Solidarity in EU asylum policy

SUMMARY

The arrival of refugees and irregular migrants in the EU in unprecedented numbers in 2015 exposed a number of deficiencies in the EU's external border, asylum and migration policy, and sparked EU action through various legal and policy instruments. Today, even though the EU has been relatively successful in securing its 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.

Turmoil in Africa and the Middle East, and now the war in Ukraine, are forcing more and more people to flee violence and seek a safe haven in Europe. At times spontaneously, Member States have reacted to these crises and showed open solidarity, as with regard to the Ukrainian citizens fleeing the war. At other times their reaction has been more ambivalent: take for instance the ripples of discord caused by the disembarkation in November 2022 of migrants rescued from the Mediterranean by four private vessels, which once again clearly demonstrated the need for a more stable and predictable mechanism to manage irregular migration. International cooperation and solidarity are key in helping to manage migration to and between states. Under international law, states have certain legal obligations to assist and protect the refugees they accept on their territory, but the legal duties of other states as regards providing help and sharing that responsibility are less clearly codified.

At EU level, the principle of solidarity is set out in several articles, including Article 80 of the Treaty on the Functioning of the European Union (TFEU). However, EU law does not define the notions of 'solidarity' or 'fair sharing of responsibilities' for refugees or asylum-seekers. This has prompted EU institutions, academics and other stakeholders to propose different ways to render solidarity more operational; these include sharing out relevant tasks and pooling resources at EU level, and providing financial and other forms of compensation for frontline Member States. 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 has yet to be resolved.

This updates and expands on a March 2020 EPRS briefing written by Anja Radjenovic.

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Background

The removal of internal border controls in the European Union (EU) has led to 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. To resolve the ensuing crisis, the EU implemented various laws and policies. Despite the relative effectiveness of these initiatives in helping to secure the external borders, reduce the number of irregular migrants arriving at the borders and increase cooperation with third countries, solidarity and responsibility-sharing for asylum-seekers among EU Member States remains a problematic issue.

Discussions in the Council of the EU on the reform of the EU asylum acquis have been going on for years. Although all Member States appear to agree that the current system does not ensure a fair distribution of asylum-seekers, there is no clarity as regards the way the solidarity principle should be applied to address the failings of the current system. In recent years, Member States have discussed ways to operationalise the concept of subsidiarity and whether solidarity should be encoded into a permanent or a temporary mechanism, whether the latter should be flexible and how this concept should be combined with a shared ‘responsibility’ among Member States. However, Member States have not managed to come to an agreement as to whether solidarity should find expression solely in mandatory relocation of asylum-seekers or also in financial aid; the European Parliament has rejected the latter option in the past. At the time of writing of the present document in early January 2023, there was no common and operational understanding of solidarity.

Commission President Ursula von der Leyen made it clear in her political guidelines that the EU needed a fresh start on migration and asylum. Accordingly, she announced a new pact and recalled that the EU needs a ‘new way of burden sharing’, underlining in particular the need for ‘a more sustainable approach to search and rescue’. She asserted that the EU needed ‘to move from case-by-case solutions to a more permanent answer’ and 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’.

In fact, the situation of irregular migration remains critical, especially in the Mediterranean. A significant number of migrants and asylum-seekers in distress at sea have been rescued by EU naval operations, EU agencies and non-governmental organisations (NGOs) in the Mediterranean in recent years (throughout 2015 up until July 2022, 586 562 lives were saved on the Mediterranean and western African routes). Nevertheless, from January to June 2022, on average five people died every day trying to cross the Mediterranean to reach Europe, as reported by the EU Fundamental Rights Agency (FRA). According to the European Border and Coast Guard Agency (Frontex), around 228 000 irregular border crossings were detected at the EU’s external borders during the first nine months of 2022; besides constituting a 70 % increase compared to the same period in 2021, this number is the highest (for the same period) since 2016.

