

# The EU Approach on Migration in the Mediterranean

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Policy Department for Citizens' Rights and Constitutional Affairs

Directorate-General for Internal Policies

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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, examines the EU approach on migration in the Mediterranean, covering developments from the 2015 refugee crisis up to the Covid-19 pandemic, assessing the effect these events have had on the design, implementation, and reform of EU policy on asylum, migration and external border control, and documenting the ramifications these changes have had on the actors who operate and are impacted by these policies, including immigration authorities, civil society organisations, and the migrants themselves. The study includes a review of the state of play of relevant EU asylum and migration legislation and its implementation, an appraisal of the situation in the Mediterranean, and a thorough examination of the external dimension of the EU migration, asylum and border policies, focusing on cooperation with third countries (Turkey, Libya and Niger), incorporating human rights and refugee law considerations and an analysis of the implications of funding allocations under the EU Trust Fund for Africa and the Refugee Facility in Turkey. The main goal is to test the correct application of EU and international law, having regard to increased allegations of human rights violations, undue criminalisation, and complicity of the EU in atrocity crimes committed against migrants at sea, stranded in Libya, or contained in Niger and Turkey. The role of EU agencies (Frontex and EASO) is also assessed alongside the bilateral or multi-lateral initiatives adopted by MS to confront the mounting challenges at the common external borders of the EU, incorporating the principle of solidarity and fair sharing of responsibility (Article 80 TFEU) as a horizontal concern.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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## LIST OF ABBREVIATIONS

<b>ACP</b>	African, Caribbean and Pacific Group of States
<b>AFIC</b>	Africa-Frontex Intelligence Community
<b>AFSJ</b>	Area of Freedom Security and Justice
<b>AIDA</b>	Asylum Information Database
<b>AMIF</b>	Asylum, Migration and Integration Fund
<b>ARIO</b>	Articles on the Responsibility of International Organizations
<b>APD</b>	Asylum Procedures Directive
<b>ARCI</b>	Associazione Ricreativa e Culturale Italiana
<b>AST</b>	Asylum Support Team
<b>AU</b>	African Union
<b>CEAS</b>	Common European Asylum System
<b>CFR</b>	Charter of Fundamental Rights
<b>CFSP</b>	Common Foreign and Security Policy
<b>CJEU</b>	Court of Justice of the European Union
<b>CoE</b>	Council of Europe
<b>CoC</b>	Code of Conduct
<b>CSDP</b>	Common Security and Defence Policy
<b>DCI</b>	Development Cooperation Instrument
<b>DCIM</b>	Department to Combat Illegal Migration
<b>DEVCO</b>	International Cooperation and Development
<b>DG</b>	Directorate-General
<b>DG ECHO</b>	Directorate-General for European Civil Protection and Humanitarian Aid Operations
<b>DGMM</b>	Directorate General for Migration Management
<b>EASO</b>	European Asylum Support Office
<b>EBCG</b>	European Border and Coast Guard Agency

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<b>ECA</b>	European Court of Auditors
<b>ECHO</b>	European Civil Protection and Humanitarian Aid Operations
<b>ECHR</b>	European Convention on Human Rights
<b>ECOWAS</b>	Economic Community of West African States
<b>ECtHR</b>	European Court of Human Rights
<b>EDF</b>	European Development Fund
<b>EEAS</b>	European External Action Service
<b>EKANA</b>	National List of Undesirable Aliens
<b>ENI</b>	European Neighbourhood Instrument
<b>EO</b>	European Ombudsman
<b>ERCI</b>	Emergency Response Centre International
<b>ETM</b>	Emergency Transfer Mechanism
<b>EU</b>	European Union
<b>EUAA</b>	European Union Agency on Asylum
<b>EUBAM</b>	EU Border Assistance Mission to Libya
<b>EUCAP</b>	European Union Capacity Building Mission
<b>EUNAVFORMED</b>	European Union Naval Force Mediterranean
<b>EUROPOL</b>	European Union Agency for Law Enforcement Cooperation
<b>EUROSUR</b>	European Border Surveillance System
<b>EUTFA</b>	EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa
<b>FRA</b>	Fundamental Rights Agency
<b>FRONTEX</b>	European Border and Coast Guard Agency
<b>FRT</b>	Facility for Refugees in Turkey
<b>FSWG</b>	Frontex Scrunity Working Group
<b>GAM</b>	Global Approach to Migration
<b>GAMM</b>	Global Approach to Migration and Mobility

<b>GCM</b>	Global Compact for Safe, Orderly and Regular Migration or Global Compact for Migration
<b>GCR</b>	Global Compact for Refugees
<b>GDP</b>	Gross domestic product
<b>GI</b>	Global Initiative Against Transnational Organized Crime
<b>GLAN</b>	Global Legal Action Network
<b>GNA</b>	Government of National Accord
<b>HOMERe</b>	High Opportunity for Mediterranean Executive Recruitment
<b>IBM</b>	Integrated Border Management
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant for Civil and Political Rights
<b>ICT</b>	Intra-corporate transferees
<b>IcSP</b>	Instrument contributing to Stability and Peace
<b>IDP</b>	Internally Displaced Person
<b>IO</b>	International Organisation
<b>IOM</b>	International Organization for Migration
<b>IMO</b>	International Maritime Organization
<b>IPA II</b>	Instrument for Pre-Accession Assistance
<b>JHA</b>	Justice and Home Affairs
<b>JIT</b>	Joint Investigative Team
<b>LIBE</b>	Committee on Civil Liberties, Justice and Home Affairs
<b>LTR</b>	Long-term residence
<b>LTV</b>	Limited territorial validity
<b>LYCG</b>	Libyan Coastguard
<b>MAS</b>	Multipurpose Aerial Surveillance
<b>MEP</b>	Member of the European Parliament
<b>MFF</b>	Multiannual Financial Framework
<b>MoU</b>	Memorandum of Understanding

<b>MPF</b>	Migration Policy Framework
<b>MPRIC</b>	Multi-Purpose Reception and Identification Centre
<b>MPs</b>	Mobility Partnerships
<b>MRRM</b>	Migrant Resource and Response Mechanism
<b>MS</b>	Member State
<b>MSF</b>	Médecins sans Frontières
<b>MSR</b>	Maritime Security Regulation
<b>NDICI</b>	Neighbourhood, Development and International Cooperation Instrument
<b>NGO</b>	Non-Governmental Organisation
<b>OCHA</b>	UN Office for the Coordination of Humanitarian Affairs
<b>OCT</b>	Operational Cooperation Team
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>QD</b>	Qualification Directive
<b>RAMM</b>	Regulation on Asylum and Migration Management
<b>RCC</b>	Rescue Coordination Centre
<b>ReSOMA</b>	Research platform on European asylum, integration and migration policies.
<b>SAFIC</b>	Strengthening the Africa-Frontex Intelligence Community
<b>SAR</b>	Search and Rescue
<b>SIBML</b>	Support to Integrated Border and Migration Management in Libya
<b>SOLAS</b>	Convention and the Safety of Life at Sea
<b>SOM</b>	UN Protocol against Migrant Smuggling by Land, Sea and Air
<b>SRR</b>	Search and Rescue Region
<b>STC</b>	Safe Third Country
<b>TCG</b>	Turkish Coast Guard
<b>TCN</b>	Third-Country National
<b>TEU</b>	Treaty on European Union

<b>TF</b>	Trust Fund
<b>TFEU</b>	Treaty on the Function of the European Union
<b>TNI</b>	Transnational Institute
<b>TTF</b>	Trilateral Task Force
<b>UN</b>	United Nations
<b>UNCLOS</b>	UN Convention on the Law of the Sea
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNTOC</b>	United Nations Convention against Transnational Organised Crime
<b>WA</b>	Working Arrangement

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Figure 1: Frontex – Budget Allocation Evolution

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## EXECUTIVE SUMMARY

### Aims and Background

The **object** of the proposed study is to examine the **EU approach on migration in the Mediterranean, covering the period from the outbreak of the 2015 refugee crisis up to the Covid-19 pandemic**. The following chapters thus capture the effect that these events have had on the design, implementation, and reform of EU policy on asylum, migration and external border control, as well as document the concrete ramifications that these changes have had on a wide range of actors who operate and are impacted by these policies, from immigration authorities to civil society organisations, and, crucially, the migrants themselves.

**Three main elements** constitute the core of the study:

- 1) The **state of play of relevant EU asylum and migration legislation and its application**;
- 2) The **situation in the Mediterranean**, paying particular attention to trends in irregular movements and asylum applications by 'boat migrants'; and
- 3) The **external dimension of the EU migration, asylum and border policies, focusing on cooperation with third countries**, particularly Turkey, Libya and Niger as specific case studies.

