

Solidarity in EU asylum policy

SUMMARY

The unprecedented arrival of refugees and irregular migrants in the EU in 2015 exposed a number of deficiencies in EU external border, asylum and migration policy, sparking EU action through various legal and policy instruments. While the EU has been relatively successful in securing external borders, curbing irregular migrant arrivals and increasing cooperation with third countries, Member States are still reluctant to show solidarity and do more to share responsibility for asylum-seekers.

International cooperation and solidarity is key in helping to manage migration to and between states. Under international law, countries have certain legal obligations to assist and protect refugees that they accept on their territory, but the legal duties of other states to help and share that responsibility are less clear.

At EU level, the principle of solidarity is set out in Article 80 of the Treaty on the Functioning of the European Union (TFEU), however there is currently no consensus on whether it can be used as a stand-alone or joint legal basis for secondary legislation. Furthermore, the notions of 'solidarity' and 'fair sharing of responsibilities' for refugees or asylum-seekers are not defined in EU law. This has prompted EU institutions, academics and other stakeholders to propose different ways to resolve the issue, such as sharing out relevant tasks and pooling resources at EU level, compensating frontline Member States financially and through other contributions – such as flexible solidarity – and changing the focus of the European Court of Justice when interpreting EU asylum law.

In recent years, the EU has provided the Member States most affected by migrant arrivals with significant financial and practical support, notably through the EU budget and the deployment of personnel and equipment. Nevertheless, the continued failure to reform the EU asylum system, as well as the implementation of temporary solidarity measures based on ad-hoc solutions, has exposed a crisis of solidarity that shows no signs of being resolved. The von der Leyen Commission has made it clear that the new EU asylum system 'should include finding new forms of solidarity and should ensure that all Member States make meaningful contributions to support those countries under the most pressure'.



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Issue

The removal of internal border controls in the European Union (EU) has triggered the gradual development of EU policy on external borders, asylum and migration. However, flaws in EU policy were exposed during the influx of refugees and irregular migrants to the EU in 2015. The EU responded by taking concrete action through the implementation of various laws and policies in an attempt to resolve the crisis. Despite the relative effectiveness of these actions in helping to secure the external border, reduce the number of irregular migrants arriving at the border and increase cooperation with third countries, the issue of solidarity and responsibility-sharing for asylum-seekers among EU Member States remains problematic.

Discussions in Council on the reform of the [Dublin Regulation](#) have been going on for over three years now, with the prospect of an agreement on establishing a concrete definition of solidarity – to facilitate a permanent, EU Treaty-based mechanism ensuring fair sharing of responsibility for asylum-seekers – seeming unlikely. Although all Member States appear to agree on the fact that the current system does not ensure a fair distribution of asylum-seekers, how the solidarity principle should be applied to address the failings of the current system remains unclear.

International solidarity and responsibility-sharing

According to the 1951 [Refugee Convention](#), countries have certain legal obligations to assist and protect refugees that they accept on their territory. However, there is currently a lack of clarity regarding the legal requirements of other states to share this responsibility. At the moment, there is no binding legal agreement at global level that would ensure the fair sharing of responsibilities for refugees or asylum-seekers.

As discussed by Rebecca Dowd and Jane McAdam in their [expert paper](#), the preamble to the 1951 Convention emphasises the importance of international cooperation with respect to international protection, but does not give any indication as to what that actually means. They point out that academics and other stakeholders have extensively focused on determining whether states have an obligation when it comes to responsibility-sharing and international cooperation, citing the more prevalent view that, although the principle of responsibility – or burden-sharing – is a vital part of international refugee law, the obligations placed on states are not legally binding. They go on to argue that states currently appear unwilling to agree to concrete commitments on responsibility-sharing in the form of a new international instrument, even if it is non-binding, something that was demonstrated by the negotiations surrounding the 2018 [Global Compact on Refugees](#).¹

Volker Türk and Madeline Garlick [argue](#) that states have legal obligations – arising from the United Nations (UN) Charter, the statute of the UN High Commission for Refugees (UNHCR), various UN General Assembly resolutions and other international instruments – to cooperate with each other and show solidarity with regard to refugees. However, they also note that it is extremely difficult to determine precisely the form and content that such cooperation should take, and what each state's respective contribution should therefore be. In the authors' opinion, this lack of certainty would be best addressed by an additional protocol to the 1951 Convention, containing agreed commitments to responsibility-sharing, cooperation and solidarity.

