of any Member State's asylum, migration or border management system[254].

Whilst it is too soon to evaluate the efficiency of the new form of the early warning and crisis management mechanism, the fact that the one provided in the Dublin III and the EASO Regulations was never activated, despite clear evidence suggesting the imminence of the upcoming 2015 crisis, defined its failure[255]. In general, the effectiveness not only of the particular mechanism, but of every endeavour made by the EU agencies, in accordance with the

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[249] Regulation (EU) 2024/1351, Ibid., Article 9 paragraphs 8, 10

[250] Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration, OJ L 317, 1.10.2020, p. 26–38

[251] Commission Recommendation (EU) 2020/1366, Ibid., Recommendations 1-4 and Annex Parts 1-2

[252] Regulation (EU) 2024/1351, Ibid., Article 7

[253] Regulation (EU) 2024/1351, Ibid., Article 9

[254] Commission Recommendation (EU) 2020/1366, Ibid., Recommendation 4 and Annex Part 3

[255] Garlick M., *Practical cooperation and the first years of the EASO*, in *Searching for Solidarity in EU Asylum and Border Policies*, A Collection of Short Papers following the Odysseus Network's First Annual Policy Conference (26-27 February 2016), pp. 10-12

Regulations establishing them, is conditional upon the degree of their independence from the will of Member States to contribute, which can only be ensured through their adequate funding by the EU budget.

c. Financial support to Member States

Solidarity in the form of financial assistance is provided through the Union's co-funding of the regular needs of the Member States' asylum, migration and external border management systems, as well as through the emergency support in cases requiring increased financial resources. Both ways of offering assistance must be calculated in the context of each 7-year EU Multiannual Financial Framework (MFF). According to the MFF for the years 2021 to 2027, as amended in February 2024, the budgetary commitment for Migration and Border Management in that specific period amounts to EUR 24,743 million[256] (approximately 2.3% of the Union's total commitment appropriations), which is further allocated mostly to the Asylum, Migration and Integration Fund (AMIF), the Integrated Border Management Fund (IBMF) and the relevant decentralised Union agencies, such as the EUAA and the EBCGA[257]. This marks a significant increase in comparison with the 2014-2020 MFF[258], which provided that EUR 10,051 million would be reserved to cover the demands of the Migration and Border Management policy cluster, but still fall quite below the initial Commission's proposal[259] and Parliament's resolution[260], which respectively suggested that EUR 30,829 and 32,194 million be distributed for the implementation of those policies.

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[256] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433I, 22.12.2020, p. 11–22; as last amended by Council Regulation (EU, Euratom) 2024/765 of 29 February 2024 amending Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027, OJ L, 2024/765, 29.2.2024

[257] D' Alfonso A., *Migration and border management: Heading 4 of the 2021-2027 MFF*, European Parliamentary Research Service, PE 690.544 (April 2021)

[258] Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ L 347, 20.12.2013, p. 884–891; as last amended by Council Regulation (EU, Euratom) 2020/538 of 17 April 2020 amending Regulation (EU, Euratom) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020 as regards the scope of the Global Margin for Commitments, OJ L 119I, 17.4.2020, p. 1–3

[259] European Commission, Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM/2018/322 final - 2018/0132 (APP), Annex

[260] European Parliament resolution of 14 November 2018 on the Multiannual Financial Framework 2021-2027 — Parliament's position with a view to an agreement (COM(2018)0322 — C8-0000/2018 — 2018/0166R(APP)), OJ C 363, 28.10.2020, p. 179–231, Annex I

The AMIF[261] and IBMF[262] Regulations specify that, in the framework of the 2021-2027 MFF, the financial envelope for the implementation of the former Fund is EUR 9,882 million and of the latter EUR 6,241 million. These resources are allocated, within each Fund, partly to the Member States' programmes[263], which must be *"consistent with and respond to Union priorities and challenges"* in the fields of asylum, migration and border management[264], and partly to a thematic facility; funding from that facility is flexibly used to *"address priorities with a high Union added value or […] to respond to urgent needs"*, including the provision of emergency assistance[265]. The primary means of granting such assistance is through the additional funding of Member States' programmes. The Member States in need are not allowed however to make use of that extra funding for any other purpose, except in relation to the circumstances that justified its addition and only as approved by the Commission through the amendment of their programmes[266]. In fact, two of the Drafts amending budget adopted in 2016 were intended to strengthen and develop the CEAS and enhance solidarity and responsibility-sharing between the Member States, by financing, among other actions, the improvement of national asylum and reception systems and the transfer of applicants for international protection[267]. Furthermore, another available source of assistance under the MFF is the Emergency Aid Reserve, which may be used for the funding of *"rapid responses to specific emergency needs within the Union […] following events which could not be foreseen when the budget was established, in particular for emergency responses and support operations […] in situations of particular pressure at the Union's external borders resulting from migratory flows"*[268].

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[261] Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, OJ L 251, 15.7.2021, p. 1–47; as lastly amended by Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147, OJ L, 2024/1350, 22.5.2024 and Regulation (EU) 2024/1359 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, OJ L, 2024/1359, 22.5.2024, Article 10

[262] Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy, OJ L 251, 15.7.2021, p. 48–93; as amended by Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, OJ L, 2024/1349, 22.5.2024, Article 7

[263] The criteria for the allocation of funding to the Member States' programmes are specified in the Annexes to the AMIF and IBMF Regulations.

[264] Regulation (EU) 2021/1147, Ibid., Article 16; Regulation (EU) 2021/1148, Ibid., Article 13

[265] Regulation (EU) 2021/1147, Ibid., Article 11; Regulation (EU) 2021/1148, Ibid., Article 8

[266] Regulation (EU) 2021/1147, Ibid., Article 31; Regulation (EU) 2021/1148, Ibid., Article 25

[267] Definitive adoption (EU, Euratom) 2016/836 of Amending budget No 1 of the European Union for the financial year 2016, OJ L 143, 31.5.2016, p. 1–35; European Parliament resolution of 1 December 2016 on the Council position on Draft amending budget No 4/2016 of the European Union for the financial year 2016: Update of appropriations to reflect the latest developments on migration and security issues, reduction of payment and commitment appropriations as a result of the Global Transfer, extension of EFSI, modification of the staff establishment plan of Frontex and update of revenue appropriations (Own resources) (13583/2016 — C8-0459/2016 — 2016/2257(BUD)), OJ C 224, 27.6.2018, p. 210–212

[268] Council Regulation (EU, Euratom) 2020/2093, Ibid., Article 9

d. Relocation of asylum seekers

The type of measures with the highest potential effectiveness, especially taking into account the legalised and normalised overburdening of specific Member States by the implementation of the Dublin system, is the relocation of the applicants for international protection from one Member State to another within the Union. Such a measure allows the mitigation not only of the financial costs of hosting asylum-seekers, but also of the collateral social, security and political costs, which cannot be easily reflected in numerical calculations. The earlier the tool of relocation is used in the process of providing refugee protection - meaning even before the recognition of refugee status, while the application is pending - the more beneficial and cost-averting it is for the Member States determined as responsible by the Dublin criteria. On the other side, precisely the fact that relocation entails the transfer from the beneficiary Member States to the others of more than the cost of financial assistance, but of all the threats associated with the long-term presence of refugees in their territories, has made the majority of Member States, which are limitedly affected by the Dublin system, reluctant or even hostile against the promotion of that kind of solidarity. That is the reason explaining why relocation has never been tried on a regular basis and the only attempt of legally imposing it to all Member States was through the adoption of Council Decisions 2015/1523 and 2015/1601, when the need to relieve Greece and Italy from their disproportionate pressure in 2015 became imperative.