The analysis incorporates human rights and refugee law considerations. We also examine the **implications of funding allocations** under the EU Trust Fund for Africa and the Refugee Facility in Turkey, in light of EU and international law provisions, including evidence of how these policies are impacting stability, human rights, the rule of law and the day-to-day operations of stakeholders on the ground.

The **main goal** is to **test the correct application of EU law**, having regard to increased allegations of human rights violations, undue criminalisation, and complicity of the EU in atrocity crimes committed against migrants at sea, stranded in Libya, or contained in Niger and Turkey. We **assess the role of EU agencies**, particularly Frontex and the European Asylum Support Office (EASO), **as well as bilateral or multi-lateral initiatives** between the MS (e.g. ad hoc relocation, or the envisaged 'return sponsorships') to confront the mounting challenges at the common external borders of the EU. In so doing, we incorporate adherence to the principle of solidarity and fair sharing of responsibility (Article 80 TFEU) as a horizontal concern.

### Scope and Structure

**Chapter 2** undertakes a detailed survey of existing and planned EU legislation in the areas of migration, asylum and return, paying particular attention to implementation flaws and lessons so far. We analyse the **state of play of EU migration policy**, including economic and labour migration, family reunification, and integration-fostering measures, like the long-term residence Directive. We undertake an overall assessment with reference to existing evaluations and explore links with irregular migration policy, its effect on access to protection, and the so-called asylum-migration nexus. The chapter also provides an **assessment of the CEAS reform**, taking account of commentary, previous evaluations, and implementation reports and the amended and new proposals put forward by the European Commission in the **New Pact on Asylum and Migration**. Throughout, the analysis is performed in light of international and EU legal standards of human rights and refugee protection.

**Chapter 3** provides the overall **picture at the external borders** of the EU, with a focus on the Mediterranean, from the outbreak of the refugee crisis in 2015 up to the current coronavirus pandemic. It evaluates **trends** in border crossings and asylum applications, incorporating **statistical and**



**qualitative data**, including by EUROSTAT, EASO, Frontex and FRA as well as IOM and UNHCR. We assess the evolving **role of EU agencies**, analysing trends such as joint implementation practices (e.g. at hotspots in Italy and Greece), coordination of MS cooperation (e.g. through the relocation programme) and the emergence of new monitoring functions. In this connection, we explore the impact of **Article 80 TFEU** and the principle of solidarity and fair sharing of responsibility in MS responses. We scrutinise the **effect of Covid-19** with a view to elucidating the effect of pandemic-motivated measures adopted to alleviate increased pressures at the common external borders of the EU. The overall purpose is to introduce the main issues that subsequent chapters address in detail, setting the scene to establish whether or not EU and international law obligations are correctly upheld in practice.

**Chapter 4** provides an overview of the development and current status of **SAR capacities in the Mediterranean**. We pay particular attention to joint **maritime operations**, including *Poseidon* in the Aegean and *Themis* in the Central Mediterranean, as well as the EUNAVFORMED mission *Sophia* and its successor *IRINI*. We define **SAR obligations** under international law and equivalent provisions under EU law and assess the extent to which SAR can be characterised as a **pull factor** for irregular migration. We take into consideration the duties to provide assistance and to ensure disembarkation at a 'place of safety', bearing in mind the **human rights** of 'boat migrants'. We examine allegations of human rights violations in this context, including illegal pushbacks and other infringements of the prohibitions of *refoulement* and collective expulsion, paying attention to the specific contribution of EU actors to any such violations so as to determine its compatibility with EU and international law obligations. Against this background, we evaluate the practicability of options for a **disembarkation mechanism** that fulfils the requirements of EU and international law, taking account of past initiatives, such as the **Malta Declaration**, and **ad hoc arrangements** in support of Italy and Malta. Measures adopted since the 2015 crisis and during the pandemic, including port closures, 'privatised pullbacks', 'aerial *refoulement*', the establishment of 'floating' hotspots at sea, or the suspension of the right to asylum are assessed for compliance with the relevant standards. In so doing, we take account of recommendations by the Council of Europe, UNHCR, IOM and the European Commission on disembarkation and reception in Covid-19 times and carry out a **detailed analysis of proposals under the New Pact on Migration and Asylum**. Cooperation arrangements with third countries for preventing boat departures towards the EU are also explored, complementing the analysis in Chapter 6.

**Chapter 5** investigates one of the key trends that emerged in the aftermath of the 2015 crisis and entrenched during the Covid-19 pandemic. The **criminalisation of humanitarian assistance to irregular migrants** is an EU-wide phenomenon with particularly insidious consequences for 'boat migrants'. It is also a longstanding preoccupation of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). This chapter updates past studies for the European Parliament on this issue, taking stock of current developments, particularly at sea, considering the societal impact of criminalisation measures on rescuers, rescuees, and the broader public, adopting a broad understanding of criminalisation, including instances of criminal punishment, as well as other restrictive measures, such as the seizure of ships, police investigations, detention, etc., which limit the capacity of civil society organisations to act freely and perform rescue.

**Chapter 6** deals with the **external dimension of migration and border policy**, which has gained special prominence since the 2015 crisis. Cooperation with third countries constitutes the most important element here and appears to play a very significant role in the Commission's plans regarding the **New Pact on Asylum and Migration**. This chapter assesses the overarching framework, mapping the EU priorities and main strategies and identifying their implications. The chapter focuses on the human rights impact of existing and developing forms of cooperation with third countries, including

**financial support.** Particular attention is paid to **informalised, soft-law tools**, adopted for the acceleration of returns, the prevention of refugee flows, or the joint enforcement of external border controls. We have regard to their enhanced potential to erode the enforceability of legal obligations, to downgrade democratic accountability, and to generally undermine the rule of law (cf. Articles 2 and 21 TEU). **Three case studies** are used to assess in detail the effects of this cooperation: (1) The **EU-Turkey Statement**; (2) **cooperation with Libya**; and (3) the EU's **engagement with Niger**.

**Chapter 7** summarises findings and puts forward **recommendations** for the European Parliament's consideration on specific means and measures to adopt in line with the study's **conclusions**. It identifies the main issues and problems and ways in which they should be addressed so that the future framework under the New Pact on Asylum and Migration delivers a more humane and effective system, in line with the European Commission's stated vision.

## Findings

**Chapter 2** demonstrates that, despite harmonisation efforts at EU level, **truly common standards have yet to materialise**. This is particularly true regarding asylum policy, where disparities persist regarding practices and standards in the processing of asylum claims and material reception conditions across MS, and legal entry channels, such as humanitarian visas, are not covered by EU law. The EU legal framework also remains incomplete with regard to legal migration, since many categories of third-country national (TCN) workers fall outside the EU *acquis*. **The New Pact on Migration and Asylum puts several controversial proposals on the agenda**. In the legal migration field, national schemes will continue to run parallel to EU ones and EU-wide mobility for TCNs remains largely absent. Concerning asylum policy, the basic premises of the Dublin system are maintained, if not reinforced; the envisaged interconnection between asylum and return under the proposed border procedure risks undermining access to protection. The focus on **externalisation of protection obligations** and **containment** of refugees and migrants **in transit countries** will render the **EU hostage to the whims of foreign political forces**.

**Chapter 3** shows that **despite the number of asylum applications and arrivals at EU external borders significantly decreasing since 2015, crisis responses and crisis discourse persist**. **Solidarity** continues to be emergency-driven and **has not been structurally embedded** in the common asylum and external border control policies. The Commission's approach in **the New Pact does not seem capable of resolving current tensions** and providing a satisfactory response to the fair sharing of responsibilities challenge. The **expanding powers of Frontex and EASO** have led to significant shifts in the implementation modes of the EU asylum and external border control policies, raising **issues with regard to independence, executive powers, accountability, and fundamental rights compliance**, which have not been adequately addressed. Covid-19 has exacerbated current complexities requiring a thorough assessment.

**Chapter 4** reveals the **shortcomings in the Commission's plan for a new common approach to search and rescue (SAR)**, which will **structuralise current malpractices** by Frontex, EUNAVFORMED, and the MS' bilateral cooperation arrangements with third countries, including those whose legitimacy and legality have been challenged in European courts and other fora. **Rescue**, in current practice and in the New Pact, has been **designed as an exception to the general rule of containment of unwanted arrivals, in contravention of the SAR Conventions**. Thus, **pullbacks and related abuse** risk becoming **normalised** as a legitimate migration management technique, regardless of human rights implications.

**Chapter 5** problematises the **criminalisation of humanitarian assistance by SAR NGOs**. This remains a salient political issue to which the Commission is unable or unwilling to put an end. **The failings of the Commission Guidance on the Facilitation Directive are exposed** alongside the difficulties encountered by SAR NGOs in their day-to-day activities in different MS, impeding the discharge of their mandate. The Guidance is focused on humanitarian assistance 'mandated by law', which leaves scope for **legal uncertainty that may foster national discrepancies and undermine the unity of EU law**. Beyond their humanitarian function, the Guidance also fails to recognise the wider role civil society organisations play in monitoring the implementation of human rights standards. There is a **need**, in this regard, **for an effective monitoring and redress mechanism that protects civil society organisations as human rights defenders and guarantors of democratic values**.