From January to December 2022, the Western Balkans route was the busiest, with 106 396 irregular border crossings. Over the same period, the central Mediterranean route came second in terms of arrivals, with 65 572 irregular border crossings putting pressure on the reception capacities in Italy in particular. According to the EU Agency for Asylum (EUAA), asylum applications in the EU+ (i.e. EU Member States plus Norway and Switzerland) reached some 84 500 in August 2022, confirming the increasing trend in arrivals since mid-2021. Since the beginning of 2022, EU+ countries have received 564 000 asylum applications, up 62 % compared to the same period in 2021. According to the recent Commission action plan for the central Mediterranean, over 90 000 migrants and refugees originating mostly from Egypt, Tunisia, and Bangladesh arrived in 2022 mainly from Libya and Tunisia. This represents an increase of over 50 % in comparison with 2021. Most reached the EU after hazardous journeys and search and rescue operations at sea.
The current situation

In September 2020, the Commission presented a [New Pact on Migration and Asylum](#), which included a proposal on asylum and migration management (AMMR), to replace the 2013 [Dublin Regulation](#), which determines the EU Member State responsible for examining asylum applications. While the proposal 'essentially preserved' the current criteria for determining this responsibility, it also introduced changes and additions to the regulation, especially on solidarity and responsibility-sharing for asylum-seekers among Member States. The Commission’s proposal moved away from the mandatory relocation of asylum-seekers, which proved controversial during the 2015 migration crisis to the point where some Member States refused to comply with the mechanisms adopted under Article 78(3) of the Treaty on the Functioning of the European Union (TFEU). It instead proposed a structured and flexible solidarity mechanism based on different solidarity contributions:

- relocation of asylum-seekers not in a border procedure;
- relocation of beneficiaries of international protection;
- return sponsorship of illegally staying third-country nationals;
- or support for capacity-building in the Member State (or non-EU country) facing migratory pressure.

Separate rules on general migratory pressure or risk of pressure, on the one hand, and search and rescue disembarkations, on the other, were also proposed. The Commission proposed to assess the extent of the migratory pressure experienced by a Member State, by taking into account a series of elements, including, for example, the number of asylum applications, search and rescue cases, irregular border crossings and returns, the geopolitical situation and cooperation with the relevant non-EU countries of origin and transit. Member States would be required to contribute to alleviating the migratory pressure on another Member State primarily by relocation (prioritising unaccompanied minors) or by helping in the return of illegally staying migrants and, when needed, by capacity-building measures, which should not exceed 30% of the total contributions identified for the benefitting Member State. The share of solidarity contributions of each Member State would be based on a distribution key that takes into account the size of its population (50% weighting) and the total GDP (50% weighting), and would be specified in a Commission implementing act.

The proposal also included a mechanism for solidarity for search and rescue operations, as well as for vulnerable persons, regardless of how they crossed the EU external border. The mechanism is primarily based on voluntary contributions to be made at the Commission’s request, taking into account the distribution key in case of relocation. Member States may choose from among the following options:

- relocation of asylum-seekers not in a border procedure;
- capacity-building measures;
- relocation of vulnerable people.

In case of insufficient pledges resulting in a shortfall greater than 30% of the total number of relocations identified for the benefitting Member State, the Member States that have decided to contribute through capacity building would be obliged to contribute either through relocation or return sponsorship. While Member States cannot choose nationalities when relocating migrants (although meaningful links, such as family links or possession of diplomas or qualifications, should be established, if possible), they can do so when assisting with return operations. Member States may also at any time make solidarity contributions on their own initiative, including by relocating applicants undergoing the border procedure or illegally staying third-country nationals. The asylum and migration management proposal did not include a solidarity mechanism to address crisis situations generated by a mass influx of persons into a Member State, as this mechanism is part of a separate proposal on ‘crisis and force majeure’ presented under the Asylum and Migration Pact.
In June 2022, under the French Presidency of the Council of the EU, the four rotating presidencies – France, Czechia, Sweden, Spain and Belgium – agreed with the European Parliament on a joint roadmap to enable the adoption of all the proposals under the Pact on Migration and Asylum by February 2024, with the aim of ensuring their entry into force by April 2024 at the latest. In September 2022, the Czech Presidency submitted a proposal for a permanent solidarity mechanism at the Justice and Home Affairs Council, which was followed up by a discussion paper entitled Way forward on EU migration solidarity and crisis response mechanism; the aim of the discussion paper was to advance on the solidarity aspects of the reform. On compulsory solidarity, the proposal put forward – for the first time – minimum annual figures for the relocation of asylum-seekers, with Member States having the choice of either 5,000 or 10,000 relocations per year from frontline countries. The Czech Presidency proposed a system of three safeguards to ensure ‘enough predictability, assurance as well as flexibility in terms of the solidarity mechanism’:

- a minimum annual threshold, which the Commission could revise upwards on its own;
- a ‘fair share’ principle as a distribution key for calculating solidarity commitments;
- additional solidarity for situations where there are not enough relocation pledges, which would make it possible to use ‘Dublin transfers’ (the transfer of an applicant to another Member State considered responsible for examining the asylum application) for reducing pressure on certain countries.