Forms of international solidarity

According to the Dowd and McAdam paper, which is based on the [outcome](#) of the June 2011 UNHCR expert meeting on international cooperation to share burdens and responsibilities, international cooperation 'can be manifested in many forms, including material, technical or financial assistance, as well as physical relocation of asylum-seekers and refugees'. The authors further suggest that international cooperation to share burdens and responsibilities generally consists of two main categories:

- the provision of financial and other assistance to host countries, and
- the admission of refugees, most commonly through resettlement.

Offering refugee-hosting countries financial assistance is considered to be the 'most convenient and common' and 'the easiest form of sharing'. The most common way for states – usually developed countries – to provide financial assistance is through contributions to the UNHCR to support overburdened host countries.

Regarding the admission of refugees, complementary pathways can take many different forms, including [resettlement](#), [humanitarian visas](#), work or study opportunities, visa exemptions for certain groups, temporary evacuation schemes, labour mobility schemes and family reunification.

Furthermore, the nature of responsibility-sharing also depends on the circumstances. In the case of sea rescue, for example, it may include financial, material, technical or other capacity-building help; such as non-disembarking states assuming responsibility for examining applications, providing international protection or ensuring long-lasting solutions for displacement.

The authors further note that the most difficult question with respect to responsibility-sharing is how those responsibilities should be measured. In this regard, they refer to the principle of [common but differentiated responsibilities](#).² This principle argues that all states do not have the same capabilities with regard to the protection of refugees, and therefore cannot all contribute in the same way or to an equal degree.

EU framework for solidarity

Legal framework

The duty of sincere cooperation is set out in [Article 4\(3\)](#) of the Treaty on European Union (TEU), which requires the EU and Member States to 'assist each other in carrying out tasks which flow from the Treaties', to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and to 'facilitate the achievement of the Union's tasks'. As stated in a 2015 European Parliament [working document](#), the principle of sincere cooperation – which applies to all policy areas – obliges the EU and its Member States to assist each other in the area of asylum and immigration.

The principle of solidarity is set out in [Article 80](#) of the Treaty on the Functioning of the European Union (TFEU). It covers not only asylum policies, as was the case before the Treaty of Lisbon, but also immigration and border control policies. Article 80 clarifies that, whenever necessary, appropriate measures to give effect to the principle of solidarity and fair sharing of responsibility – including its financial implications – shall be adopted. However, the notions of 'solidarity' and 'fair sharing of responsibilities' are not defined.

Different forms of solidarity

According to the above-mentioned [Parliament working document](#), solidarity at EU level can be divided into two categories:

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

Internal solidarity³ can be further divided into the following categories:

- relocation,⁴ which refers to the transfer of an applicant for international protection, or a beneficiary of international protection, from one Member State to another within the European Union;
- mutual recognition of positive asylum decisions, which works to increase the level of trust between Member States and encourage internal solidarity in the context of a future permanent relocation mechanism;
- operational support and joint/supported processing provided via EU agencies (European Asylum Support Office, European Border and Coast Guard Agency/Frontex) to frontline Member States, either in relation to the processing of applications or protection of the external border;
- pro-active interpretation of the Dublin Regulation through the use of the humanitarian clause (Article 17(2)) to bring together family relations based on family or cultural considerations, even where that Member State is not responsible under the Dublin rules;
- the Temporary Protection Directive (TPD),⁵ which provides for both financial solidarity and practical solidarity in the form of sharing the reception of displaced people in the event of a mass influx.