**Chapter 6** critiques **the external dimension of migration and asylum policy** under the major documents shaping the EU's approach, tracing the **legacy of the Global Approach to Migration and Mobility, the EU Agenda on Migration, and the Migration Partnership Framework** in the Commission's **New Pact on Migration and Asylum**, including the manner in which EU funds are employed in this area. The analysis of EU cooperation with **Turkey, Libya, and Niger as case studies** reveal an **overwhelming focus on the fight against irregular migration, paying limited attention to the rights of TCNs**. Furthermore, **migration management becoming the ultimate priority of EU funding mechanisms has led to a misuse of development (Article 208 TFEU) and humanitarian aid (Article 214 TFEU)**, without consideration for the real needs and interests of the parties concerned, **even when their detrimental effect on fundamental rights is clear** from multiple sources. This **falls short of the legal obligation to observe and promote fundamental rights** when the EU acts externally (Articles 2 and 21 TEU and Article 205 TFEU), which is **binding on all EU institutions, bodies and agencies as well as on the MS when implementing EU law (Article 51 CFR)**. It also **risks undermining foreign policy coherence** and may lead to **mistrust by external partners**, negatively impacting the EU's ability to address the root causes of migration and build relationships based on an equal partnership. The **use of informal arrangements** poses additional problems, as it **side-lines judicial and democratic accountability**, undermining the rights to effective judicial protection and good administration, and the principle of **institutional balance**, eroding the **competences of the European Parliament** and its budgetary authority.

## Recommendations

In light of the findings arrived at, we submit in **Chapter 7** that the Parliament should:

*Regarding the current legislative acquis, implementation, and ongoing practice*

1. Evaluate the Commission's practice regarding the **introduction of infringement procedures** against MS that do not fully apply the Directives in the area of legal migration and asylum;
2. Launch a study on the **discrimination risk that some categories of TCN workers compared to other categories of TCN workers** face under EU law due to differences in the scope of the equality principle between the category-specific Directives regarding legal migration;
3. Ensure that refugees and **migrants deprived of their liberty**, on arrival, during the asylum process, or during pre-removal proceedings, **have access to an effective remedy** against the decision ordering the deprivation of liberty, as well as to a review at regular intervals;
4. Launch a study to analyse the **accountability mechanisms** pertaining to Frontex and EASO to ensure effectiveness and avoid duplication;

5. Launch a study on MS' asymmetric responsibilities in border and asylum policies, to **concretely evaluate the breadth of the solidarity gap** between the current situation and the desirable size of EU fair sharing and compensation mechanisms;
6. Launch a study to **scrutinise the compatibility of MS' Covid-19 responses at the borders with EU and international refugee law and human rights**, specifically the principle of human dignity (Article 1 CFR), the right to asylum (Article 18 CFR), and the prohibitions of inhuman and degrading treatment (Article 4 CFR), arbitrary detention (Article 6 CFR), collective expulsion (Article 19(1) CFR), and *refoulement* (Article 19(2) CFR);
7. **Extend the terms of the Frontex Scrutiny Working Group** to cover not only incidents in the Aegean, but also facilitation of pullbacks in the Central Mediterranean. A **similar investigation** should be opened **into** the workings and effects of **EUNAVFORMED Operations** to elucidate potential violations and legal responsibilities;
8. **Establish a permanent SAR Observatory for the Mediterranean** to monitor human rights violations occurring in the course of, or as a result of, maritime interventions.<sup>1</sup> Collaboration with third countries should be closely supervised to prevent instances of unlawful pullbacks/pushbacks and related practices. The work of the Observatory can feed into ongoing and future investigations and support the work of Scrutiny Working Groups, FRA, the Consultative Forum of Frontex, and its Fundamental Rights Officer;
9. Promote the **formal recognition in all EU legal and policy instruments** affecting their position **of the work and status of SAR NGOs as human rights defenders**, whose activity is protected under international law. The UN and EU human rights defenders' framework should be applied to civil society organisations acting within the EU;
10. Support the **introduction of independent monitoring of the acts carried out against humanitarian actors and human rights defenders working with migrants** and **launch a formal, independent investigation into** human rights breaches occurred in this context since the 'refugee crisis'. This should not only include criminal convictions, but also all cases of criminal investigations as well as harassment, intimidation and undue prosecution;
11. Call for the **urgent deployment of EU/MS SAR capacities in the Mediterranean**, either in the form of dedicated MS missions or an EU-wide SAR operation. In parallel, request **the Commission, Frontex, EUNAVFORMED and the MS to decriminalise and facilitate cooperation between merchant ships and civil society rescuers**;
12. Require MS to **release NGO vessels from impoundment** so that they can return to sea. MS should, in addition, help NGOs meet any other needs related to their work or technical requirements introduced in legal provisions, including during the Covid-19 health crisis;
13. Call on the MS to **refrain from misusing criminal and administrative proceedings and technical requirements to obstruct NGOs' life-saving work**;
14. Require that all agreements with third countries and all EU external actions regarding migration be adopted following a **comprehensive compliance system**, covering the entire formulation-implementation-revision cycle, so as to honour the **right to good administration** and the European Ombudsman's recommendations, including:

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<sup>1</sup> The Search and Rescue Observatory for the Mediterranean ([SAROBMED](#)) project, recording SAR and interdiction incidents during 2015-19 through a consortium of researchers and civil society organisations, offers a model that could be replicated.

- A **pre-conclusion human rights impact assessment** that determines the concrete human rights situation along the specific migration route to which the envisaged agreement/action/funding refers and that establishes any human rights risks the intended measure may foreseeably give rise to;
- Specific **benchmarks** and **indicators** should be used for the pre-conclusion assessments so that, if the country concerned is not safe, no operational cooperation that affects the rights of TCNs should be established;
- **Mitigation measures** should be designed to counter any surmountable risks that may be detected, to guarantee compliance with human rights;
- For any **funding**, a **demonstrable and measurable link to the safeguarding and consolidation of human rights** should be shown (Article 21(2)(a)-(b) TEU);
- If and only when human rights risks have been mitigated, a detailed and enforceable **human rights conditionality clause** should be inserted in all agreements/actions/funding finally adopted, making specific provision for the protection of TCN rights;
- Appropriate **operationalisation clauses** that provide for **specific safeguards** when the agreement/action/funding is being implemented should be included;
- A **body in charge of the adequate implementation** of the agreement/action/funding adopted should be designated with powers to check compliance with fundamental rights;
- **Implementation guidelines** should be produced, on the basis of the aforementioned benchmarks and indicators, specifying the ways in which the agreement/action/funding should be applied to ensure compliance with EU law;
- The implementation body should **report periodically** to the Commission, the Council, and the European Parliament, on the ways in which EU law compliance, specifically with the rights of TCNs, has been fulfilled in practice;
- An **independent, transparent, and ongoing monitoring mechanism** with objective and up-to-date data on implementation should be introduced that includes representation of experts from different backgrounds, who are given access to all materials necessary to perform their task and allowed to conduct unannounced visits to relevant locations and interview competent actors. **If it emerges that an agreement/action/funding scheme contributes to the infringement of fundamental rights, it should be discontinued;**
- A **periodic evaluation** should be undertaken by an independent body at regular intervals with the responsibility to assess how EU law compliance, specifically with TCN rights, has been guaranteed, reviewing the full remit of activities and formulating recommendations for improvement or derogation of specific actions/components as appropriate;
- There should be a **follow-up mechanism**, overseen by the European Parliament, whereby evaluation results and expert recommendations are incorporated in the relevant agreement/action/funding and reviews/adjustments introduced as necessary;
- It should remain possible at all times for the persons impacted by the relevant agreement/action/funding to challenge any decisions with a detrimental effect in a process that complies with **effective remedy** standards;
- Pre-assessment reports, the text of the relevant agreement/ action/funding adopted, the implementation guidelines, the implementation reports, the monitoring reports, the post-



implementation evaluations and the follow up (review and reform) reports should be communicated to the Commission, the Council, and the European Parliament and be made **publicly accessible** (e.g. through a dedicated e-portal);

- Any **damage** caused should be **repaired** through an effective system of redress (Article 47 CFR) and the **action/omission giving rise to the violation** immediately amended for compliance with the relevant right or, when not possible, **suspended or cancelled**.