The first Decision was adopted on 14 September 2015 and it provided for the relocation of 40,000 applicants for international protection from Greece and Italy to the other Member States over a period of two years. That relocation of 24,000 persons from Italy and of 16,000 from Greece was designed as voluntary; the Member States were free to define how many of them they were able and willing to accept. However, the continuing increase of the refugee and migrant flows in the central and eastern Mediterranean during the summer of 2015 necessitated further provisional measures in that direction and only 8 days after the first Decision was made, the second one was adopted on 22 September by the Council. It established a mandatory relocation mechanism of 120,000 asylum-seekers from Greece and Italy, also lasting for 24 months, in the framework of which the number of persons that each Member State was obliged to receive was not determined in a unilateral or arbitrary manner, but justified under common objective criteria. The initial Commission's proposal[269] included Hungary as well, as a beneficiary frontline Member State, and required the relocation of 15,600, 50,400 and 54,000 persons from Italy, Greece and Hungary respectively to the other Member States. When Hungary rejected its inclusion among the beneficiary States of the Decision, the finally amended version treated it therefore as a receiving Member State of those relocated from Greece and Italy. The

[269] European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM(2015) 451 final (9 September 2015)

Decision provided that the 54,000 applicants planned as corresponding to Hungary's needs would be relocated from Italy and Greece in proportion to the already fixed numbers of 15,600 and 50,400 and that they would be distributed among the other Member States proportionally to the figures laid down in the Annexes to the Decision[270]. In essence, the Decision, based on Article 78 paragraph 3 TFEU, introduced a temporary derogation from the state-of-first-entry criterion in Article 13 of the Dublin III Regulation, aiming at achieving a *"fair burden sharing between Italy and Greece on the one hand and the other Member States on the other"*[271]. The Slovak Republic and Hungary challenged the validity of Decision 2015/1601 mainly on the grounds that Article 78 paragraph 3 TFEU did not constitute a proper legal basis and that its adoption was in breach of the principle of proportionality.

The CJEU first clarified that the effectiveness of the Union's response to the emergency situation required that the Council Decision, as a non-legislative EU act adopted in accordance with Article 78 paragraph 3 TFEU, could derogate from the provisions of legislative acts based on paragraph 2, in the particular case of the Dublin III Regulation. Such provisional measures must be of sufficiently circumscribed material and temporal scope, so that they neither replace nor amend the legislative acts, thus circumventing the ordinary legislative procedure provided in Article 78 paragraph 2. The CJEU ruled that the challenged Decision fulfilled those conditions, as it concerned a limited number of 120,000 asylum-seekers and it would be applied only for a two-year period[272]; it argued that the specific period was not excessive, as the preparation and implementation of the *"unprecedented and complex [relocation] operation […] in particular as regards coordination between the authorities of the Member States"* demanded adequate time, before having *"any tangible effects"*[273]. The Court further justified the choice of Article 78 paragraph 3 as a legal basis for the Decision, in response to the argument that the inflow of third-country nationals in Greece and Italy could not be classified as "sudden" in the context of the above provision. The Council, acting within a broad margin of appreciation and taking into consideration the statistical data which indicated a rapid increase of those inflows during July and August 2015, made no manifest error in its assessment that they were "sudden", although they occurred in the midst of an ongoing migratory crisis[274].

With regard the Decision's compatibility with the principle of proportionality, the Court reiterated that, given the discretion allowed to the EU institutions when making choices under circumstances requiring complex political evaluations, only a manifestly inappropriate or

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[270] Council Decision (EU) 2015/1601, Ibid., Article 4 paragraphs 1-2

[271] Council Decision (EU) 2015/1601, Ibid., Recitals 23, 26 of the Preamble

[272] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 57-84

[273] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 89-103

[274] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 113-124

unnecessary action in relation to its pursued objective could be judicially reviewable[275]. Whether specifically the contested Decision was suitable with view to the relief of the pressure on the Greek and Italian asylum systems had to be assessed not by perceiving it as the sole means for the attainment of that goal, but as part of a set of adopted measures, mainly of financial and technical assistance to those two States. In addition, that assessment should not be made retrospectively, by taking into account factors that could not have been foreseen, especially the absence of willingness to cooperate on behalf of certain Member States, but it should rely on the information available at the time when the Decision was adopted. In that respect, the Council's analysis of the situation could not be regarded as manifestly mistaken[276].

The same applies concerning the necessity of the Decision, in particular the binding character and the temporal and material scope of application of the relocation mechanism, including the retainment of the 54,000 asylum-seekers initially planned to be relocated from Hungary. The urgent need to provide swift and effective assistance to Greece and Italy, in light of Article 80 TFEU, justified the gravity of the legal and practical effects of the Decision. Less restrictive measures would not have been sufficient to resolve or substantially mitigate the problem and could therefore only serve as complementary. In any case, no concrete evidence was submitted that alternative, less intervening measures could have been equally efficient[277].

Last but not least, the pleas made against the legality of the Decision, due to the alleged violation of the principle of proportionality, were answered by the CJEU by referring to the principle of solidarity. It argued that, since the costs removed from Greece and Italy were shared by all the other Member States and their distribution was determined on the basis of various criteria which reflected the differences in the population, the economic size and the pressure on the national asylum systems of those Member States, thus ensuring that none would be unequally and excessively burdened, it could not be upheld that the establishment of the relocation mechanism was contrary to the demands of proportionality. Besides, the very text of the Decision provided that any Member State designed as a relocation state could, under specific conditions, request that its obligations deriving from that mechanism be suspended[278]. If it considered itself furthermore as experiencing pressure of such emergency that would justify the activation of Article 78 paragraph 3 TFEU, it would have the option of informing the Commission and the

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[275] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 206-208

[276] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 212-224

[277] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 235-261, 267-278

[278] Council Decision (EU) 2015/1601, Ibid., Articles 4 paragraph 5 and 9

Council of its situation, which could lead to its being included among the beneficiaries of the Decision[279][280].

e. Temporary Protection Directive

In the aftermath of the war conflicts in Yugoslavia during the 1990s and the caused displacement and movement of massive populations, which caught the EU utterly unprepared, with enormous delays and lack of coordination in its (re)action[281], the Temporary Protection Directive (TPD)[282] was adopted in 2001[283]. Its purpose is *"to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons"*[284]. The existence of such a mass influx of displaced persons and the introduction of temporary protection for a maximum period of three years are *"established by a Council Decision adopted by a qualified majority on a proposal from the Commission"*[285], in which it is also defined what the reception capacity of the Member States is[286]. The Member States must ensure that the persons enjoying temporary protection in their territory are provided with residence permits, employment and self-employment opportunities, access to accommodation, social security and welfare systems, medical care and education for persons under 18 years of age (mandatory) and adults (discretionary)[287]. When members of the same family - either spouses/partners or close relatives - have received temporary protection in different Member States, their reunification must be promoted[288]. The beneficiaries of the TPD may lodge an application for asylum and have access to the asylum procedure at any time; in that case, the general criteria and mechanisms for the determination of the Member State responsible for the examination of the asylum claim are

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[279] Council Decision (EU) 2015/1601, Ibid., Article 4 paragraph 3

[280] Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 285-310

[281] Suhrke A., *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, Ibid., pp. 406-412

[282] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12–23

[283] Luyten K., *Temporary Protection Directive*, Ibid., p. 2

[284] Council Directive 2001/55/EC, Ibid., Article 1

[285] Council Directive 2001/55/EC, Ibid., Articles 4-5

[286] Council Directive 2001/55/EC, Ibid., Article 25

[287] Council Directive 2001/55/EC, Ibid., Articles 8, 12-14

[288] Council Directive 2001/55/EC, Ibid., Article 15

applicable[289], which means that, under the hierarchy of criteria in the system of both the Dublin Regulations and the Regulation on Asylum and Migration Management, the responsible Member State will be the one that has already granted residence permit to the applicant in the framework of the temporary protection[290]. If a person granted temporary protection by a Member State seeks to enter or remains without authorisation in the territory of another Member State, then the former one is obliged to take him/her back, unless a bilateral State agreement is made that the specific rule will not apply[291]. In general, the measures required by the TPD to address a mass influx of displaced persons are financially assisted by the Asylum, Migration and Integration Fund[292].