Views on Article 80 TFEU

Article 80 TFEU has not been used as a legal basis to date. The European Commission proposed using it as a joint legal basis for funds dealing with asylum and migration, but the Council of the European Union [rejected](#) the proposal, reiterating its view that Article 80 TFEU does not constitute a legal basis within the meaning of EU law and that within the said chapter, only Article 77(2) and (3), Article 78(2) and (3) and Article 79(2), (3) and (4) TFEU contain legal bases enabling the relevant EU institutions to adopt EU legal acts.

[Parliament](#) has repeatedly taken the view that Article 80 TFEU provides a joint legal basis in the areas of asylum, migration and borders along with Articles 77 to 79 TFEU. The authors of the working paper thus state that Article 80 TFEU provides a legal basis 'jointly' with Articles [77](#), [78](#) or [79](#) TFEU to implement the principle of solidarity in the areas of asylum, immigration and border control, whereas the use of Articles 77 to 79 alone would not explicitly or implicitly provide a basis for the specific measures necessary to achieve solidarity and fair sharing of responsibility between Member States. In line with the concept of joint legal basis, the [Advocate General of the Court of Justice of the European Union](#) has stated that another Treaty provision on asylum, [Article 78\(3\)](#), constitutes a specific legal basis for provisional measures to implement the principle of solidarity, when read in conjunction with Article 80 TFEU.

A similar opinion is expressed by Antonio Caiola in his [article](#) on the second sentence of Article 80 TFEU. According to Caiola, Article 80 TFEU must always be read in conjunction with another provision (Article 77, 78 or 79 TFEU) when concrete and appropriate measures are necessary to implement the principle of solidarity and the fair sharing of responsibility. Likewise, the [Committee of the Regions](#) also deems it a valid legal basis to promote solidarity and fair sharing of responsibility.

A 2011 European Parliament [study](#), which assessed the implementation of Article 80 TFEU, concluded that there is currently relatively little consensus on Article 80 TFEU when it comes to its effects, scope and outlook. However, the study also stressed that cooperation on these issues is key to the success of border, asylum and immigration policies, as well as to the success of the EU as a whole.

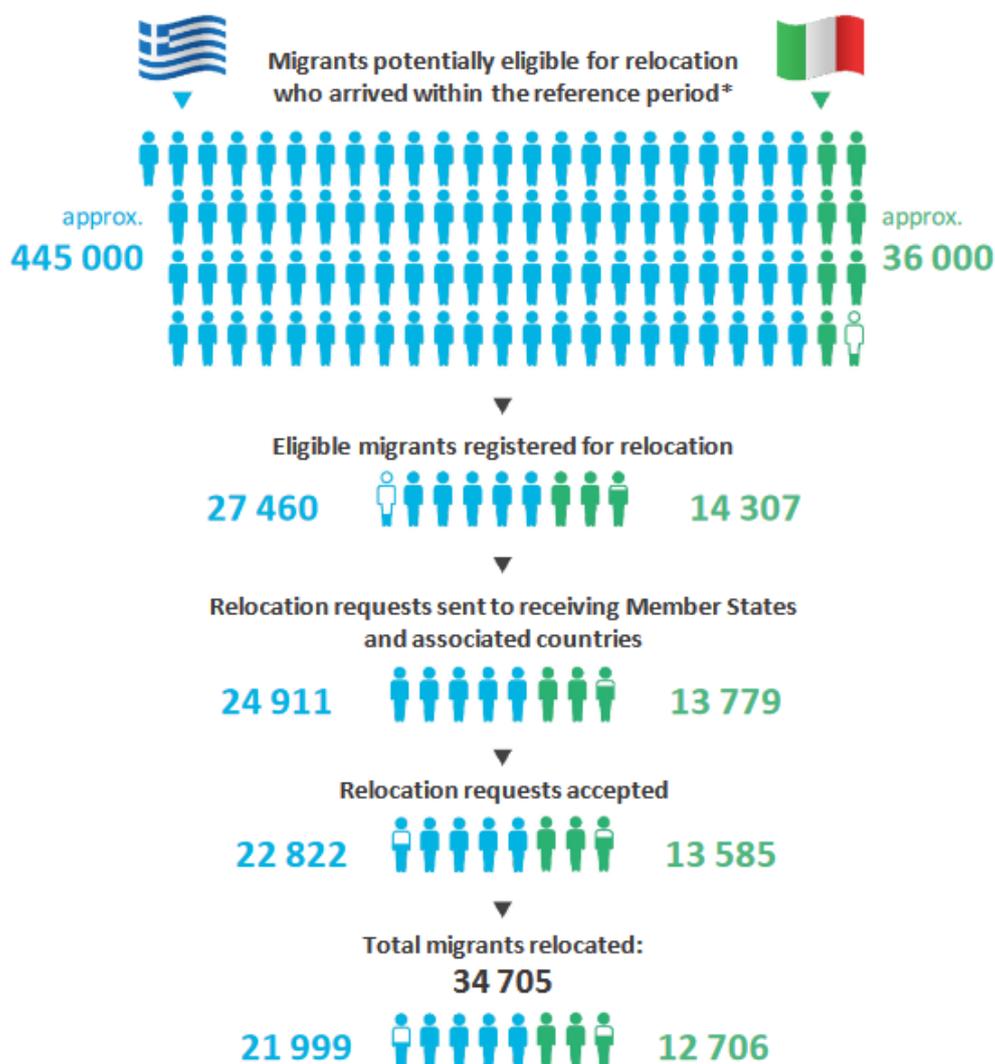
A 2019 EPRS study outlines possible further [scope for action](#) in the area of immigration, asylum and border policies. Specifically, ideas regarding solidarity and the fair sharing of responsibility – proposed by institutions, academics and stakeholders on the basis of [Article 80 TFEU](#) – include doing more to share tasks and pool resources at EU level, as well as compensating frontline Member States both financially and through other contributions such as flexible solidarity.

