



SOLIDARITY AND FAIR SHARING OF RESPONSIBILITY IN EU AT ITS
CONSTITUTIONAL AND OPERATIONAL DIMENSION INCLUDING
FINANCIAL IMPLICATIONS, BETWEEN THE MEMBER STATES IN THE
FIELD OF BORDER CHECKS, ASYLUM AND IMMIGRATION

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Contents

- I. Institutional framework
- II. Constitutional tradition
- III. Jurisprudence
- IV. Implementation and Funding
- V. Conclusion

Area of Freedom Security and Justice

- ❑ Area = policy
- ❑ **Territorial** meaning of *Area*
- ❑ Policy linking of the *Area* with the **free movement of persons**
- ❑ **“Our territory”** – Presidency Conclusions of the 1999 Tampere Council

Why constitutional law

1. Essential functions and prerogatives of the State

- Internal security
- Access to national territory
- Administering justice

2. Implications on the rights status of the individual

- Deprivation of liberty
- Refusal of entry
- Expulsion

3. EU action & MS action

- State solidarity
- Solidarity amongst the People
- Free movement



**Area of Freedom, Security
and Justice**

How to cooperate

Ordinary legislative procedure

Art. 294 TFEU

European Commission (exclusive right to initiative)



European Parliament (co-decision)



Council of EU (QMV)

Article 78 TFEU

- 1. The Union shall develop a **common** policy on asylum, subsidiary protection and temporary protection with a view to offering **appropriate status** to any third-country national requiring international protection and ensuring compliance with the **principle of non-refoulement**. This policy must be **in accordance with the Geneva Convention** of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
- 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a **uniform status** of asylum for nationals of third countries, valid **throughout the Union**; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of **temporary protection** for displaced persons in the event of a **massive inflow**; (d) **common procedures** for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) **criteria** and mechanisms for determining **which Member State is responsible** for considering an application for asylum or subsidiary protection; (f) standards concerning the **conditions for the reception** of applicants for asylum or subsidiary protection; (g) partnership and **cooperation with third countries** for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
- 3. In the event of one or more Member States being confronted by an **emergency situation** characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article 79 TFEU

- 1. The Union shall develop a **common immigration policy** aimed at ensuring, at all stages, the **efficient management** of migration flows, **fair treatment** of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to **combat, illegal immigration** and trafficking in human beings.
- 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure (40), shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of **long-term visas** and **residence permits**, including those for the purpose of **family reunification**; (b) the definition of the **rights** of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and **repatriation** of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children.
- 3. The 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.
- 4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide **incentives and support for the action of Member States** with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.
- 5. This Article shall not affect the **right of Member States to determine volumes of admission of third-country nationals** coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 80 TFEU

- The policies of the Union set out in this Chapter and their implementation shall be governed by the **principle of solidarity** and **fair sharing of responsibility**, including its **financial implications**, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

- “Whenever necessary”:
 - emergency or inherence
- Obligation or leeway

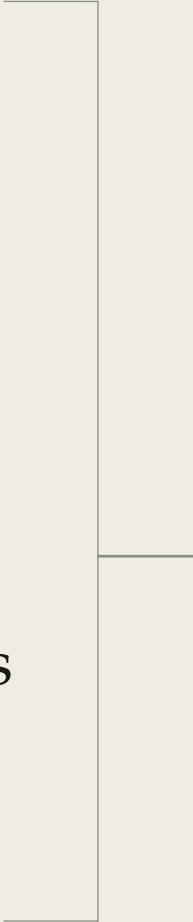
1951 Convention Relating to the Status of Refugees (Preamble)

- (...) considering 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**.

- International **problem**
- “refugee challenges are inherently transnational and cannot be addressed by any one State alone” (UNHCR 2017)
- Emergency
- Article 6.3 TEU

“Islands of solidarity”

- objective
- general principle of constitutional law
- standard of (judicial) review – legal basis
- programmatic/ directional rule – legal basis



loyalty - trust
- fairness -
necessity

State- or individual-centred solidarity?

Member State obligation

- Complemented by loyalty
- Expectation to fulfil implementation requirements – structural deficiencies
- Limited up to the “fair share”
- “whenever necessary” – subsidiarity and proportionality
- “appropriate measures” – proportionality
- Obligation of result – effectiveness

Asylum seeker

- Indirect beneficiary
- Appropriate status - Non-refoulement
- Reception conditions – dignified living standard
- Family and social links for allocation
- Compensatory solidaristic welfare
- Non-suspensive remedy against the decision not to examine their application (Article 19(2)) and the decision concerning their taking back by the MS responsible to examine the application (Article 20(1)(e))