*Regarding ongoing negotiations and amendments to existing instruments*

15. **Scrutinise the fundamental rights implications of the envisaged Asylum and Migration Management Regulation's proposals to curb secondary movements**, such as transferring unaccompanied minors to the MS of first entry, if no family criterion is applicable, and removing the entitlement to reception conditions in MS other than the 'responsible' MS;
16. Ensure that refugees and migrants subject to the envisaged asylum and return border procedures benefit from the **right to an effective remedy** against MS decisions;
17. Ensure that the **Union Resettlement Framework** will **not introduce negative conditionality** between MS resettlement commitments and third countries' adherence to EU migration management objectives;
18. Ensure the **fundamental rights compatibility of all legislative amendments to the CEAS** instruments, in particular with the principle of *non-refoulement*, the principle of non-penalisation for irregular entry, the principle of human dignity, the right to an effective remedy, the prohibition of arbitrary deprivation of liberty, and the right to asylum;
19. Ensure the European Parliament's involvement in the **monitoring mechanism of the new EUAA** to render it more objective and impartial, e.g. through the possibility of Parliament delegations being present in on-site visits, or through reporting obligations, especially regarding escalation measures;
20. **Ensure that the EUAA Consultative Forum is vested with adequate capacities** (e.g. through reporting obligations, and allowing members to conduct on-site visits during operations), making it an independent monitor and a meaningful accountability forum;
21. Request the European Commission to **revise the SAR Recommendation** for compliance with international standards. Under the maritime Conventions, **all seafarers**, including IRINI and Frontex-coordinated assets, **are subject to the customary international legal duty to rescue**. They cannot ignore distress calls or refuse requests for assistance on convenience or 'pull factor' considerations, and should **pro-actively engage in SAR**, searching for persons in distress, retrieving survivors, and delivering them to a **'place of safety', in line with the principle of non-refoulement**;
22. Request the European Commission to **revise the SAR Recommendation to guarantee that SAR NGO activities are not hindered** by the adoption of administrative, technical or criminal measures impeding their work. Unproven 'pull factor' rhetoric should be abandoned and replaced with compliance with the SAR Conventions and the rights of SAR NGOs under the **UN and EU human rights defenders' framework**;
23. **Amend the solidarity mechanisms proposed** as part of the New Pact on Migration and Asylum to guarantee compliance with Article 80 TFEU and the CFR, particularly in what regards post-disembarkation arrangements, avoiding discriminatory outcomes on account of refugees' mode of

arrival, in line with the principles of **non-discrimination** and **non-penalisation** for irregular entry in Articles 3 and 31 of the 1951 Geneva Convention. **TCNs'** rights must be duly protected in any reception/relocation system, factoring in their **needs, preferences, and entitlements**, and **taking account of MS capacities** in line with the principle of solidarity and fair sharing of responsibility;

24. **Amend the Facilitation Directive** to bring it in line with the definition of migrant smuggling contained in the UN instruments. Meanwhile, the European Parliament should require the European Commission to **revise the Criminalisation Guidance** to incorporate a definition of 'humanitarian assistance' that covers activity at sea as well as on land, and makes **the humanitarian exemption clause mandatory**;
25. **Before final approval of the recast NDICI**, insist in the inclusion of:
  - **A risk-assessment and ongoing monitoring and evaluation mechanism** to ensure that EU funded actions comply with EU and international obligations, including TCN rights, as well as with the principle of policy coherence for development aid, along the lines of the comprehensive compliance system recommended above;
  - **A provision for the suspension of funds** in case of serious violations of human rights, democratic principles, or the rule of law, following the Cotonou Agreement and the human rights conditionality clauses usually contained in EU trade agreements;
  - An amendment to proposed Article 17 NDICI, **removing cooperation on migration as one of the criteria for receiving additional funds**;
  - **A clause obliging the Commission to specifically justify the existence of crisis situations warranting the use of rapid response actions**, with a view to avoiding that it may use the crisis justification to opt for rapid response actions, as opposed to thematic or geographic ones, thereby evading its obligation to inform the European Parliament prior to adoption.

*Regarding future initiatives*

26. Ensure that the **status of legal migrants** (in particular long-term residents and Blue Card holders) **becomes genuinely European** on the basis of the principle of mutual recognition, in particular regarding mobility within the EU, as per Article 79(2)(b) TFEU;
27. Launch a European added-value assessment on the **extension of the EU *acquis* to categories of TCN workers not currently covered** by it, to decide whether it is necessary or not to adopt further legislation in line with the principle of subsidiarity;
28. Launch an own-initiative report on **rendering existing regular admission schemes more accessible to international protection seekers**;
29. Launch an own-initiative report on **the mutual recognition of positive asylum decisions coupled with qualified free movement rights for recognised** beneficiaries of international protection, considering its potential impact on the reduction of secondary movements and the enhancement of compliance with the CEAS provisions;
30. Continue to pursue the **introduction of binding legislation on legal entry channels**, e.g. a European Humanitarian Visa, renewing the invitation to the Commission to table specific instruments that facilitate admission for the purposes of lodging an asylum application;
31. Revise the **composition of the management boards of EASO and Frontex**, foreseeing a role for the European Parliament as a non-voting member, at the very least, to enhance political accountability and scrutiny channels;

32. **Strengthen the role of the European Parliament as a political accountability forum** for JHA agencies, by increasing its ability to influence agency dynamics (e.g. answering ad-hoc questions in writing, keeping comprehensive records of Management Board meetings, and taking a role in the dismissal of Executive Directors);
33. **Establish political accountability arrangements before national parliaments** (e.g. reporting obligations or hearings) and/or joint accountability mechanisms involving both the European Parliament and national parliaments, along the lines of the European Union Agency for Law Enforcement Cooperation's (Europol) Joint Parliamentary Scrutiny Group;
34. **Actively follow up on implementing the internal fundamental rights oversight mechanisms** included in the envisaged EUAA, such as hiring a Fundamental Rights Officer and resourcing their office, and running the individual complaints mechanism in a manner that guarantees compliance with the rights to good administration (Article 41 CFR) and an effective remedy (Article 47 CFR), including through effective judicial protection, to ensure adequate redress of any violations;
35. **Evaluate the legal and practical feasibility**, alongside the financial and operational implications, **of new solidarity mechanisms** under the New Pact, including 'return sponsorships', considering both the horizontal and vertical dimensions (i.e. inter-State and vis-à-vis refugees and migrants) to ensure full compliance with the relevant standards;
36. Prepare an own-initiative report, in line with its previous Resolutions, on the **launch of an 'integrated SAR response' in the Mediterranean**, involving Frontex, the EUNAVFORMED, and the EU MS. The deployment should aim at restoring SAR capacity and activity at sea in line with the EU *acquis* and the international maritime Conventions. SAR responsibility cannot continue to primarily rest on the shoulders of private actors;
37. Call for the adoption of EU-wide **Covid-19 safety procedures that comply with the human rights and protection needs of rescuees, NGO workers, and reception staff**, where SAR boats disembark in EU ports as 'places of safety';
38. Request the European Commission and the MS to draw a plan that **enables safe, quick and predictable disembarkation of SAR boats in a 'place of safety'**, in line with international standards, thus discontinuing cooperation with the Libyan Coastguard and the facilitation of 'pullbacks' that lead to the delivery of survivors to unsafe ports in Libya and elsewhere outside Europe;

*Proposals on litigation*

39. **Challenge the legality of any measures that impinge upon its competences under the Treaties.** Cooperation with third countries must be pursued following the rules provided for in the Treaties on 'development cooperation' (Article 208 TFEU), on 'economic, financial and technical cooperation with third countries', including 'financial assistance' (Article 212 TFEU), and on 'humanitarian aid' (Article 214 TFEU), which require that '[t]he Parliament and the Council', rather than the MS or the Council alone, 'adopt the measures necessary for the[ir] implementation' jointly and through 'the ordinary legislative procedure' (Articles 209(1), 212(2) and 214(3) TFEU). Otherwise, the Parliament should challenge non-compliance (Article 263 TFEU), to preserve its competences as co-legislator in the areas concerned and to guarantee Parliamentary scrutiny and the observance of the principles of democracy and political accountability (Article 2 TEU);
40. **Contest the validity of any measures that fail to observe fundamental rights.** The soft-law instruments scrutinised in this study (regarding Turkey, Libya and Niger) should be repealed and replaced with hard-law alternatives that comply with the principle of legality, which requires that



any measure interfering with fundamental rights be provided for by laws that are published and accessible by the individuals concerned, offering guarantees against arbitrariness, subject to the principle of proportionality, and preserving the essence of the rights concerned (Article 52(1) CFR). Arguably, such laws, when referring to EU-level action, need to take the form of legally-binding instruments (i.e. EU Treaties or legislative acts), adopted following the relevant procedure and involving the European Parliament. Failure to do so, allows the Parliament to contest their validity (Article 263 TFEU);

*Proposals on budgetary control*

41. **Make full use of its powers of budgetary control, including via the discharge procedure**, to ensure compliance with relevant EU primary and secondary law provisions;
42. **Engage the European Court of Auditors** (Article 287(4) TFEU) to monitor and ensure that funding decisions under the Facility for Refugees in Turkey, the EU Trust Fund for Africa and related allocations comply, in particular, with fundamental rights;
43. EU external development and humanitarian funding should not be made dependent upon cooperation on migration containment, as this clashes with the purpose of development aid and humanitarian assistance and may undermine human rights. The Parliament should thus **contest the legality of funding measures that fail to comply with development cooperation and humanitarian aid policy objectives** (Article 263 TFEU);
44. Request the European Commission to **make available a complete and public overview of EU funding to third countries in the field of migration management**, in line with the principles of transparency and good administration (Article 41 CFR), to preserve the rationality of EU expenditure decisions and encourage better management of the Union's budget overall;
45. Insist that the European Commission **informs** the European Parliament **of the process and rationale behind the selection of specific EU-funded actions**, including any risk-assessment, monitoring and evaluation procedures undertaken or planned, to ensure continued democratic accountability. This is needed to enable Parliamentary oversight of EU budget use and for the Parliament to fully exercise its budgetary control competences.