Some, such as [Esin Küçük](#), also suggest that secondary legislation adopted by the EU in relevant policy areas – and its interpretation by the CJEU – and an agreement on the definition of shared responsibility could facilitate implementation of the principle of solidarity. Scholars, such as [Valsamis Mitsilegas](#), further argue that in its interpretation of Article 80, the CJEU needs to move from a state-centred and exclusionary concept of solidarity – one that is focused exclusively on the state and inter-state relations – to a concept of solidarity based on affected individuals, thus respecting their fundamental rights (see case [C-411/10](#)).⁶

Solidarity and responsibility-sharing in EU asylum policy

The EU has provided its Member States with significant [financial and practical support](#) in recent years. The European border and coast guard agency and the European asylum support office have provided personnel and equipment, while a new [emergency support instrument](#) has been funding emergency support operations addressing the needs of migrants and refugees in the most affected Member States. Furthermore, by October 2019, more than 34 000 people had been [relocated](#) inside the EU from Italy and Greece.

Figure 1 – Number of migrants relocated from Italy and Greece (2015-2017)



Source: [European Court of Auditors](#).

Nevertheless, the continued failure to reform the current EU asylum system, as well as temporary solidarity measures based on ad-hoc solutions, exposes a [crisis of solidarity](#) that shows no sign of being resolved. Despite three years of EU Council discussions on the reform of the Dublin regulation, the Council has so far failed to produce an agreement regarding a concrete definition of solidarity, preventing the creation of a permanent, EU treaty-based mechanism to ensure the fair sharing of responsibility for asylum-seekers.

The Dublin Regulation is the main pillar of the common European asylum system (CEAS) and establishes the criteria that determine the Member State responsible for examining an asylum application, based primarily on the first point of irregular entry. Although a 2016 European Commission [proposal](#) envisaged a corrective allocation mechanism intended to ease the pressure on frontline Member States, some non-governmental organisations (NGOs) considered it [insufficient and unfair](#). Furthermore, the [European Parliament](#) has consistently called for an automatic, binding mechanism for the fair distribution of asylum-seekers among all EU Member States, and for limits on access to EU funds for non-cooperative countries, including in its October 2017 [report](#) on the recast of the Dublin Regulation.