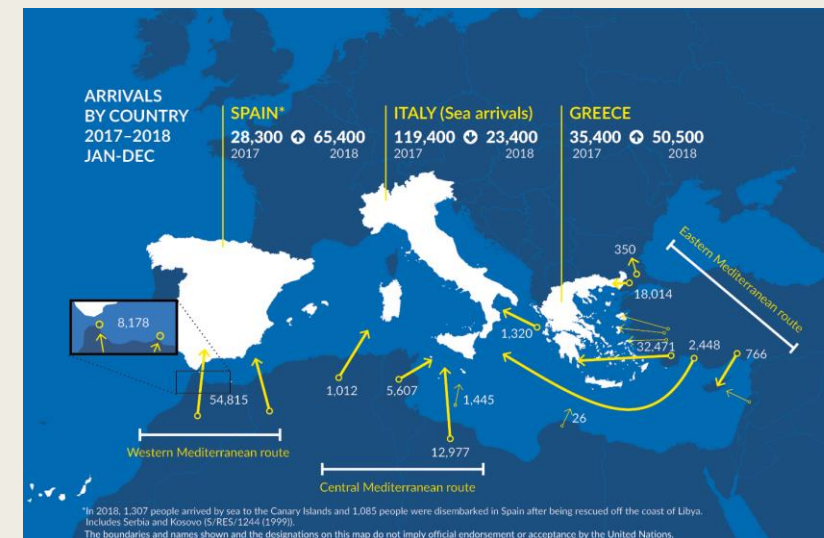
Structural or emergency solidarity?

- Textual arguments
- key principle of European identity addressed to EU Member States and their 'peoples'

- Reality
- Securitization
- Agencification
- Externalization

"Solidarity is at stake, the future of Europe is at stake. Leaders should find a compromise, guided by the *European spirit*."

Commissioner
Avramopoulos



Slovak Republic and Hungary v. Council

State-centred solidarity?

■ A. Facts:

SL and H action for annulment of Council Decision on provisional measures in the area of int. protection for the benefit of IT and GR (Relocation decision) adopted with QMV - with CZ, H, RO and SL voting against and FIN abstaining.

■ B. Pleas

1. Article 78(3) TFEU not proper legal basis - Should have been classified as legislative act because of content and effects, **provisional?**
Sudden inflow of TCN?
2. Breach of procedural requirements for the adoption - infringement of Article 68 TFEU, unanimity, failure to consult the EP, right of national parliaments to issue an opinion
3. Substance of the decision - Proportionality - decision capable of redressing the structural defects in GR and IT + small number of people relocated + cultural impact + lack of legal certainty and normative clarity

■ C. Answer and Reasoning:

Relocation Decision **integral part of the EU asylum *acquis*, fully applicable despite temporary derogations**, right to an effective remedy, relocation mechanisms cannot be regarded as arbitrary system since, *inter alia*, recital 34 provides that applicants are to be relocated to a MS where family, cultural or social ties.

Slovak Republic and Hungary v. Council

Opinion of Advocate General Bot

- 17. (...) solidarity is among the **cardinal values** of the Union and is even among the **foundations** of the Union. How would it be possible to **deepen the solidarity between the peoples** of Europe and to envisage ever-closer union between those peoples (...) without solidarity between the Member States when one of them is faced with an emergency situation? I am referring here to the quintessence of what is both the *raison d'être* and the **objective** of the European project.
- 22. Given the **de facto inequality between Member States because of their geographic situation and their vulnerability in the face of massive migration flows**, the adoption of measures on the basis of Article 78(3) TFEU and their effective application is even more pressing. (...).
 - ❑ non-legislative act introduces a derogation from a legislative text, no time limit by the Treaty
 - ❑ Member States set a **paradigm**
 - ❑ No prerequisite that Member States, desirous of solidarity, should implement their own obligations first **≠ loyalty**; “In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules.” → only due to massive migration flows? Internal situations?

N.S. v. UK and M.E. v Ireland

Individual-centred solidarity?

■ A. Facts:

Afghan to the UK via Greece, where arrested and not applied for asylum; ordered to leave, then expelled to Turkey where detained in appalling conditions; escaped from Turkey and came to the UK where claimed asylum; under Dublin, transfer decision to Greece; request for examination under Art. 3(2), for presumable breach of fundamental rights (EU, ECHR, Geneva Convention).

■ B. Questions:

(1) Is the transferring MS to assess compliance of the receiving MS with fundamental rights?

(2) If yes, and if the receiving MS is found **not** to be in compliance, is the transferring MS to accept responsibility for examining the application?

■ C. Answer and reasoning:

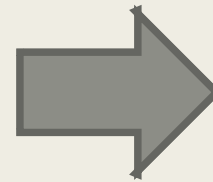
determination of MS responsible, but Art.51.1. CFR; MS cannot be unaware of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State, **rebuttable assumption**.