# 1. INTRODUCTION

## 1.1 Rationale and Objectives

The **object** of the proposed study is to examine the **EU approach on migration in the Mediterranean, covering the period spanning the outbreak of the 2015 refugee crisis up to the Covid-19 pandemic**. The following chapters thus capture the effect that these events have had on the design, implementation, and reform of EU policy on asylum, migration and external border control, as well as document the concrete ramifications that these changes have had on a wide range of actors who operate and are impacted by these policies, from Member States (MS) immigration authorities to civil society organisations, and, crucially, the migrants themselves.

**Three main elements** constitute the core of the study:

- 1) The **state of play of relevant EU asylum and migration legislation and its application**, including a brief discussion of the legislative proposals that the European Commission has launched as part of its **New Pact on Migration and Asylum**<sup>2</sup> for the reform of migration and external border control policies and the Common European Asylum System (CEAS), and of current international developments, including the UN Global Compacts on Refugees and Migration<sup>3</sup>;
- 2) The **situation in the Mediterranean**, paying particular attention to trends in irregular movements and asylum applications by 'boat migrants', specifically since the Covid-19 pandemic, including the responses adopted by the EU and its MS, via Frontex and the EUNVAFORMED, with regard to search and rescue (SAR) and the criminalisation of humanitarian assistance, analysing their compatibility with EU law, the maritime conventions, and human rights obligations; and
- 3) The **external dimension of the EU migration, asylum and border policies, focusing on cooperation with third countries**, taking the EU-Turkey Statement<sup>4</sup> and cooperation with Libya and Niger as specific case studies. We examine the influence of these policies on the MS, specifically Greece (regarding the impact of the EU-Turkey Statement) and Italy and Malta (regarding the effects of cooperation with Libya and Niger). The analysis incorporates human rights and refugee law considerations. We also examine the **implications of funding allocations** under the EU Trust Fund for Africa (EUTF), and the Refugee Facility in Turkey, in light of EU and international law provisions, including evidence of how these policies are impacting stability, human rights, the rule of law and the day-to-day operations of stakeholders on the ground, including migrants, civil society, and border authorities in third countries.

The **main goal** is to **test the correct application of EU law** throughout the study, having regard to increased allegations of human rights violations, undue criminalisation, and complicity in atrocity crimes committed against migrants at sea, stranded in Libya, or contained in Niger and Turkey. We **assess the role of EU agencies**, particularly Frontex and the European Asylum Support Office (EASO), **as well as bilateral or multi-lateral initiatives** between the MS (e.g. ad hoc relocation, or the envisaged 'return sponsorships') to confront the mounting challenges at the common external borders of the EU. In so doing, we incorporate adherence to the principle of solidarity and fair sharing of responsibility (Article 80 TFEU) as a horizontal concern.

<sup>2</sup> New Pact on Migration and Asylum, COM(2020) 609 final, 23.9.2020 ('New Pact on Migration and Asylum').

<sup>3</sup> [UN Global Compact on Refugees](#), (2018) A/73/12 (Part II) ('GCR') and [UN Global Compact for Safe, Orderly and Regular Migration](#), (2019) A/RES/73/195 ('GCM').

<sup>4</sup> EU-Turkey Statement, [18.3.2016](#).

## 1.2 Scope and Structure

**Chapter 2** undertakes a detailed survey of existing and planned EU legislation in the areas of migration, asylum and return, paying particular attention to implementation flaws and lessons so far. We analyse the **state of play of EU migration policy**, including economic and labour migration, family reunification, and integration-fostering measures, like the long-term residence directive. We undertake an overall assessment with reference to existing evaluations and explore links with irregular migration policy, its effect on access to protection, and the so-called asylum-migration nexus. The chapter also provides an **assessment of the CEAS reform**, taking account of commentary, previous evaluations, and implementation reports and the amended and new proposals put forward by the European Commission in the **New Pact on Asylum and Migration**. The examination of EU migration policy instruments and the CEAS reform is performed in light of international and EU legal standards of human rights and refugee protection.

**Chapter 3** provides the overall **picture at the external borders** of the EU, with a focus on the Mediterranean, from the outbreak of the refugee crisis in 2015 up to the current coronavirus pandemic. It evaluates **trends** in border crossings and asylum applications, incorporating **statistical and qualitative data**, including by EUROSTAT, EASO, Frontex and FRA as well as IOM and UNHCR. We assess the evolving **role of EU agencies**, analysing trends such as joint implementation practices (e.g. at hotspots in Italy and Greece), coordination of MS cooperation (e.g. through the relocation programme) and the emergence of new monitoring functions. In this connection, we explore the impact of **Article 80 TFEU** and the principle of solidarity and fair sharing of responsibility in MS responses. We scrutinise the **effect of Covid-19** with a view to elucidating the impact of health protocols, quarantine measures and emergency support adopted to alleviate increased pressures at the common external borders of the EU. The overall purpose is to introduce the main issues that subsequent chapters address in detail, setting the scene to establish whether or not EU and international law obligations are correctly upheld in practice.

**Chapter 4** provides an overview of the development and current status of **SAR capacities in the Mediterranean**. We pay particular attention to joint **maritime operations**, including *Poseidon* in the Aegean and *Themis* in the Central Mediterranean, as well as the EUNAVFORMED mission *Sophia* and its successor *IRINI*. We define **SAR obligations** under international law and equivalent provisions under EU law and assess the extent to which SAR can be characterised as a **pull factor** for irregular migration. We take into consideration the duties to provide assistance and to ensure disembarkation at a 'place of safety', bearing in mind the **human rights** of 'boat migrants'. We examine allegations of human rights violations in this context, including irregular pushbacks and other infringements of the prohibitions of *refoulement* and collective expulsion, paying particular attention to the specific contribution of EU actors to any such violations so as to determine their compatibility with EU and international law obligations. Against this background, we evaluate the practicability of options for a **disembarkation mechanism** that fulfils the requirements of EU and international law, taking account of past initiatives, such as the **Malta Declaration**, and **ad hoc arrangements** mobilised in support of Italy, Malta and Spain. Measures adopted since the 2015 crisis and during the pandemic, including port closures, 'privatised pullbacks', 'aerial *refoulement*', the establishment of 'floating' hotspots at sea, or the suspension of the right to asylum are assessed for compliance with the relevant standards. In so doing, we take account of recommendations by the Council of Europe, UNHCR, IOM and the European Commission on disembarkation and reception in Covid-19 times and carry out an **analysis of relevant proposals under the New Pact**. Cooperation arrangements with third countries for preventing boat departures towards the EU are also explored, complementing the analysis in Chapter 6.

**Chapter 5** investigates one of the key trends emerged in the aftermath of the 2015 crisis and entrenched during the Covid-19 pandemic. The **criminalisation of humanitarian assistance to irregular migrants** is an EU-wide phenomenon with particularly insidious consequences for 'boat migrants'. It is also a longstanding preoccupation of the LIBE Committee. This chapter, therefore, updates past studies for the European Parliament on this issue, taking stock of current developments, particularly at sea, considering the societal impact of criminalisation measures on rescuers, rescuees, and the broader public. We assess the effects of these measures in terms of the rule of law, fundamental rights, and democracy at large. We adopt a broad understanding of criminalisation, in keeping with the '**policing humanitarianism**' framework,<sup>5</sup> including instances of criminal punishment, as well as other restrictive measures, such as the seizure of ships, police investigations, detention, etc., which limit the capacity of civil society organisations to act freely and perform rescue. Related issues of mistrust in EU and MS authorities, the impact of public narratives, and the lived experiences of rescuers, rescuees, and their support networks, are taken into consideration to allow for nuanced findings.