On flexible responsibility, the presidency suggested extending the scope of the derogations to the right of asylum as defined in the draft regulation on the instrumentalisation of migrants; it furthermore suggested easing the reception conditions for asylum-seekers and procedural deadlines for the asylum procedure at the border, covered by the draft regulation on asylum procedures. Again, there would be additional flexibilities on processing times or a lowering of the percentage threshold for nationalities subject to this procedure at the border. In addition, the Crisis and Force Majeure Regulation adds another condition for Member States contributing through return sponsorship in situations of crisis: if an irregular migrant does not return or is not removed within four months, it would trigger a transfer of the migrant to the ‘sponsor’ Member State.

### International solidarity and responsibility-sharing

According to the 1951 United Nations (UN) Refugee Convention, states have certain legal obligations to assist and protect refugees that they accept on their territory. However, there is currently no clarity regarding the legal requirements towards other states when it comes to sharing this responsibility. There is currently no binding legal agreement at global level to 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 as regards responsibility-sharing and international cooperation, citing the more prevalent view that, although the principle of responsibility – or burden-sharing, which should not be confused with burden shifting – 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, as demonstrated by the negotiations for the 2018 Global Compact on Refugees. Volker Türk and Madeline Garlick argue that states have legal obligations – arising from the 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 the precise form and content of such cooperation and, from here, the respective contribution of each state. 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.
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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 ones – to provide financial assistance is through contributions to the UNHCR to support over-burdened host states.

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 to displacement. The authors further note that the most difficult question with respect to the sharing of responsibilities is how they should be measured. In this regard, they refer to the principle of common but differentiated responsibilities. 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 the 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.

It is commonly acknowledged that the term 'solidarity' does not have a single and uniform meaning in the EU legal context. Suffice to recall that the term 'solidarity' is referred to in several articles of the EU Treaties in relation to values, principles and different policy areas, notably in Articles 2, 3.3(2), 21, 24.2 and 31 TEU and Articles 122.1, 194.1 and 222.1 TFEU. As regards asylum, migration and border control the principle of solidarity is set out in Article 80 TFEU. It covers 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, it does not define the notions of 'solidarity' and 'fair sharing of responsibilities'.

Moreover, Article 67.2 TFEU refers to solidarity as a guiding principle when designing asylum, immigration and external border control policies. This means that solidarity should form the basis of these policies in general and not only in emergency situations. Over the years, several other policy documents have referred to solidarity in the area of migration, for instance the 1999 Tampere
European Council conclusions, the 2004 Hague programme, the 2008 European Pact on Immigration and Asylum and the 2010 Stockholm programme.

Different forms of solidarity

Article 80 TFEU clearly states that the policies on asylum, migration and border control as well as their implementation should be governed by the principle of solidarity and fair sharing of responsibility, 'including its financial implications', among the Member States. The fact that the article explicitly refers to the term 'including' suggests the importance of sharing the financial burden but also suggests that other forms of solidarity are possible.

According to a 2015 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 solidarity can further be divided into the following categories:

- **relocation**, 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 EU;
- **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 the European Union Agency for Asylum and Frontex) to frontline Member States, either in relation to the processing of applications or the 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 members based on family or cultural considerations, even where that Member State is not responsible under the Dublin rules;
- **the Temporary Protection Directive (TPD)**, 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.


Following Russia’s invasion of Ukraine in February 2022, 7.8 million people fled the country and were forced to seek refuge, mostly in neighbouring countries. In response, the European Union swiftly decided to grant EU-wide temporary protection to people arriving from Ukraine. The EU Temporary Protection Directive (2001/55/EC), although invoked several times in the past, had never before been activated. The directive was conceived to ‘promote a balance of efforts between the Member States in receiving displaced persons and to establish minimum standards for giving temporary protection in the event of a “mass influx”. For the first time ever in March 2022, it enabled the Member States to move rapidly so as to offer protection and rights to people in need of immediate protection and to avoid an overwhelming of national asylum systems due to mass arrivals of displaced persons. At the time of writing, more than 4.8 million Ukrainian citizens had registered for temporary protection or similar national protection schemes in the EU. The Temporary Protection Directive will be repealed by the proposed crisis and force majeure regulation once it is adopted.
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Article 80 TFEU has not been used as a legal basis to date. The Commission proposed using it as a joint legal basis for funds dealing with asylum and migration, but the Council 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 Chapter 2 of the TFEU on policies on border checks, asylum and immigration 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 within the TFEU, Article 80 along with Articles 77-79 provides a joint legal basis in the areas of asylum, migration and borders. The authors of the previously mentioned Parliament 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 77-79 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 (CJEU) 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.