Voices calling for the activation of the TPD were expressed especially with regard to the large inflows of asylum-seekers from North Africa to Malta and Italy in 2011 following the emergence of the Arab spring movements[293] and from Middle Eastern countries to Greece and Italy in 2015 because of the regional war conflicts[294]. Yet, the first and only so far activation of the TPD came as a result of the Russian armed invasion in Ukraine in February 2022 and the mass scale expatriations it generated. Only few days after the beginning of the attack, the Council, acting on a proposal by the European Commission, adopted Implementing Decision 2022/382[295], which established that the forced exit of populations from Ukraine falls under the concept of mass influx of displaced persons within the meaning of the TPD and that temporary protection would accordingly be offered. The preamble to the Council Implementing Decision states that, as of the status of Ukraine in the Regulation determining the third-country nationals who must be in possession of visas when crossing the Member States' external borders and those who are exempted from that requirement[296], the Ukrainian nationals are capable of visa-free movement within the EU for 90 days in any 180-day period. In practice, after being admitted into the Union territory, they have 90 days *"to choose the Member State in which they want to enjoy the rights attached to temporary protection"*; once a Member State has granted residence permit, notwithstanding the right to travel without visa requirement, the benefits deriving from

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[289] Council Directive 2001/55/EC, Ibid., Articles 17-18

[290] Peers S., *Temporary Protection for Ukrainians in the EU? Q and A*, available at: https://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html (27 February 2022)

[291] Council Directive 2001/55/EC, Ibid., Article 11

[292] Regulation (EU) 2021/1147, Ibid., Article 31 paragraph 1(b)

[293] European Commission, *The European Commission's response to the migratory flows from North Africa*, MEMO/11/226 (8 April 2011)

[294] İneli Ciğer M., *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*, available at: https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022 (7 March 2022)

[295] Council Implementing Decision (EU) 2022/382 of 4 March 2022 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, OJ L 71, 4.3.2022, p. 1–6

[296] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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, 28.11.2018, p. 39–58, Annex II

temporary protection will be limited within that specific State. Its free choice by the Ukrainians is expected to function as a means of solidarity not only to them, due to their particular condition, but also among the Member States: on the one hand, the limited need of the displaced persons to apply immediately for international protection saves the national asylum systems from a high sudden pressure[297]; on the other hand, when they finally lodge an asylum application, it will principally not be the state-of-first-entry rule that triggers State responsibility, but the previous-residence-permit criterion, so that the asylum-seekers will be more equitably distributed across the EU and the directly neighbouring to Ukraine Member States - Poland, Hungary, Slovakia and Romania - will be relieved from a potential overburdening.

That legislative direction signals a remarkable political shifting from the obsessive adhesion to the Dublin system's rules and the Member States' will to avoid the movement of third-country nationals within the Union by all means necessary, whether legal or not. A similar change is also observed in the public rhetoric, as political leaders of Member States that had notoriously objected to the idea of asylum-seekers finding shelter in their territory in the past few years, expressing strong anti-refugee opinions, were all of a sudden more than open to warmly welcoming Ukrainians[298]. The activation of the TPD and the attachment of mobility, economic and social rights to the protection status of its beneficiaries in the case of the fleeing Ukrainian nationals in comparison to the mistrustful treatment of asylum-seekers during the refugee and migratory crisis of the 2010s can be attributed to racial, religious, cultural and political reasons associated with the identity of the persons in need of protection. The people reaching the Union's Mediterranean borders in the last decade were mostly coming from countries like Libya, Tunisia, Syria, Iraq and Afghanistan - as were those who tried to enter the EU from Belarus through the Latvian, Lithuanian and Polish borders in 2021 - and their Arab ethnic origin and/or Muslim faith brought to the surface the limits of the European States' solidarity and willingness to contribute to their protection and to the relief of their fellow Member States. The common perception of those arriving populations was and still remains that of a serious threat: to the preservation of cultural and ethnic homogeneity of the Member States, to their social cohesion and public finances, to their internal security, due to the fear of terrorist attacks connected with the action of islamist organisations during that period and generally after 9/11[299]. To the contrary, the Ukrainian displaced persons are not only "compatible" with the traditional notion of the educated white Christian Europeans, thus resembling to the perspective of the EU peoples on themselves, but they actually share cultural, historical and social bonds with the Member States. Parts of the modern Ukrainian state used to belong to Poland and Hungary, whilst more than 1

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[297] Council Implementing Decision (EU) 2022/382, Ibid., Recitals 6, 16 of the Preamble

[298] Brito R., *Europe welcomes Ukrainian refugees - others, less so*, Associated Press News (28 February 2022), available at: https://apnews.com/article/russia-ukraine-war-refugees-diversity-230b0cc790820b9bf8883f918fc8e313; Carrera S./Ineli Ciger M./Vosyliute L./Brumat L, *The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy*, Ibid., p. 8

[299] Esposito A., *The Limitations of Humanity: Differential Refugee Treatment in the EU*, Ibid., pp. 12-17; Wamsley L., *Race, culture and politics underpin how — or if — refugees are welcomed in Europe*, Ibid.

million Ukrainian nationals were living and working in Poland even before the Russian invasion and others have established significant diaspora communities across the Union[300]. These double standards in the treatment of Ukrainians and persons of North African/Middle Eastern roots are a reminder, as the Director of Amnesty International's EU office stated, *"that Europe has long had the tools to protect people fleeing war and help new arrivals, and the usual 'Fortress Europe' approach is a politically motivated choice"*[301].

3. Interim evaluation

There cannot be an overall unequivocal view on the problem of the efficiency of the EU measures to give practical effect to the principle of solidarity. The outcome of the assessment depends on which criterion is promoted. As far as the goal of establishing a fair sharing of responsibilities is concerned, the Union's action as a whole must be considered as definitely unsuccessful; the three-decade functioning of the Dublin system has been in fact the major cause of the systemic unfairness in the allocation of burdens among the Member States. The question however whether that action has produced more benefits than costs compared to a hypothetical complete inaction must be answered in the affirmative: even a deficient coordination of the Member States with the EU and with each other is preferable to the lack of it, which would endanger the very existence of the AFSJ. What if the criterion is not nonetheless the objective of the mere maintenance of the AFSJ, but its long-term orderly operation through an effective common asylum, immigration and border control policy? Solidarity has been used so far more as tool for short-term responses to emergency situations than as a constitutional principle that should govern the relevant Union policies with a view to future challenges as well[302]. The approximation of national legislations is in essence the only preventive method employed by the EU, but the adopted minimum standards are more oriented to the protection of fundamental rights and probably more costly than gainful for the Member States. The EU asylum and border management agencies have a great potential to assist in the fulfillment of Member States' obligations, yet they often lack the necessary human, material and financial resources to adequately address the factual conditions they are called upon to face. The early warning mechanism was never activated when it would have been most useful and it remains questionable whether the distribution of funds within the AMIF and the IBMF sufficiently corresponds to the different in nature and extent needs of each Member State. In an

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[300] Council Implementing Decision (EU) 2022/382, Ibid., Recitals 16, 20 of the Preamble; Brito R., *Europe welcomes Ukrainian refugees - others, less so*, Ibid.; İneli Ciğer M., *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*, Ibid.