**Chapter 6** deals with the **external dimension of migration and border policy**, which has gained special prominence since the 2015 crisis. Cooperation with third countries constitutes the most important element and appears to play a very significant role in the Commission's plans regarding the **New Pact on Asylum and Migration**. This chapter assesses the overarching framework, mapping the EU priorities and main strategies and identifying their implications. The chapter focuses on the human rights impact of existing and developing forms of cooperation with third countries, including **financial support**. Particular attention is paid to **informalised, soft-law tools**, adopted for the acceleration of returns, the prevention of refugee flows, or the joint enforcement of external border controls. We have regard to their enhanced potential to erode the enforceability of legal obligations, to downgrade democratic accountability, and to generally undermine the rule of law — which are constitutional, founding values of the Union, required to guide both its internal and external action in every policy area (Articles 2 and 21 TEU). **Three case studies** are used to assess in detail the effects of this cooperation: (1) The **EU-Turkey Statement**; (2) **cooperation with Libya**; and (3) the EU's **engagement with Niger**.

With regard to **Turkey**, the chapter maps out EU-Turkey relations in the area of migration, asylum, and border control, encapsulated in the **EU-Turkey Statement**. It scrutinises the **elements and workings** of the Statement and identifies its **implications**. We pay particular attention to the knock-on effect on asylum applications that the implementation of the Statement has had **in Greece** and thus on the overall hotspot scheme in the Greek islands. Developments since the outbreak of the **Covid-19 pandemic** are also examined, including the suspension of the right to asylum by Greece, and allegations of human rights violations at border points. The chapter also evaluates the situation of refugees **in Turkey**, undertaking a human rights appraisal of the conditions they endure and assessing compliance with 'safe third country' (STC) criteria. We pay particular attention to instances of pushbacks at sea, *refoulement* to Syria and other neighbouring countries, and to collective expulsions, border violence, and forced returns by Turkey. The effect of EU support, including **financial allocations** to the Refugee Facility, is considered in detail to determine conformity with EU and international law and to establish potential legal responsibility.

Regarding **Libya and Niger**, as top priority countries on the Central Mediterranean route, the chapter tracks the **origins and effects of EU cooperation**. We start by mapping the different **actors** and **components**, including Frontex, the EUNAVFORMED operations, the EU Border Assistance Mission

<sup>5</sup> Carrera, Mitsilegas, Allsopp and Vosyliute, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing, 2019).

(EUBAM),<sup>6</sup> and EUCAP Sahel mission.<sup>7</sup> The **human rights** situations in Libya and Niger provide context to our assessment. **Covid-19** is also taken into account, as an aggravating factor in both countries. Against this background, we scrutinise pushbacks, pullbacks and other *refoulement* allegations; risks to life at sea, while in detention, and in the desert; and border policing practices, bearing in mind freedom of movement entitlements under the Economic Community of West African States (ECOWAS) Protocols.<sup>8</sup> We consider whether Libya and Niger can be considered safe third countries in the EU legal sense and what the implications are otherwise. We identify and assess the main **projects** related to **migration management, asylum capacity-building** and **border control** in both countries, including cooperation with the **Libyan Coastguard** (LYCG), the establishment of a **Joint** (Spain/France/Niger) **Investigation Team** (JIT) of migration-related offences, and the launch of an **Emergency Transfer Mechanism** (ETM) for displaced persons out of Libya. The specific impact of EUTFA allocations is paid close attention to determine compatibility with EU and international legal frameworks.

**Chapter 7** summarises findings and **recommendations** for the European Parliament's consideration on specific means and measures to adopt in line with the study's **conclusions**. It identifies the main issues and problems and ways in which they should be addressed so that the future framework under the New Pact on Asylum and Migration delivers 'a more resilient, more humane and more effective ... system', in line with the European Commission's stated vision.<sup>9</sup>

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<sup>6</sup> [EU Border Assistance Mission in Libya](#).

<sup>7</sup> [EUCAP Sahel - Niger](#).

<sup>8</sup> Protocol relating to Free Movement of Persons, Residence and Establishment, [ECOWAS/979.A/P.1/5/79](#).

<sup>9</sup> Commission Work Programme 2020, COM(2020) 37 final, 29.1.2020, p. 8; [Political Guidelines for the Next European Commission 2019-2024](#), pp. 15-16.

## 2. STATE OF PLAY OF EU LEGISLATION: A NEW PACT ON MIGRATION AND ASYLUM

### KEY FINDINGS

- The spike in arrivals in 2015 showed the limitations in the design and implementation of EU asylum and return policies, most notably a structural solidarity deficit.
- Overall, there was limited progress towards a more holistic approach to migration.
- Legal migration policy continued to be less advanced than asylum and return policies.
- A four-year negotiation stalemate (2016-20) on central issues reveals deep political rifts on refugee protection, interlinked with rule of law backsliding in some MS.
- The legal migration *acquis* covers different types of migration channels corresponding to different categories of migrants, rather than adopting a general approach. However, a fitness check of the relevant directives in 2019 considered them 'fit for purpose'.
- The Family Reunification Directive did not result in harmonising MS' national rules due to the abundance of discretionary 'may' clauses in the text, which has resulted in disparate interpretations and continuous efforts to restrict its scope of application.
- The number of migrants who have acquired long-term residence (LTR) status has been limited to date: 3.1m in 2017, i.e. less than half of those holding a national LTR permit.
- The limitations of EU labour migration policy are linked to the principle of subsidiarity: supporting intra-EU mobility of workers and increasing the attractiveness of the EU by enlarging the labour market plea for a common policy at EU level; sovereignty concerns and the absence of a unified EU-wide labour market, plea for MS action.
- Legal entry channels, such as protected-entry procedures and humanitarian visas, are not covered by EU law, despite the efforts of the European Parliament. There has been some progress with resettlement, but it remains a discretionary act.
- The most pronounced problems in EU asylum policy stem from the limits of legislative harmonisation in bringing about uniform, or at least comparable, outcomes.
- Dublin as currently designed does not aim to share responsibility fairly between MS, allocating most responsibility to MS at the EU's external maritime borders in practice, notwithstanding that fair sharing is required under EU law.
- While the EU has engaged in voluntary and programmatic responsibility sharing commitments at the global level through the UN Compact on Refugees, in practice it continues to institutionalise containment and externalisation in its external relations.
- The Return Directive was initially criticised, but its implementation and judicial application have constitutionalised the guarantees for returnees provided for in its text.



## 2.1 Introduction

The spike in arrivals during the summer and early autumn of 2015 highlighted **the limitations inherent in the legal design and implementation modes of EU asylum and return policies**, most notably the existence of a **structural solidarity deficit**.<sup>10</sup> The Mediterranean region was the epicentre of these developments. These arrivals overwhelmed the EU and **generated a crisis discourse as well as crisis responses** that persist today,<sup>11</sup> such as emergency relocation for the benefit of Greece and Italy,<sup>12</sup> the roll out of the hotspot approach for migration management,<sup>13</sup> and the release of significant amounts of emergency EU funding from multiple sources.<sup>14</sup> They spurred increased administrative integration that manifested mainly through the further empowerment, whether *de facto* or *de jure*, of EU agencies with executive power.<sup>15</sup>

At the same time, **legal migration policy continued to be less advanced** than asylum and return policies. This is because this policy field is extremely politically sensitive for MS, as it refers to one of the defining components of statehood (i.e. a population) and entails a key attribute of sovereignty (i.e. control over entry/exit from State territory). This is also why the transition from the intergovernmental to the supranational method in this area only took place in 2009 with the Lisbon Treaty. Both legal migration channels and legal pathways to protection (e.g. refugee resettlement) remain meagre. This has contributed to the proliferation of mixed migration flows to the EU (i.e. irregular arrivals of international protection seekers and migrants), which compounds the difficulty in policy delivery and implementation.

Beyond the immediate emergency-driven responses, the European Commission launched a series of legislative initiatives to structurally amend EU asylum policy.<sup>16</sup> Some of these proposals, such as the reform of qualification for international protection,<sup>17</sup> or reception,<sup>18</sup> form the basis of ongoing negotiations. Other proposals, such as the reform of the responsibility allocation system for the

<sup>10</sup> Tsourdi, 'The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System', in Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press, 2020) 191; see Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 Common Market Law Review 1545; Den Heijer, Rijpma, and Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607.

<sup>11</sup> European Commission, Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration, COM(2015) 490 final, 29.9.2015.

<sup>12</sup> 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, [2015] OJ L239/146 ('1st Emergency Relocation Decision'); 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, [2015] OJ L248/80 ('2nd Emergency Relocation Decision').

<sup>13</sup> European Commission, 'Managing the Refugee Crisis' (n 11), Annex II.

<sup>14</sup> By August 2018, a total of €734,474,723 in emergency funding under AMIF had been awarded. See European Commission, Managing the Refugee Crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration, COM(2015) 510 final, 14.10.2015, and updated Annex 8, 25.6.2018.