In 2019, CJEU Advocate General Sharpston addressed three fundamental questions, namely the rule of law, the duty of sincere cooperation and the principle of solidarity in relation to the ‘parameters of the EU legal order and the duties incumbent upon Member States’. The case was related to two Council decisions on relocation introducing provisional measures for the benefit of the frontline Member States: Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601. This latter decision was challenged by Slovakia and Hungary, but the Court dismissed the action in September 2017. In November 2019, the Commission then brought infringement proceedings against three Member States: Poland, Hungary and Czechia for failure to comply with their legal obligations on relocation. In a judgment delivered on 2 April 2020, the Court confirmed that those Member States had failed to fulfil their obligations under EU law. Advocate General (AG) Sharpston wrote in her opinion (paragraphs 246 to 255) that since the Schuman Declaration in 1950, it was acknowledged that Europe would ‘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’. She added that the principles and shared values upon which Europe is built include ‘pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men’. AG Sharpston then recalled how the Court had ‘over the years, echoed that call to solidarity’ and she referred to a number of previous Court rulings that made it clear that ‘the principle of solidarity necessarily sometimes implies accepting burden-sharing’.12

Some pundits underline that Article 80 TFEU must always be read in conjunction with another provision (Article 77, 78 or 79 TFEU) when concrete and appropriate measures are needed to implement the principle of solidarity and the fair sharing of responsibility. Likewise, the European Committee of the Regions also deems Article 80 TFEU 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 at the time there was 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 outlined 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 – together with an agreement on the definition of shared responsibility, could facilitate the 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 on inter-state relations – to a concept of solidarity based on affected individuals, thus respecting their fundamental rights (see case C-411/10). Other scholars argue that the principle of solidarity could be interpreted, inter alia, as a sort of ‘joint insurance policy mechanism’ meaning that by helping the Member States under migratory pressure, the other Member States will foster stability of the EU as a whole.

**Solidarity and responsibility-sharing in EU asylum policy**

The EU has provided its Member States with significant financial and practical support in recent years. Frontex and the EU Agency for Asylum 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 from Italy and Greece to 25 Member States and Schengen-associated countries under the two relocation decisions. Since January 2019, the Commission has been coordinating and supporting ad hoc voluntary relocation from Italy and Malta following search and rescue (SAR) operations, with over 2 000 people relocated. At the same time, the Commission has been continuously calling for coordinated action and cooperation in search and rescue. Nevertheless, the continued failure to reform the current EU asylum system, coupled with the fact that solidarity measures are temporary and are based on ad-hoc solutions, speaks of a crisis of solidarity that shows no sign of being resolved. The Parliament also has consistently called for an automatic, binding mechanism for the fair distribution of asylum-seekers among all EU Member States and for limiting the access of non-cooperative countries to EU funds, including in its October 2017 report on the recast of the Dublin Regulation.

**Crisis in the Mediterranean**

Disagreements regarding the Common European Asylum System (CEAS) were reflected in the 2018 ‘disembarkation crisis’, when Italy and Malta repeatedly prevented NGOs’ and other vessels conducting SAR activities in the Mediterranean from disembarking the people they had rescued at sea in their ports. Furthermore, in early 2019, the Member States decided to discontinue the work of the maritime patrols of Operation Sophia, which 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 the 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 the EU’s 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. Italy and Malta’s stiff resistance 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. While these arrangements were a positive shift from the previous stand-off, they were nevertheless criticised for being made 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.

Recent developments

Notwithstanding the lower number of arrivals compared to 2015, the situation in the Mediterranean
Sea remained critical throughout 2022. According to the UNHCR, in 2022, 159 381 individuals had
arrived by sea to Italy, Greece, Spain, Cyprus and Malta, and 1 940 persons had lost their lives or had
gone missing since the beginning of the year. Indeed, as confirmed by a report from the
International Organisation for Migration (IOM), the Mediterranean remains the most dangerous
route for migrants seeking to reach Europe.