A lack of consensus on how to interpret solidarity, as enshrined in [Article 80 TFEU](#), was already apparent during the 2015 emergency relocation exercise. To alleviate the migratory pressure on [Greece and Italy](#), which have borne the brunt of the influx of migrants, the Commission tried to ensure a fair and balanced distribution and sharing of responsibility for asylum-seekers who were already in the EU. However, despite most Member States' willingness to [relocate](#) asylum-seekers, Slovakia and Hungary objected to the scheme. They challenged the Council's decision to adopt the scheme before the CJEU, which rejected their case in a [judgment](#) in September 2017 ([C-643/15 and C-647/15](#)). Despite the judgment, Hungary, Czechia and Poland decided not to cooperate with the implementation of the decision, which resulted in the Commission [referring](#) them to the CJEU for non-compliance with their legal obligations on relocation.

Crisis in the Mediterranean

Disagreements regarding the CEAS were reflected in the 2018 'disembarkation crises', when Italy and Malta repeatedly prevented NGO and other vessels conducting search and rescue (SAR) activities in the Mediterranean from disembarking the people they had rescued at sea in their ports. Furthermore, in early 2019, Member States decided to cease the maritime patrols of [Operation Sophia](#), an operation that had saved [tens of thousands](#) of lives. A policy of forcing migrants to stay for several days and sometimes weeks on boats, together with legal action and various administrative barriers preventing NGO ships from operating at sea, was the result of a [stand-off](#) between EU Member States, as most governments were reluctant to offer relocation spaces or to give protection to people who needed it. Instead of sharing responsibility fairly and standing in solidarity with frontline Member States, EU countries continued to secure external borders and focused on cooperating with third countries (in particular [Libya](#)) to curb migration flows, prompting strong criticism from [academia](#) and [civil society organisations](#).

On the basis of the European Council's June 2018 [conclusions](#), the potential creation of [controlled centres](#) and [regional disembarkation platforms](#) in third countries was explored as a way of resolving the disembarkation problem, however no consensus could be reached owing to a lack of political and legal feasibility.

The stark resistance from Italy and Malta to disembarkations prompted a group of Member States referred to as a 'coalition of the willing' to show 'ship by ship' solidarity with frontline Member States and stranded migrants, and make ad hoc arrangements to take in the people who had disembarked. These arrangements, although a positive shift from the previous stand-off, were nevertheless criticised for being conducted in a purely [intergovernmental](#) fashion, for being [dependent](#) on other EU countries agreeing to take responsibility for people rescued before their disembarkation and for being unpredictable and [not compatible](#) with the CEAS. Furthermore, according to experts, this partial solidarity fails to deliver a unified approach, fails to consider the interests of all EU countries

and is against the letter and spirit of Article 80 TFEU, which requires EU policies on asylum, migration and border management to be based on the fair sharing of responsibilities.

In December 2018, the Commission [suggested](#) that temporary arrangements showing genuine solidarity and responsibility could be made. These arrangements, which would be time-limited and serve as a stop-gap until the new Dublin Regulation was adopted and applied, could be used to anticipate the core elements of the future EU asylum system. Furthermore, several NGOs [called for](#) – and even presented [plans](#) for – a consistent and fair relocation arrangement following disembarkation.

After a series of informal discussions, in September 2019 ministers of four Member States (Germany, France, Italy and Malta) reached an [agreement](#) on a predictable temporary solidarity mechanism. They 'jointly committed' to a non-legally binding scheme with voluntary pledges for the relocation of migrants before disembarkation in the central Mediterranean. Although the deal was welcomed by some NGOs, including [Amnesty International](#) and [Oxfam](#), others raised [concerns](#) regarding its compliance with EU Treaties and principles – such as equal solidarity and fair distribution of responsibility for asylum-seekers among all Member States. Furthermore, SAR NGOs operating in the Mediterranean issued a [joint statement](#) calling for sanctions against countries that refused to comply.