<sup>15</sup> See analysis in Chapter 3.

<sup>16</sup> Legislative instruments as part of the European Agenda on Migration [are accessible here](#).

<sup>17</sup> Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466, 13.7.2016.

<sup>18</sup> Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, 13.7.2016.

examination of asylum applications,<sup>19</sup> have been superseded by the new logic introduced by the New Pact on Migration and Asylum and new legislative proposals.<sup>20</sup>

A four-year negotiation stalemate (2016-20) on central issues reveals **deep political and ideological rifts on refugee protection**. These rifts are interlinked with rule of law backsliding in some MS. For example, Hungary has *de facto* dismantled its national asylum system and the Court of Justice of the EU (CJEU) has found that it has violated a number of asylum-related obligations, as well as obligations under the return *acquis*.<sup>21</sup> More broadly, the tension between upholding refugee protection and deflecting protection obligations to third countries, a constant in the evolution of EU asylum policy,<sup>22</sup> has resurfaced with an increased intensity since 2015. The EU and its MS are pursuing externalisation with renewed zeal, e.g. through the introduction of negative conditionality between mobility and legal migration opportunities and control-oriented commitments,<sup>23</sup> and through funding, as discussed in Chapter 6.

In the following sections, we provide a critical overview of developments in EU legal migration, asylum and return policies, with an emphasis on their legislative components. We **assess developments** in these policies **based on the 'holistic approach to migration'** advocated by the European Parliament.<sup>24</sup> Chapter 3 complements this picture by contextualising developments in the Mediterranean, drawing from practice on operationalising solidarity and the increasing role of EU agencies, and focusing on the impact of the Covid-19 pandemic on the ground.

## 2.2 Legal Migration policy

**The EU *acquis* covers different types of legal migration channels through several directives corresponding to different categories of migrants:** family members, workers, students, and forced migrants understood as asylum seekers. **Workers are divided into several categories (researchers, highly skilled, seasonal, and intra-corporate transferees) that do not cover every type of worker, in particular those considered low and medium skilled.** The instruments concerned contain rules regarding the admission of migrants to the territory of MS as well as their rights once admitted. Moreover, the EU has adopted the long-term residence (LTR) Directive, regulating the passage from temporary migration to permanent settlement as a tool for the integration of migrants into their host MS.

### 2.2.1 Family Reunification

The Directive on Family Reunification was adopted in 2003,<sup>25</sup> after three years of difficult negotiations within the Council. Family reunification can be seen either as the expression of an individual right or as

<sup>19</sup> Proposal for a Regulation of the European Parliament and of the Council 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), COM(2016) 270 final, 4.5.2016.

<sup>20</sup> Legislative instruments as part of the New Pact on Migration and Asylum [are accessible here](#).

<sup>21</sup> See among the rich case law of the CJEU, Joined Cases C-715-17, C-718/17 and C-719-17, *European Commission v. Poland, Czech Republic and Hungary* [2020] ECLI:EU:C:2020:257; Joined Cases C-924/19 and C-925-19, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* [2020] ECLI:EU:C:2020:367; and Case C-808/18, *Commission v. Hungary* [2020] ECLI:EU:C:2020:1029.

<sup>22</sup> Tsourdi and Costello, 'The Evolution of EU Law on Refugees and Asylum', in Craig and de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, forthcoming), ss 3C, 'Compacts, Deals and the Flight from the Law'.

<sup>23</sup> Reform of the EU Visa Code with Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), [2019] OJ L 188/25.

<sup>24</sup> European Parliament, Resolution of 16 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)) ('2016 Mediterranean Resolution').

<sup>25</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L 251/12.



a mechanism of migration management by the State concerned. Despite its title suggesting it is about a right to family reunification, the directive leaves MS considerable room to manoeuvre, which fits the sovereigntist migration management paradigm.

**The Directive did not result in harmonising MS' national rules due to the abundance of discretionary 'may' clauses in the text.** Neither the definition of family members, nor the conditions to be fulfilled to benefit from family reunification are harmonised. While some MS may require the family to meet all conditions related to accommodation, sickness insurance, financial resources, and even integration, others may only request proof of family ties. One example of a restrictive policy is the imposition of integration conditions, such as a language and a civic test *before* admission to the territory, as required in The Netherlands.<sup>26</sup> **This is the opposite of the traditional view of family reunification, which is supposed to function as an integration mechanism, rather than as a reward for proving 'integrability' in the host MS.**

**Paradoxically, MS can follow a very restrictive or a very liberal policy on the basis of the same provisions,** which shows the low level of harmonisation achieved. Even the creation of a right to family reunification following the Directive's title is doubtful, as the conditions that the holder must satisfy leave abundant discretion to MS authorities. Moreover, the Directive allows MS to adopt more favourable provisions in their domestic legislation, and even makes some such provisions mandatory for refugees (but not for subsidiary protection beneficiaries). Furthermore, the instruments on researchers, highly skilled workers, and intra-corporate transferees, discussed below, contain derogations to the Directive. **It is thus clear that family reunification is not harmonised across the EU.** These different regimes of family reunification may lead to discrimination between the different categories of migrants recognised under EU law.

Several MS have introduced progressively more demanding conditions under the Directive, contributing to a restrictive trend in the EU. The CJEU has limited these conditions, ruling that they are authorised under EU law as long as they do not make family reunification exceedingly difficult.<sup>27</sup> **This evolution has transformed the Directive into a minimum standard. Despite that, the Commission does not envisage proposing amendments to the current regime** for the Lisbon objective of achieving a 'common policy' to be realised. In its two reports on the implementation of the Directive, of 2008 and 2019 respectively,<sup>28</sup> the Commission announced that it would launch infringement procedures against MS in cases of incorrect transposition or misapplication, including violations of human rights. No cases have yet been brought to the Court of Justice, although this does not mean that the Commission has not initiated discussions with MS that may have led to solutions without the need to start legal proceedings.

**Any plans to amend the directive will be hard to realise,** even if this may have been the Commission's hope when it pushed for the adoption of the Directive as a minimum standards instrument in 2003. The political climate does not seem favourable to a recast process aiming at higher standards; the New Pact does not mention Directive 2003/86 at all. The policy dynamic regarding the evolution of standards on family reunification will rely upon the case law of the CJEU, which has been

<sup>26</sup> Van Oers, Ersbøll, and Kostakopoulou, 'Mapping the Redefinition of Belonging in Europe', in van Oers, Ersbøll, and Kostakopoulou (eds), *A Re-definition of Belonging? Language and Integration Tests in Europe* (Brill, 2010) 302.

<sup>27</sup> CJEU, Case C-153/14, K & A [2015] ECLI:EU:C:2015:453.

<sup>28</sup> Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610 final, 8.10.2008; and Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, COM(2019) 162 final, 29.3.2019.

cautious in this very sensitive area, as well as possible infringement procedures eventually launched by the Commission. The Commission employed another tool in 2014, providing soft-law guidance on the correct interpretation and implementation of the Directive.<sup>29</sup> All this means that the role the European Parliament may play in the area of family reunification in the near future remains limited.

### 2.2.2 Long-Term Residence

The LTR Directive, adopted in 2003,<sup>30</sup> aims to integrate migrants into their host MS. Its primary goal is to consolidate their status by limiting the risk of expulsion. **By acquiring LTR status, migrants transition from a temporary to a permanent right to stay.** This status can be considered a step towards full integration for third country nationals (TCNs), before they acquire the citizenship of their host MS. The LTR Directive was revised in 2011 to favour the integration of persons benefiting from international protection in the EU.<sup>31</sup> While refugees and subsidiary protection beneficiaries were initially excluded from the scope of the Directive, they now can acquire LTR status. Half of the period related to the asylum procedure, or its entirety if it exceeds 18 months, counts toward the five-year period required for the acquisition of LTR status.

**The first goal of the LTR Directive is to provide migrants with a more stable status within the Union** than the temporary right to remain attached to national short-term permits. This is achieved by providing them with more rights through extending the **principle of equal treatment** of EU citizens in eight key areas (employment, education, recognition of degrees, social security and assistance, tax benefits, access to goods and services including social housing, freedom of association and affiliation to trade unions, and freedom of movement throughout the entire territory), with the caveat that MS may restrict equal treatment to a certain extent, in particular regarding social protection. The **second goal** is to **extend freedom of residence across the EU** for stays of more than three months to long term residents, which is otherwise available only to EU citizens — complementing and expanding the right to travel for up to three months in every six-month period that TCNs derive from the Schengen *acquis*.