Table 1 – Sea arrivals and deaths per year since 2014

<table>
<thead>
<tr>
<th>Years</th>
<th>Arrivals</th>
<th>Dead and missing</th>
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<tr>
<td>2022</td>
<td>159 381</td>
<td>1 940</td>
</tr>
<tr>
<td>2021</td>
<td>123 318</td>
<td>3 231</td>
</tr>
<tr>
<td>2020</td>
<td>95 774</td>
<td>1 881</td>
</tr>
<tr>
<td>2019</td>
<td>123 663</td>
<td>1 510</td>
</tr>
<tr>
<td>2018</td>
<td>141 472</td>
<td>2 277</td>
</tr>
<tr>
<td>2017</td>
<td>185 139</td>
<td>3 139</td>
</tr>
<tr>
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<td>373 652</td>
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<tr>
<td>2015</td>
<td>1 032 408</td>
<td>3 771</td>
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<tr>
<td>2014</td>
<td>225 455</td>
<td>3 538</td>
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In early November 2022, four charity rescue boats full of migrants asked Italian port state
authorities to dock. One of them, the Rise Above boat docked in the port of Reggio Calabria, and 89 rescued individuals were let
ashore. One of the ships, the Ocean Viking, operated by the European charity SOS Méditerranée under a Norwegian flag, with
234 migrants on board, remained off the coast of Sicily and kept asking for docking. Facing the firm refusal by Italy, the Ocean
Viking headed to France. Meanwhile, the Commission confirmed that it is not
responsible for designating a safe port,
however it recalled that a voluntary solidary mechanism approved in June 2022
(see below) may serve as a basis to relocate
people among the Member States. Tensions
mounted between France and Italy, with
France reportedly accusing Italy of not
respecting EU and international law,
because Italy was originally the nearest safe
place to disembark the migrants. It is reported that the French interior minister declared that France
would proceed with the disembarkation of 234 migrants on the Ocean Viking but ‘decided to freeze
a plan to take in 3 500 migrants currently in Italy, part of the European burden-sharing accord, and
urged Germany and other EU nations to do the same’. Eventually, on 10 November, the Ocean Viking
was granted access to the French military port of Toulon in order to allow disembarkation of the
individuals on board, including children.

The stand-off between France and Italy about the disembarkation showed clearly that
notwithstanding years of discussion and negotiation about a possible ‘solidarity mechanism’, views
among Member States are still divergent. On 12 November 2022, four Member States – Italy, Greece,
Cyprus and Malta (Spain and France did not join the statement) – issued a joint statement in which
they pointed out that they were bearing the heaviest burden involved in managing migratory flows
in the Mediterranean. They called once again for migration and asylum policy based on the
principles of solidarity and fair sharing of responsibility among the Member States. In the absence
of an agreement on a ‘permanent burden sharing mechanism’, the four Member States could not
subscribe to the principle that only the country of first entry is responsible for the disembarkation
of irregular migrants, especially when disembarkation is the result of uncoordinated decisions taken by private vessels without the involvement of the competent state authorities. Finally, they called on the Commission and the Council presidency to immediately start the discussion on how to better coordinate these operations in the Mediterranean.

On 16 November 2022, the Council held a discussion but it was reported that the Member States were not yet ready to call an extraordinary Justice and Home Affairs Council, unless the meeting was organised and based on concrete initiatives; thus, the discussion remained at ambassadorial level. On 21 November, the Commission put forward an action plan to address the situation in the Mediterranean, which included 20 actions around three main pillars. The first pillar aims to strengthen cooperation with third countries and international organisations; the second pillar envisages a more coordinated approach to SAR operations. This is why, inter alia, the plan announces that the Commission will relaunch the European Contact Group on Search and Rescue, in the number of people an expert group aiming to enhance cooperation and information exchange between Member States and relevant stakeholders. The third pillar aims to accelerate the implementation of the Solidarity Declaration agreed on 22 June 2022, as so far only a minor percentage of the originally pledged relocations has materialised. On 25 November 2022, an emergency meeting of European Justice and Home Affairs ministers discussed the increase in irregular migration into the EU, including the sharp rise in the number of people reaching the EU by the perilous Mediterranean route. The Czech Presidency issued a summary of the meeting reiterating Member States' willingness to build a sustainable migration and asylum system. However, as regards solidarity, Member States simply stressed the need to implement the Solidarity Declaration for the Mediterranean taken in June 2022.