[301] Amnesty International Press Release, *EU: Temporary protection is needed for everyone fleeing Ukraine* (3 March 2022), available at: https://www.amnesty.eu/news/temporary-protection-is-needed-for-everyone-fleeing-ukraine/

[302] Monar J., *The AFSJ two decades after Tampere: Institutional balance, relation to citizens and solidarity*, Ibid., pp. 36-37

overstatement, it could be argued that the measure with the most impactful capacity, the relocation of asylum-seekers, was applied in such a way that turned out to be of less practical and more academic value, through the interest in the judgments of the CJEU; even if the 2015 Council Decisions on relocation were fully implemented as they were meant to be, the combined removal from Greece and Italy of the responsibility for 160,000 asylum-seekers would be far below the gravity of their pressure, account being taken of the nearly 1 million that arrived at their shores. Finally, the recent activation of the TPD dispelled any doubt on the discriminatory criteria underlying the shaping of the Union's action towards third-country nationals. Therefore, the (in)effectiveness of all such measures should perhaps be evaluated based on the degree to which they made the Member States adjust their incentives and behaviour into complying with the adopted EU legal rules and contributing to an equitable sharing of burdens.

B. (THE LACK OF) SOLIDARITY IN THE ACTION OF MEMBER STATES: CONFLICTS BETWEEN EU RULES AND NATIONAL INTERESTS

The generalised perception of irregularly entering third-country nationals - whether in search of international protection or not - as a multifaceted threat has driven Member States' action towards measures intended to prevent access to their domestic territory and to avoid being determined as responsible for the examination of their asylum applications. In most cases, that motivation has led to the circumvention of EU rules to the degree that they required the admission of asylum-seekers and thus were in conflict with the Member States' national interests[303]. Such rules concern in principle either the protection of human and especially refugee rights or the necessary conditions for the legal entry into the Schengen Area or the implementation of the Dublin system of responsibility allocation. The most important means the Member States have made use of to safeguard their national priorities are:

i) allowing the transit of third-country nationals from their territory to the next neighbouring state, in violation of the Schengen Borders Code and the Eurodac Regulation;

ii) the temporary reintroduction of internal border controls, in accordance with the requirements set by the SBC provisions;

iii) the erection of border fences and the imposition of additional legal and physical restrictions to asylum seekers' entry;

iv) the prohibition of the docking of ships carrying out SAR operations at national ports and of the disembarkation of the persons rescued at sea;

v) the downgrading of reception conditions standards;

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[303] Goldner Lang I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, Ibid., p. 46; Tsourdi E./Costello C., *The Evolution of EU Law on Refugees and Asylum*, Ibid., pp. 819-820

vi) the direct non-compliance or the limited compliance with the 2015 Relocation Decisions;

vii) the adoption of non-legally binding arrangements bypassing the application of the Dublin criteria.

1. The domino effect of physical and legal barriers to asylum seekers' entry

The Member States' practice of tolerating or facilitating the irregular entry of third-country nationals into their territory and their transit through it on the way to their destination deeper within the EU has been utilised since before the outbreak of massive refugee and migratory flows. The consistent infringement of the obligations to check whether the SBC requirements for crossing the Union's external borders were met and to register and fingerprint those who were admitted allowed the frontier Member States to take advantage of the irregular migrants' and asylum-seekers' intention to move onwards and not remain on their national ground, by eliminating evidence that could trace the entry and presence of those persons in the Union back to them and render them responsible for examining their asylum applications and possibly hosting them for years[304]. When the numbers and frequency of the incoming flows were still controllable, that practice could be regarded as a form of 'free-riding', a way for States to reduce their costs without being detected or raising significant concerns on behalf of the other Member States to which the burdens were shifted. When the arrivals of third-country nationals started increasing however, it became more of a strategic choice for Member States that faced disproportionate pressures, in the absence of sufficient Union assistance and the scarcity of national resources to effectively contain them outside their borders - especially when being smuggled in by sea - and to endure their long-term reception in the midst of an ongoing financial crisis.

The most extensive EU law violations of this kind have been observed in the case of protection-seekers and migrants entering the EU from Turkey by illegally crossing the borders with Greece or Bulgaria and then continuing via North Macedonia, Serbia, Croatia, Hungary or Slovenia, in order to reach Central, Western or Northern Europe[305]. The tactics of irregular transits is neither endemic only in the so called "Western Balkan route", nor applied merely through the volitional tolerance of the Member States, but may even be deliberately organised.

A distinct, yet similar and representative of bilateral state tensions case, which gave rise to variant legal opinions on the interpretation of the SBC and the principle of sincere cooperation, took place at the French-Italian borders in April 2011. Italy was then confronted, as was Malta, with considerable human influx from North Africa. In response to the lack of the requested solidarity from the EU and the other Member States and in contradiction of the Commission's MEMO/11/226 issued on 8 April 2011, which praised that very solidarity in the Union's reaction

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[304] Bast J., *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, Ibid., p. 296

[305] Armstrong A.B., *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, Ibid., p. 361

to the situation[306], Italy decided to do something more than simply allow the transit of third-country nationals through its territory. Since the start of that year, it had been granting temporary residence permits for humanitarian protection to Tunisian immigrants, thus enabling them to move freely within the EU for any three months per six-month period, by way of derogation from the general entry conditions, which they did not fulfill[307]. On 17 April the French authorities stopped a train coming from Ventimiglia, an Italian town placed only 7 km from the French-Italian border on the Gulf of Genoa, which carried approximately 300 migrants in possession of such permits and activist NGO representatives, and they forced them back to Italy.

The French, as well as other European governments, questioned the validity of those residence permits and claimed that the right to free movement requires that all first entry conditions be satisfied. Nevertheless, it could be argued that these legal demands are applicable precisely when a third-country national first enters Union territory and they fall under the control of the relevant receiving State, not of the others to which that person may subsequently travel. Moreover, the issuing of the permits on humanitarian grounds is specifically drafted in the SBC as an exception to the general rule and therefore, as lex specialis it prevails over it. If there was a legal weakness in the Italian practice, it must have lain in the intention of the national government to make its problems common to the rest EU by physically and legally transferring them to the other Member States, in contrast to the principle of sincere cooperation[308].

The action of the French border authorities on the other side did not escape legal criticism either. The SBC allows *"the exercise of police […] powers by the competent authorities of the Member States […] as conferred on them by national law, insofar as the exercise of those powers does not have an effect equivalent to border checks"*, in particular when it does not *"have border control as an objective"*, its aim is to respond to *"possible threats to public security or public policy"* and it is *"clearly distinct from systematic checks on persons at the external borders"*[309]. The specific French practice exceeded those limits and could be considered as reintroducing internal border controls, which are subject to stricter conditions, both substantial and procedural.