Non-financial recourses

- Civil Protection Mechanism – “effectiveness and response to major emergencies”
- Intra-EU humanitarian aid - Article 122.1 TFEU
- Emergency Decisions - exceptionality
- Hotspots - suspension of relocations

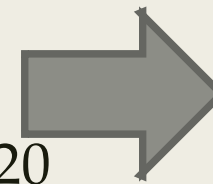
Financial assistance 2010 - present

- European Refugee Fund (renewed)
- European Integration Fund
- European Return Fund
- External Borders Fund



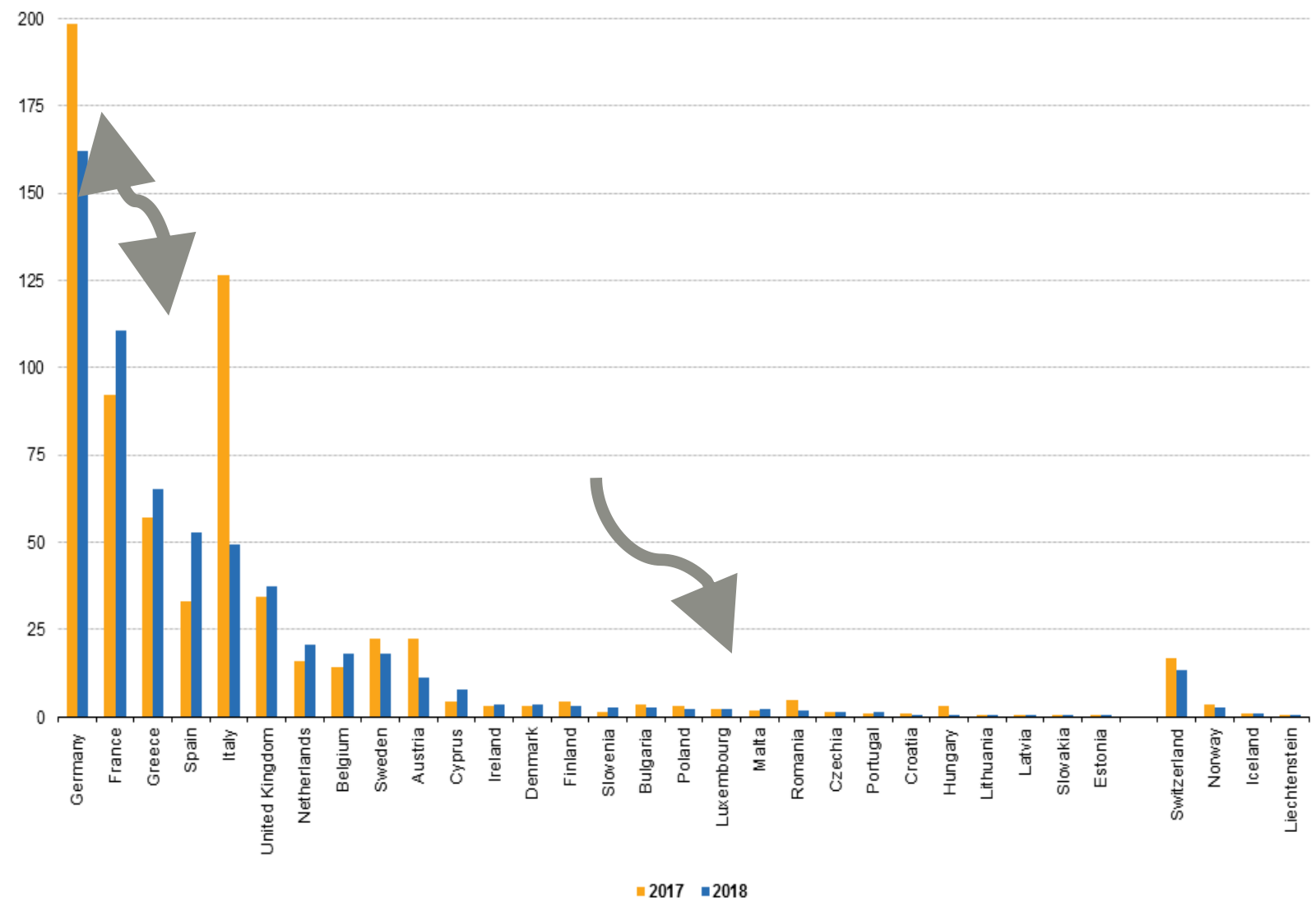
particular pressure

- Home Affairs financial framework 2014-2020



relative pressure

Number of (non-EU) asylum seekers in the EU and EFTA Member States, 2017 and 2018
 (thousands of first time applicants)



What kind of burden-sharing and fair distribution

- Entry
- Application
- Allocation - Relocation
- Integration
- financial
- operational

Source: Eurostat (online data code: migr_asyappctza)

Towards a reform of the CEAS: Dublin IV Regulation Proposal

- Lack of trust ↔ uniformity
- Institutional balance ↔ emergency
- Observance of human rights ↔ judicial opportunism
- “Abuse in the form of multiple simultaneous or consecutive applications for asylum” ↔ coherence
- Burden shifting ↔ fairness
- “De facto citizenship” ↔ static exclusion

Commission's Proposal

- !! **corrective** allocation mechanism in cases of **disproportionate pressure**
- !! If one country receives disproportionate numbers - over 150% of the reference number, all further new applicants in that country would (**regardless of nationality**) be relocated, after an admissibility verification, across the EU until the number of applications is back below that level.
- ✓ proportionate **procedural and material consequences** in case of non-compliance
- ✓ Removal of responsibility clauses cessation and shortening time limits for requests and transfers
- ✓ guarantees for **unaccompanied minors** and a extension of the **definition of family members**

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THANK YOU FOR YOUR
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