The voluntary solidarity mechanism: A solution in the near future?

After a series of informal discussions, in September 2019 the home affairs ministers of 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.

The 2019 Finnish Presidency of the Council expressed the hope that the proposed temporary voluntary mechanism (the Malta deal) 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 home affairs 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 areas 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.

Calls for solidarity were also made after in February 2020 the Turkish authorities decided to stop implementing the EU-Turkey statement, which led to a significant increase in migrant arrivals along the Greek-Turkish border and to 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 heads of state or government 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. During the first half of 2022, the French Presidency, in an attempt to overcome the stalled negotiation on the EU Pact on Migration and
Asylum, proposed a ‘gradual approach’ as opposed to a ‘package approach’. As a first step, in June 2022 18 Member States (Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Spain, Finland, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Portugal and Romania) together with three non-EU Schengen countries (Norway, Switzerland and Liechtenstein) agreed on a Solidarity Declaration, establishing a voluntary and temporary solidarity mechanism. It is reported that six Member States – Hungary, Poland, Slovakia, Austria, Latvia and (de facto) Denmark – rejected the declaration. The 21 countries committed to: ‘implementing a voluntary, simple and predictable solidarity mechanism designed to provide the Member States most affected by migratory flows in the Mediterranean and mainly under pressure, including the Western Atlantic route, with needs-based assistance from other Member States complementary to European support, by offering relocations (the preferred method of solidarity) and financial contributions’.

A recent CEPS study notes that the possibility granted to Member States to contribute by other means than relocations follows the logic of asymmetric solidarity. It means that Member States are allowed to pick and choose how to contribute to solidarity, not necessary with relocations. This would, according to some commentators, be contrary to the equal solidarity concept put forward by the CJEU in relation to Article 78.3 TFEU (C-715/17, C-718/17 and C-719/17). Participating countries also agreed on a common set of principles, one being that the relocations should benefit Member States confronted with disembarkations following SAR operations in the Mediterranean and Western Atlantic, and another being that priority should be given to vulnerable people. In order to ensure some sort of predictability, in the impossibility of agreeing on a permanent mechanism, Member States agreed on an annual relocation volume to which each Member State should contribute with a relocation pledge based on its population and GDP. Thus the distribution key used to calculate relocation pledge is similar to the one used in the proposal for a regulation on asylum and migration management. Member States kept the possibility to go beyond this pledge but also to temporarily reconsider the relocation commitments in case of ‘disproportionate pressure on a Member State and its reception system due to secondary flows, taking into account the state of cooperation under the Dublin system’. Based on that declaration, the relocation of 10,000 individuals was initially envisaged, with France agreeing to 3,000 and Germany to 3,500 relocations. Nevertheless, 13 out of the 21 countries proposed the relocation of 8,000 individuals, while Denmark, the Netherlands, Czechia and Switzerland proposed a financial contribution. The first group of 38 individuals was relocated from Italy to France in August 2022.

On 8 December 2022, EU home affairs ministers continued their discussions on migration and expressed support for the work of the Czech Presidency of the Council on the concepts of solidarity and responsibility-sharing. Czech Minister of the Interior Vít Rakušan acknowledged that an agreement on solidarity would require compromises and hoped that the succeeding Swedish Presidency would be able to continue with the legislative work.

MAIN REFERENCES


Luyten K., Addressing pushbacks at the EU’s external borders, EPRS, European Parliament, October 2022.


Goldner Lang I., Is There Solidarity on Asylum and Migration in the EU?, 2013.

ENDNOTES

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 are not equally responsible.
4 Article 63.2 (b) TEC-Amsterdam.
5 The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the EU. The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between the Member States.
6 The second phase of development of a common policy in the field of asylum, migration and borders started on 1 May 2004. It should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between Member States.
7 The Commission considers that the time has come, in a spirit of mutual responsibility and solidarity between Member States and of partnership with third countries, to give a new impetus to the definition of a common immigration and asylum policy that will take account of both the EU’s collective interest and the specific needs of each Member States.
8 The development of a forward-looking and comprehensive EU migration policy, based on solidarity and responsibility, remains a key policy objective for the EU.
10 As this briefing focuses on solidarity in EU asylum policy, it does not therefore discuss external solidarity.
11 In the autumn of 2015, the Commission proposed the use of an emergency response mechanism under Article 78(3) 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.
12 Bold added by the authors of this briefing.
13 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 EU Charter of Fundamental Rights.

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