The SBC provides that internal border controls may be temporarily reintroduced within the Schengen Area when *"there is a serious threat to public policy or internal security in a Member State"*[310] and as long as the principle of proportionality is respected. The reference to the

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[306] European Commission, *The European Commission's response to the migratory flows from North Africa*, MEMO/11/226 (8 April 2011)

[307] Article 5 paragraphs 1, 4(c) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006, p. 1–32, as then last amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa, OJ L 85, 31.3.2010, p. 1–4 (no longer in force). The comparable provisions of the SBC currently in force are included in Article 6.

[308] Carrera S./Guild E./Merlino M./Parkin J., *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, CEPS Paper in Liberty and Security in Europe (April 2011), pp. 5-11

[309] Regulation (EU) 2016/399, Ibid., Article 23(a); Regulation (EC) No 562/2006, Ibid., Article 21(a)

[310] Regulation (EU) 2016/399, Ibid., Article 25 paragraph 1

concepts of public policy and internal security as justifying exceptional limitations to the free movement in an area without internal frontiers must be narrowly interpreted, in accordance with the settled case law of the CJEU on the derogations from free movement in the context of the Internal Market (Articles 36, 45, 52, 65 TFEU) and the maintenance of law and order in the AFSJ (Article 72 TFEU)[311]. In all cases, the temporary reintroduction of border control is permitted *"only as a measure of last resort"* and its *"scope and duration [may] not exceed what is strictly necessary to respond to the serious threat identified"*[312]. The maximum duration of such national measures and their procedural requirements, including the deadlines for their notification to the Commission and the other Member States and then the Council and the Parliament, depend on the urgency of the necessitated action and the foreseeability, the extent and the persistence of that threat[313].

Although the practice of the French authorities in April 2011 was not compatible with those conditions (as they applied before the multiple amendments of the SBC ever since then), especially with the principle of proportionality[314], it would only become part of a long series of reintroductions of internal border checks in the following years, when the inflows of third-country nationals into the Union grew rapidly. In September 2015, at the peak of the refugee/ migrant crisis, the shifting of those flows towards their territories by the unilateral or arbitrary actions of other Member States, through either the facilitation of their transit or the erection of fences on their respective borders, made six Schengen States - Germany, Austria, Sweden, Denmark, Norway and Belgium - reinstate internal border controls. The constant imposition of internal border controls in the last decade, in a frequency which only in words would render them temporary - whatever that means for the statutory character of the AFSJ - has highlighted, among other observations, two justifying reasons: a) the association of criminal and terrorist activities with organised groups of people sharing similar ethnic and religious identity with the (extraordinary and not easily manageable number of) asylum-seekers; b) the vulnerability of the EU to the instability and the military conflicts in the broader geopolitical region.

Currently, at the end of September 2024, eight Schengen Member States apply border checks at parts of their external borders - France, Sweden, Denmark, Norway, Italy, Slovenia, Austria and Germany. All of them invoked security risks related to: irregular migration and the increase of illegal border crossings from Turkey, the Western Balkans and North Africa; the pressure on national asylum and reception systems; terrorist threats; the turmoil in the Middle East, due to the conflict between Israel and Hamas, Lebanon and Iran; the Russian aggression in Ukraine.

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311 Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, *European Commission v Republic of Poland and Others*, Ibid., pars. 143-144

312 Regulation (EU) 2016/399, Ibid., Article 25 paragraph 2

313 Regulation (EU) 2016/399, Ibid., Articles 25-35; Piçarra N., *Control and Closure of Internal Borders in the Schengen Area*, in *Searching for Solidarity in EU Asylum and Border Policies*, A Collection of Short Papers following the Odysseus Network's First Annual Policy Conference (26-27 February 2016), pp. 15-18

314 Carrera S./Guild E./Merlino M./Parkin J., *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, Ibid., pp. 11-18

From October 2006 until September 2024, 442 cases of reintroduction of internal border controls have been notified. Yet, only 35 of them occurred before 2015 and among those not a single one was associated with the movement of asylum-seekers and irregular immigrants[315].

As was implied above, although the reinstatement of internal border checks has been the most institutionally provided way for Member States to avoid the entry of third-country nationals on their domestic ground, it has certainly not been the only one. Since the 1990s, twelve Member States have constructed walls at their external borders, over different time periods, in relation to different geopolitical sequences of events and of variant length and duration. The majority was unsurprisingly erected after the influx of third-country nationals began to escalate and notably during the 2015-2016 crisis. In practice, each State's fence incentivized the same measure on behalf of its neighbouring countries, as it forced those flows to shift their route towards inner Europe through their territories. The fence Greece constructed at its border with Turkey in the valley of Evros river in 2012 was followed by Bulgaria's fence at its border with Turkey in 2014 and North Macedonia's fences at its border with Greece in 2015. Those that managed to pass through that first block would then encounter the fences built in 2015 at the Hungarian-Serbian, Hungarian-Croatian, Slovenian-Croatian and Austrian-Slovenian borders, as well as the reintroduced internal border controls in several Central European States[316]. Thus, the Western Balkan route turned within a few months into a "fortress".

Beyond the symbolic importance of an area without internal frontiers being filled with physical and legal barriers to free movement, the erection of these walls has raised serious controversy about their harmful impact on fundamental rights, which are supposed to be an equally pursued goal in the framework of the AFSJ and in any case, to set a limit to Member States' action. The heaviest violations concern the systemic "pushbacks" of asylum-seekers and irregular migrants, whom national border guards obstruct from entering and effectively exercising their right to apply for international protection, contrary to the provisions of the Geneva Convention, the CFREU and the ECHR. Furthermore, when pushbacks force them back to countries where they face the risk of inhuman or degrading treatment, they also amount to breaches of the principle of non-refoulement[317]. The result is similar in the case of their long detention/entrapment in transit zones between opposite States' border fences, often under harsh weather conditions and scarcity of resources to cover fundamental survival needs[318].

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[315] European Commission, *Document on Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code* (until 30 September 2024), available at: https://home-affairs.ec.europa.eu/document/download/11934a69-6a45-4842-af94-18400fd274b7_en?filename=Full%20list%20of%20MS%20notifications_en.pdf

[316] Armstrong A.B., *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, Ibid., p. 335; Dumbrava C., *Walls and fences at EU borders*, European Parliamentary Research Service, PE 733.692 (October 2022), pp. 1-4

[317] See inter alia: Articles 4, 18-19 CFREU; Articles 1, 2, 4 of Directive 2008/115 (Return Directive); Articles 14-15 of Regulation 2016/399 (SBC); Article 14 of Directive 2011/95 (Qualification Directive); Article 33 of the 1951 Geneva Convention.