Calls for solidarity were also made after the [Turkish authorities decided](#) in February 2020 to stop implementing the [EU-Turkey agreement](#), leading to a significant increase in migrant arrivals along the Greek-Turkish border and rising tensions. This prompted Greece to announce that it would not be accepting any new asylum applications for one month, and that it was 'invoking [Article 78\(3\) TFEU](#) to ensure full European support'. The visit of EU leaders to Greece on 3 March 2020 sent a strong signal of unity and readiness to tackle the brewing crisis, while also providing Greece with [support and practical solidarity](#).

The way forward: towards lasting solidarity

The 2019 Finnish Presidency of the Council expressed the hope that the proposed temporary voluntary mechanism could '[serve as an experiment](#)' for the broader reform of the European asylum system. However, the [initial response](#) from governments at the meeting of EU interior ministers in October 2019 did not give much cause for optimism, as Member States clearly indicated that they were not prepared to make concrete commitments on responsibility-sharing in the form of a new instrument at that time, even if it were non-binding.

Furthermore, [academics](#) have warned that allowing states to choose when to implement solidarity measures would mean returning to intergovernmentalism in fields that are now clearly under EU competence and subject to qualified majority voting, putting at risk the EU Treaties' objective of having a single area of asylum common to all EU Member States. As pointed out in one [expert opinion](#), for any system of responsibility-sharing to be sustainable, Member States must be able to rely at all times on solidarity from other Member States in order to neutralise the negative effects of unbalanced distribution. Otherwise, Member States may be more likely to diverge from the accepted way of processing asylum-seekers, for example not taking fingerprints or 'waving through' – which poses a threat to the integrity of the Schengen system – or engaging in pushback practices.

The [Commission President](#), Ursula von der Leyen, has made it clear that the new EU asylum system 'should include finding new [forms of solidarity](#) and should ensure that all Member States make meaningful contributions to support those countries under the most pressure'. This was also echoed by Vice-President [Margaritis Schinas](#), who suggested that all Member States must show solidarity, but are able to do this in 'different ways'. During her parliamentary hearing in October 2019, the Commissioner for Home Affairs, Ylva Johansson, made a number of [commitments](#), also stating that the solidarity mechanism in the EU was not and should not be voluntary. According to the latest [reports](#), Member States more or less agree on the need for solidarity with countries facing sudden

migration pressures. However, there are differences regarding the form that this solidarity should take, for example whether it should refer to the mandatory relocation of asylum-seekers, or solidarity through financial aid, with the latter already having been [rejected](#) by the European Parliament.

MAIN REFERENCES

- Metsola R. and Kyenge K., [Working document on Article 80 TFEU](#); European Parliament, July 2015.
- Dowd R. and McAdam J., [International cooperation and responsibility - sharing to protect refugees: what, why and how?](#); Cambridge University Press, August 2017.
- [The implementation of Article 80 TFEU](#), Directorate-General for Internal Policies of the Union, European Parliament, 2011.

ENDNOTES

- ¹ V. Türk and M. Garlick, '[From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees](#)', *International Journal of Refugee Law*, December 2016.
- ² The principle of [common but differentiated responsibilities](#) derives from international environmental law establishing that all states are responsible for addressing global environmental destruction but not equally responsible.
- ³ This briefing focuses on solidarity in EU asylum policy, therefore external solidarity will not be discussed here.
- ⁴ In the autumn of 2015, the European Commission proposed the use of an emergency response mechanism under Article 78(3) of the TFEU for the first time in order to set up a temporary relocation scheme to alleviate the pressure on frontline Member States. The scheme ended at the end of 2017.
- ⁵ The Temporary Protection Directive has never been triggered. In its April 2015 [resolution](#) on the latest tragedies in the Mediterranean and EU migration and asylum policies, the European Parliament called on the Council to trigger the 2001 Temporary Protection Directive's solidarity mechanism in the case of mass and sudden inflows of displaced persons.
- ⁶ The European Court of Justice decided that Member States may not transfer an asylum-seeker to a Member State where there are substantial grounds for believing that the asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment under Article 4 of the Charter of Fundamental Rights.

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