[318] Dumbrava C., *Walls and fences at EU borders*, Ibid., pp. 5-7; Radjenovic A., *Pushbacks at the EU's external borders*, European Parliamentary Research Service, PE 689.368 (March 2021), pp. 1-5

Even though this type of human rights' violations seemed to gradually decrease after 2016, they were recently brought back to the EU agenda, with regard to the instrumentalisation of protection-seekers and migrants by third countries that were instructing them towards the Union's external borders:

i) In February 2020, Turkey stopped implementing its part of the March 2016 joint statement with the European Council, according to which it agreed to prevent new arrivals to the EU by sea and land and to readmit any person moving irregularly from Turkish ground to the Greek islands. It decided to not only allow them, but to facilitate their transport to Greek-Turkish border at the Evros river and direct them to cross it. In response, the Greek government intensified the safeguarding of the borders by military and police forces[319] and announced that it would suspend all asylum applications for one month (March 2020) and that, even if someone managed to enter the Greek territory, he/she would be returned to his/her country of origin or transit without registration. As the legal basis of that practice, Greece invoked Article 78 paragraph 3 TFEU. Its action received political support by the EU; the President of the Commission praised Greece for acting as Europe's "shield" and promised financial and practical assistance[320]. Nonetheless, both the unilateral invocation of Article 78 paragraph 3 TFEU, whose procedural requirements provide for the participation of the Council, the Commission and the Parliament in the adoption of a decision, and the negative consequences of the Greek authorities' practices on the rights of asylum-seekers, were criticised, in particular by the UN High Commissioner for Refugees, the Council of Europe and human rights advocates[321]. The application of the Greek Emergency Legislative Act ceased on 1 April 2020.

ii) In May 2021, the Belarusian regime started orchestrating the transport of Middle Eastern migrants first to Belarus and then to its borders with Latvia, Lithuania and Poland. When they reached those borders, they found themselves trapped between opposite border forces pushing them to the each one's other side[322] and exposing them to fatal living conditions. The Member States in question answered that "hybrid attack" by raising fences and adopting legislative measures that restricted entry and expediting expulsion. The activation of the civil protection mechanism by the EU and the provision of financial, operational and diplomatic

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[319] Cortinovis R., *Pushbacks and lack of accountability at the Greek-Turkish borders*, CEPS Papers in Liberty and Security in Europe, No. 2021-01 (February 2021), pp. 3-7

[320] 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), available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_380

[321] Del Monte M./Luyten K., *Emergency measures on migration. Article 78(3) TFEU*, Ibid., p. 6

[322] European Parliament Press Release, *Poland-Belarus border: MEPs alarmed by humanitarian and political crisis* (10 November 2021), available at: https://www.europarl.europa.eu/RegData/presse/pr_info/2021/EN/03A-DV-PRESSE_IPR(2021)11-10-17001_EN.pdf

support was not sufficient to prevent severe violations of fundamental rights and even human casualties for many months[323].

Dangers for human rights and lives have been the result of the Member States' efforts to avoid responsibility not only for the third-country nationals arriving by land, but also those arriving by sea. The view expressed by AG Sharpston in her Opinion in the Mengesteab case, where she argued that persons rescued at sea and then brought ashore should not be legally equated to those irregularly crossing land borders and therefore that the State of their disembarkation should not be regarded as the State of first entry according to the Dublin criteria[324], was not shared by the CJEU, neither has it been endorsed by Member States beyond those directly affected in the Mediterranean[325]. Italy has primarily in more than one occasions used its denial to ships carrying out SAR operations from porting and disembarking asylum-seekers and migrants on its territory as a tool of negotiation against the EU and the other Member States. Although the rescue of people at sea is a legal duty imposed by Article 98 of the United Nations Convention on the Law of the Sea[326], which has been ratified by all Member States and the EU, it has refused to let them in, unless an agreement has already been achieved on their relocation[327].

2. The limited implementation of the Council Relocation Decisions

The effort of Member States to protect their national interests against EU rules they perceive as disregarding their position or compromising their priorities has been most accurately reflected in the cases of Council Decisions 2015/1523 and 2015/1601, especially the second as it established a mandatory relocation mechanism. Four Member States voted against that Decision - the Czech Republic, Hungary, Romania and Slovakia - but were not enough to block its adoption in the Council which decided by qualified majority voting. Two of them - Hungary and Slovakia - filed actions for the annulment of the Decision, both of which were rejected by the CJEU whose judgment reaffirmed its legal validity[328]. Although the Decisions were adopted in 2015 and they provided that the relocation mechanism would last until September 2017, the Court's ruling on

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[323] Carrera S., *Walling off Responsibility? The Pushbacks at the EU's External Borders with Belarus*, CEPS Policy Insights, No 2021-18 (November 2021), pp. 3-5; Del Monte M./Luyten K., *Emergency measures on migration. Article 78(3) TFEU*, Ibid., pp. 1-3

[324] Case C-670/16, Opinion of Advocate General Sharpston delivered on 20 June 2017, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, ECLI:EU:C:2017:480

[325] Schmalz D., *Fences, Fiction, and the Magic Mountain. Responsibility- sharing for Refugees in Europe*, Ibid., pp. 378-379

[326] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)

[327] Marin L., *Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law*, European Journal of Migration and Law, Vol. 22, No. 1 (2020), pp. 68-69

[328] Goldner Lang I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, Ibid., p. 11

their legality was only issued in that very month. In the meanwhile, notwithstanding the fulfillment by certain States of their obligations deriving from the Council Decisions, their overall implementation was extremely limited. Three Member States in particular were the least compliant: Hungary and Poland, which relocated no asylum seeker from Greece and Italy, and the Czech Republic, that only accepted 12 on its territory. In addition, Hungary held a referendum in October 2016 against the Union's relocation plans and the Czech Republic adopted a Resolution in June 2017 declaring that it would suspend the implementation of its obligations[329]. Taking into account the gravity and persistence of their violations, the Commission initiated infringement proceedings against those three States[330]. The judgment establishing the breach of EU law on their behalf was however released long after the termination of the relocation mechanism, in April 2020.

In both rulings the Court's answer to the arguments of the parties on the conflict between the Decisions and their national interests hold a special place and interest in its reasoning. In the context of the action for annulment against Council Decision 2015/1601, Poland claimed, in intervention to an argument proposed by the Hungarian side, that *"the imposition of binding quotas [would have] disproportionate effects"* on countries like itself, which are characterised by an ethnic homogeneity; the integration of the asylum-seekers whom the Decision obliged it to receive would entail *"far greater efforts and bear far heavier burdens than other host Member States"*, because of their cultural and linguistic dissimilarity with the native population. The CJEU dismissed that argument on two grounds: that it was put forward in a procedurally erroneous way and that the hypothetical conditionality of each applicant's relocation upon his/her connection with the receiving State would be contrary to the realisation of the principle of solidarity and would make *"the adoption of a binding relocation mechanism [...] impossible"*. Furthermore, any considerations regarding the ethnic origin of the asylum-seekers are in contravention of the prohibition of discriminatory behaviour, as enshrined in Article 21 of the Charter of Fundamental Rights[331].

In a more explicit manner, the Member States in defence in the case of the action for infringement of the Relocation Decisions argued that Article 72 TFEU - which in any conflict with secondary EU law adopted in the framework of the AFSJ, including the Decisions in question, must prevail - grants them exclusive competence for the maintenance of law and order and the safeguarding of internal security in their territories. In that respect, the relocation of persons with possible associations with religious extremism and terrorist activities would jeopardise their internal security. According to their assessment, the established relocation

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329 Joined Cases C-715/17, C-718/17 and C-719/17, Judgment of the Court (Third Chamber) of 2 April 2020, *European Commission v Republic of Poland and Others*, Ibid., pars. 24-31; Marin L., *Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation*, Ibid., p. 68

330 Joined Cases C-715/17, C-718/17 and C-719/17, Ibid., par. 81

331 Joined Cases C-643/15 and C-647/15, Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Ibid., pars. 302-304

mechanism did not guarantee effectively the prevention of acts threatening those national priorities[332].

The CJEU answered that Article 72 TFEU must *"be interpreted strictly"* as providing a derogation in *"clearly defined cases"* and does not constitute a general exception conferring on Member States the power to unilaterally *"depart from the provisions of European Union law" "without any control by the [EU] institutions"*. Any national measures adopted on the basis of Article 72 do not fall therefore *"outside the scope of European Union law"*; otherwise, the binding character and consistent application of EU law could be impaired. Any deviation from Member States' obligations under the Council Decisions should have been in accordance with the identical in both legal acts Article 5 paragraphs 4 and 7, which concretised and placed within a uniform procedure the concerns reflected in Article 72. Those provisions allowed the Member States to not approve or deny the relocation of a specific person, due to reasonable grounds that he/she is a *"danger to national security or public order"*. It follows that such a conclusion could be reached only through *"a case-by-case investigation"* of the present and potential threat of each asylum-seeker and neither by arbitrary evaluation and invocation of Article 72, nor with *"the sole [purpose] of general prevention"*[333].

3. Tendency towards non-binding arrangements

The inability of the Member States to ensure the protection of their national interests through the institutional operation of the EU, especially as regards the decision-making process, has created a tendency towards non-binding arrangements, in order to escape both the obstacles of procedural requirements and the judicial control of the CJEU. Although examples of such practices are more usually observed in the conduct of the Union's foreign policy on asylum and immigration, they can also be found in the relations among Member States.

The most notable document of this type is the German-Greek "Administrative Arrangement"[334] of August 2018 on cooperation when entry is refused to persons seeking protection in the context of temporary checks at the internal German-Austrian border[335]. The legal nature and binding effect of that arrangement is debatable, whether specifically it constitutes an international treaty, a treaty concluded in simplified form or, as it claims to be, an administrative arrangement established in the context of Article 36 of the Dublin III Regulation. The arrangement provides

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[332] Joined Cases C-715/17, C-718/17 and C-719/17, Ibid., pars. 134-138

[333] Joined Cases C-715/17, C-718/17 and C-719/17, Ibid., pars. 139-172

[334] Administrative Arrangement between the Ministry of Migration Policy of the Hellenic Republic and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border (18 August 2018)

[335] Germany signed a similar bilateral arrangement with Spain as well.

for a fast-track procedure for the return to Greece of adult asylum-seekers who are identified during a check in the German-Austrian border and have already applied for asylum in Greece since July 2017, as indicated by the Eurodac information. That return procedure, unless objected by the Greek authorities within 6 hours from the receipt of the apprehension's notification, should be initiated no later than 48 hours since the refusal of entry. As such, the arrangement resembles more to a sui generis readmission agreement. In any case, its content exceeds the scope of Dublin Regulation's Article 36, based on which *"Member States may, on a bilateral basis, establish administrative arrangements [...] concerning the practical details of the implementation of this Regulation"* regarding in particular: *"(a) exchanges of liaison officers; (b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants"*, as it creates essentially a new para-Dublin procedure. Moreover, the provisions of the "arrangement" circumvent many of Dublin Regulation's safeguards - deemed by Member States as impediments - including, for instance, the individual assessment of each applicant's conditions and the right to appeal against the transfer decision. Consequently, irrespective of the legal nature of that document, it is incompatible with the EU rules in force[336] and the application of the practices it contains could be the subject of judicial review by the CJEU.

On the other hand, the Member States have also engaged in negotiations leading to purely political and non-legal commitments. In 2019 and 2022, two Declarations were adopted on the creation of voluntary, predictable and temporary solidarity mechanisms. The first one[337] was concluded by Italy, Malta, France, and Germany and expressed their willingness to establish a voluntary relocation scheme as an alternative solution to the applied or threatened prohibition of disembarkation of asylum-seekers rescued at sea at Italian and Maltese ports. The second Declaration[338], endorsed by 18 EU Member States and 3 Schengen Member States, was meant as an interim step in the negotiation process of the New Pact on Asylum and Migration and provided for the relocation of 10,000 third-country nationals rescued at sea within a year. Neither document has any legally binding effect and the participation of Member States in the relocation plans is entirely voluntary, as is the degree of their solidarity contributions. Besides, their wording is too abstract to be interpreted as more than precisely a declaration of political intention, let alone as founding a structured mechanism, even a voluntary one[339]. One could

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[336] Marin L., *Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law*, Ibid., pp. 63-67; Poularakis S., *The Case of the Administrative Arrangement between Greece and Germany: A tale of "paraDublin activity"?*, available at: https://www.asylumlawdatabase.eu/en/journal/case-administrative-arrangement-between-greece-and-germany-tale-%E2%80%9Cparadublin-activity%E2%80%9D (5 November 2018)

[337] Joint Declaration of intent on a controlled emergency procedure - Voluntary commitments by Member States for a predictable temporary solidarity mechanism (Malta Declaration) (La Valletta, 23 September 2019)

[338] Council of the European Union Declaration, *First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism* (22 June 2022)

[339] Carrera S./Cortinovis R., *The Declaration on a voluntary solidarity mechanism and EU asylum policy: One Step Forward, Three Steps Back on Equal Solidarity*, CEPS In-depth Analysis (October 2022); Del Monte M./Orav A., *Solidarity in EU asylum policy*, Ibid., pp. 9-11; Marin L., *Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law*, Ibid., pp. 69-73

argue that their only usefulness lay in the affirmation of Member States' reluctance to assume binding obligations and in pointing the way towards a more flexible conception and realisation of solidarity.

C. EXTERNALISATION OF EU ASYLUM AND MIGRATION POLICY: MOTIVES, FORMS OF COOPERATION WITH THIRD COUNTRIES AND CONCERNS

The recognition of the fact that any problem relating to asylum, immigration and external border management is rooted outside the EU, in the situation of non-European countries and regions that produces the movements of human populations, in combination with the failure to achieve commonly accepted solutions within the strictly perceived Union's institutional framework, has gradually created a tendency towards the externalisation of the relevant EU policies. Article 78 paragraph 2(g) of the TFEU explicitly provides that the measures adopted for the functioning of a common European asylum system may also comprise *"partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection"*. Furthermore, according to Article 79 paragraph 3 TFEU, *"[t]he Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States"*. The Union's objectives in its external relations with third countries appear thus to be oriented to a dual direction: a) the prevention of third-country nationals from arriving at the territory of EU Member States and b) the facilitation of their removal from the EU, by means of their return/ readmission to third countries.

These goals are pursued through a variety of practices: political initiatives in the context of the Union's Common Foreign and Security Policy; cooperation arrangements with third countries concluded by the EU agencies; readmission agreements, mobility partnerships and visa facilitation agreements between the EU and third states; bilateral state cooperation and readmission agreements. Regardless of the legally binding or informal nature of such instruments, the cooperation of third countries is usually attained in exchange for the granting by the EU of development funds, the practical support of its specialised agencies, the liberalisation of travel within the EU by waiving visa requirements and the initiation or intensification of accessional negotiations[340].

[340] Gkliati M./Nicolosi S.F., *External Solidarity in Integrated Border Management: The Role of EU Migration Agencies*, in: Kassoti E./Idriz N. (eds.), *The Principle of Solidarity. International and EU Law Perspectives*, Global Europe: Legal and Policy Issues of the EU's External Action: Volume 2, The Hague, Netherlands: T.M.C. Asser Press/Springer (2023), pp. 216-217

As far as the role of the EU asylum and border management agencies is concerned, pursuant to the Regulations governing their operation, the EUAA[341] and the EBCGA[342] contribute by offering technical and operational assistance for the fast and effective performance of the return procedures, as well as for the improvement of the third countries' capacity to control the crossing of their borders and prevent the persons on their territory - whether they are their own citizens or only transiting through their land - from reaching the EU. With view to carrying out those tasks, they engage, among other forms of support, in the exchange of information with their counterpart foreign authorities, they deploy liaison officers who provide training and technical expertise and the EBCGA in particular may take part in joint patrol and surveillance operations.

Nevertheless, the manner in which the EU has chosen to conduct the external aspect of the specific sensitive policies has raised concerns regarding the protection of fundamental rights, the democratic accountability of the Union's action and the respect for the rule of law. Many of the cooperation arrangements agreed on behalf of the EU by its agencies are informal instruments of soft law and, despite the significance of their impact on the EU budget and on human rights, their conclusion escapes any participation of the European Parliament and the potential judicial scrutiny of the CJEU, which may even be the reasoning behind the choice of such non-legal forms. Furthermore, there is no sufficient monitoring on how the provided resources are actually used by the third countries' authorities. Most crucially, what remains unclear is the treatment by the national forces of the asylum-seekers or irregular migrants after they are returned or prevented from moving towards the Union, for which the EU assumes no responsibility. These practices may therefore render the Union complicit in violations of the right of any person to leave his/her country of origin or residence[343], of the right to seek asylum and of the principle of non-refoulement[344], to the extent that there is a risk of inhuman or degrading treatment of those persons returned or intercepted. The EU has especially gathered criticism for its cooperation with Libya and Turkey, as they have consistently been accused of brutal humanitarian violations by international human rights advocates; Libya is not even a contracting party of the Geneva Convention, whilst Turkey's commitments extend only to persons arriving from Europe[345]. The fact that no EU Member State had designated Turkey as a safe third country before the above mentioned March 2016 EU-Turkey statement is indeed a source of suspicion, which was even more increased by the recognition of refugee status to Turkish officials escaping prosecution in

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[341] Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, Ibid., Article 2

[342] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, Ibid., Article 10

[343] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto (Strasbourg, 16 September 1963), Article 2

[344] As enshrined in the 1951 Geneva Convention, the 1967 New York Protocol, Article 78 paragraph 1 of the TFEU and Articles 18 and 19 of the CFREU.

[345] Gkliati M./Nicolosi S.F., *External Solidarity in Integrated Border Management: The Role of EU Migration Agencies*, Ibid., pp. 221-224

Turkey by German courts in 2017[346]. Hence, it could be concluded that, by inappropriately expanding the concept of safe third country, the EU seeks to limit the scope of the principle of non-refoulement and consequently the restrictions on the available legal means for the promotion of its interests and goals - excluding that of fundamental rights' protection, which appears to be sacrificed.

[346] Lavenex S., *'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, Ibid., pp. 1206-1207

IV. CONCLUSION

The absence of clear directions in the body of the law on how solidarity should be understood and realised in practice has rendered necessary the path of legal interpretation. It is consistent with the nature of solidarity as a legal principle that such interpretations may diverge from each other and that there cannot be an absolute degree of its attainment, as it is neither a goal by itself, nor a rule which is either complied with or violated, but it is meant to constitute the theoretical foundation and guide which the concrete legal measures must adapt to and respect to the highest level possible, depending on the factual circumstances. As could be expected, it is the extremity of those circumstances that turns that envisaged adaptability into persistent disagreement and makes the interpretation and the practice of solidarity a matter of conflicting interests rather than legal opinions.

The preceding analysis on the principle of solidarity as it is conceived in the context of the EU Area of Freedom, Security and Justice was based on a teleological interpretation focusing on what role should be ascribed to it with view to the effectiveness of the common policies on asylum, immigration and external border control, which according to Article 80 TFEU it is supposed to govern. The first conclusion was that both the source of the necessity for solidarity and the cause of the difficulty to apply it in a generally acceptable and uniform manner must be attributed to the collective character of the problems that those policies are called upon to manage and of the goods they aim at protecting, as a result of the legal nature of the AFSJ as an area without internal borders. The combination of the indivisible enjoyment of the benefits created by the existence and development of the AFSJ and of the potential threat of the influx of third-country nationals to those benefits leads to specific consequences: on the one hand, the efforts of individual Member States cannot be expected to suffice for the safeguarding of the stability and security within the AFSJ, but coordinated action is required; on the other hand, every State sees its own excessive burdens as the price for another State's relief and, vice versa, no Member State can be expected to voluntarily assume burdens it can avoid by unilateral action or owing to asymmetrically favourable to it legal provisions, even more so taking into account the impact of such burdens to its national sovereignty.

Ultimately, the effectiveness of the asylum, migration and border checks policies depends on the cumulative fulfillment of two requirements:

a) the regulatory intervention of EU law through the adoption of legally binding rules that give practical effect to the principle of solidarity. These rules must ensure i) a fair allocation of responsibilities among the Member States in a way that respects their differences, in particular with regard to their absorption capacity, by calculating financial, social, geographical and other relevant variables, and does not assign disproportionate burdens to any of them; ii) efficient corrective mechanisms, which regulate the provision of timely and adequate support to Member States faced with burdens exceeding their fair share of responsibility and potentially their capacity to respond to them;

b) effective enforcement mechanisms. Even if the required legal rules are adopted, solidarity will remain an empty letter, insofar as compliance with them is not secured by enforcement mechanisms that can swiftly and strictly respond to violations and thus have a sufficiently preventive effect.

In other words, solidarity may be considered as effectively expressed in legal provisions, when they are of such content to practically reduce both the possibility of a Member State's incapacity to manage potential problems relating to asylum, immigration or external border control and the non-contribution incentives of Member States.

As the events of the last years have manifestly proven, the EU has failed on both grounds. The Dublin mechanism of responsibility allocation has produced systematically unequal burdens for the frontier Member States and accordingly disproportionately low costs for the others, which - being the majority - have managed to keep it in force for approximately three decades. The adopted solidarity measures of various types could have been useful in the absence of the Dublin system, but under the particular conditions they have not succeeded in adequately compensating for the overburdening it has been causing to Member States.

Consequently, borrowing the Voice and Selective Exit logic from Weiler's work[347], it could be argued that, to the extent that the EU decision-making process does not seem to take into consideration and respect the Voice and national interests of certain Member States, they are equally encouraged to adopt a Selective Exit attitude, by retaining their EU membership, but violating or disregarding their obligations under EU law. Two ways have been proposed in order to prevent such behaviour or make it less attractive: through either the judicial and enforcement mechanism or the increase of Member States' Voice in the law-making procedures.

The EU enforcement mechanisms however, as the case of the infringement of the Council Relocation Decisions showed, are highly ineffective and limitedly preventive, too slow and without sufficiently burdensome consequences - if any - for the violating States. Yet, this assessment is unlikely to change without an amendment of the Treaties.

The legislative process on the other hand led, after a lengthy negotiation period, to the adoption of the New Pact. Although it is too early to evaluate the future impact of the legal acts included in it, it appears to have preserved many of the already existing deficiencies, predominantly the criterion of state-of-first-entry for the determination of State responsibility in the Regulation on Asylum and Migration Management, and to have legalised the desire for flexible solidarity contributions that will enable the non-periphery Member States under certain conditions to avoid receiving asylum-seekers in their territory by exchanging them for different kinds of contributions.

In conclusion, it is not only the "selfish" Member States' incentives, but also the weaknesses in the institutional operation of the EU that could be "blamed" to a significant degree for the non-implementation of the principle of solidarity in the EU policy on asylum, immigration and

[347] Weiler J.H.H., *The Transformation of Europe*, The Yale Law Journal, Vol. 100, No. 8 (1991), pp. 2403-2483

external border management and in general the lately exposed inefficiency of that policy, as regards both the relations among Member States and subsequently the state of fundamental rights' protection in the Union.

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