**The number of migrants acquiring LTR status has been quite limited to date. Around 3.1 million TCNs held European LTR status in 2017, i.e. less than half of those holding a national LTR permit.**<sup>32</sup> This limited number of LTR status holders EU-wide is apparently due to the fact that the Directive authorises MS national permit schemes to have substantially the same remit, so that many TCNs perceive no added value in acquiring EU status in parallel to the national one from their host MS. This issue is similar to the one arising from the Blue Card Directive, about which there is also a discussion on the possibility of maintaining national schemes for highly skilled migrants in parallel to the EU-wide mechanism: one of the main issues blocking the negotiations between the Council and the Parliament for the past four years.

Instead of the radical solution of prohibiting parallel schemes at the national level, which would deprive MS of the flexibility of their domestic rules, an alternative would be to require MS **to issue EU LTR permits on top of their national ones when applicants fulfil the required conditions of each of**

<sup>29</sup> Communication on guidance for the application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, 3.4.2014.

<sup>30</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] OJ L 16/44. The consolidated version is available [here](#).

<sup>31</sup> 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 Text with EEA relevance, [2011] OJ L132/1.

<sup>32</sup> Commission Staff Working Document: Fitness Check on EU Legislation on legal migration, SWD(2019) 1056 final, 29.3.2019, p. 19.

**the schemes.** This solution might entail a certain degree of complexity, but the combination of both statuses into a single administrative act would also avoid TCNs having two different cards. As a result, applicants would acquire both statuses, even if they only applied for one of them, so they could benefit from both simultaneously.

**The conditions for acquiring EU LTR status are:**

1. Having resided legally and continuously for five years prior to the application;
2. Having stable and regular resources sufficient to avoid depending upon the social assistance system of the host MS;
3. Having sickness insurance covering the risks for which nationals are normally covered; and
4. Complying, where applicable, with integration conditions in accordance with national law.

The first three conditions are mandatory, while the last is left to the discretion of MS. There is a further controversy about ‘**appropriate accommodation**’. While this element is not listed as a condition under Article 5 of the Directive, Article 7(1), 2<sup>nd</sup> indent, allows MS to require, as part of the evidence to be produced for acquiring LTR status, documentation with regard to suitable accommodation, which some MS have regulated very restrictively. This point should be clarified if the Directive is eventually revised.

MS can also impose **integration conditions on applicants for LTR** on top of the three aforementioned application conditions. While five years of continuous residence in a MS may be considered a sufficient indicator of integration, it may not seem unreasonable for domestic authorities to impose additional requirements to check the ‘real’ degree of integration of the applicant prior to delivering a LTR permit — as opposed to the imposition of integration conditions *before* admission for family reunification, which may be deemed disproportionate and too restrictive.

**The Directive is particularly weak regarding the extension of freedom of residence to long-term residents.** Chapter III of the Directive allows MS to set conditions for the exercise of an economic activity in an employed or self-employed capacity. MS may impose a labour market test on long-term residents willing to work in another MS, in line with the principle of European preference or priority, as if they were applying for a work authorisation for the first time from abroad. This is obviously a severe limitation of the possibility for long-term residents to work in another MS, indicating that the Area of Freedom, Security and Justice (AFSJ) does not follow the rationale of the internal market and may defy economic logic.

Article 79(2)b) TFEU foresees measures regarding ‘the definition of the rights of TCNs residing legally in a MS, including the conditions governing **freedom of movement and of residence** in other MS’. While this provision does not have direct effect, it nevertheless imposes on the legislator the obligation to set conditions that respect the essence of freedom of residence across the Union. Even if no deadline is foreseen for this, more than ten years have already passed since the entry into force of the Lisbon Treaty; arguably, the time has come to progress on this point.

In the absence of real EU mobility rights for LTR workers, **LTR status remains a national, rather than a European** status, tailored around MS migration management systems, considering that:

- years spent in different MS do not count towards the five-year period condition;

- there is no mutual recognition of the status between MS,<sup>33</sup> so a long-term resident moving to another MS will lose LTR status and must stay a further five years to acquire a second LTR status in that MS, even if s/he will immediately enjoy equal treatment in the second MS as described above;
- long-term residents may have to fulfil integration measures in the second MS, if they were not subject to integration conditions in the first MS;
- access to the labour market of the second MS may be limited for a maximum of 12 months to the activities for which the persons have been accepted.

While the Commission suggested some amendments to the Directive in the first report on its implementation in 2011,<sup>34</sup> this was not the case in the second report of 2019,<sup>35</sup> where it merely stated it would continue to monitor MS' implementation. **The Commission only announced a revision of the LTR Directive when the New Pact on Migration and Asylum was presented in 2020**, on the basis that it is currently underused and does not provide an effective right to intra-EU mobility. The objective should be to create a true EU LTR status, in particular by **strengthening the right of long-term residents to move and work in other MS**. This can have positive ramifications in other areas, including asylum and irregular migration, since facilitating intra-EU mobility is bound to diminish secondary movements between MS in the medium and long terms. The Parliament has the potential to play a major role as co-legislator in this process. In this context, it could request independent expertise in a dedicated study to feed the debate.

### 2.2.3 Labour Migration

**The European labour migration system is based on demand rather than supply** and does not include point permits allowing migrants to enter on the basis that persons with a high score will find a job on account of their abilities. The legal basis for labour migration policy (Article 79 TFEU) prohibits the EU from fixing quotas, which are the preserve of MS. This limitation has not created a problem in practice, except in negotiations with third countries, where the Commission cannot offer a complete package and must refer to MS about the volume of labour migrants to be admitted into the EU.

In 2001, the Commission proposed a horizontal approach covering all categories of foreign workers in a single instrument.<sup>36</sup> The proposal was rejected outright by the MS. The Commission came back with a **Policy Plan based on distinguishing between different categories of workers**.<sup>37</sup> On this basis three Directives were adopted on highly skilled workers in 2009, intra-corporate transferees (ICTs) in 2014, and seasonal workers in 2014, on top of the single permit Directive in 2011. Another Directive addressing the specific category of researchers was adopted in 2005 and reviewed in 2016. Therefore, the scope of EU law regarding labour migration does not cover low and medium skilled migrants

<sup>33</sup> See further Moreno-Lax, 'Mutual (Dis-)Trust in EU Migration and Asylum Law: The Exceptionalisation of Fundamental Rights', in González Pascual and Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021) 77.

<sup>34</sup> European Commission, Report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, 28.9.2011.

<sup>35</sup> European Commission, Report on the implementation of Directive 2003/109 concerning the status of TCNs who are long-term residents, COM(2019)161, 29.3.2019.

<sup>36</sup> European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final, 11.7.2001.

<sup>37</sup> European Commission, Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005.

(except seasonal workers), job seekers (except students and researchers), self-employed persons, like entrepreneurs and creators of start-ups, international service providers (except ICTs), or investors.

The policy debate about the **limitations of the EU policy on labour migration relates to the principle of subsidiarity**: supporting the mobility of workers and increasing the attractiveness of the EU by enlarging the labour market to cover all MS and foster smart, sustainable and inclusive growth<sup>38</sup> plea for a 'comprehensive labour migration policy' adopted at EU level, as favoured by the European Parliament.<sup>39</sup> On the contrary, the **absence of a unified EU-wide labour market** (proven by the limited use that EU citizens make of the freedom of movement of workers) and **of a strong EU employment policy** that an economic migration policy could complement, are strong arguments for leaving the policy in the hands of MS and allow for national differences and idiosyncrasies.<sup>40</sup>

Apart from establishing a common set of minimum rights, the **Single Permit Directive** focuses on the procedure of admission of TCN workers.<sup>41</sup> Its aim is to facilitate this procedure by merging the residence and work permits in one administrative act. The Directive is based on a single application at the beginning of the procedure and a single permit issued at the end of a successful application. However, the procedure can still involve different authorities competent for residence or work, so one key limitation is that appeals against a refusal must generally be addressed to different judges, depending on their subject matter (residence or work).

An important question is whether the single permit system has affected the processing times of applications by national administrations. Article 5(2) of the Directive only requires the authority concerned to adopt a decision 'as soon as possible and in any event within four months of the lodging of the application'. This time limit is longer than the three months generally set by immigration Directives. The Commission has announced in the New Pact that it will conduct '[a] review of the Single Permit Directive', deeming that it 'has not fully achieved its objective to simplify the admission procedures for all third-country workers'. The revision will aim to simplify and clarify the scope of the legislation, 'including admission and residence conditions for low and medium skilled workers',<sup>42</sup> going beyond the current regime.

By contrast, the Directive for the admission of **highly skilled workers**, generally called the **Blue Card Directive**, aims at attracting more of this category of workers to the EU. The basic conditions for workers to be admitted under the Blue Card scheme are: A work contract of at least 12 months; a degree after three years of higher education, or five years of comparable professional experience; and a salary of at least 1.5 times the average gross annual salary in the MS concerned.

It is commonly admitted that the Blue Card Directive has been a failure. Very few Blue Cards have been delivered by MS, which prefer to make use of their domestic provisions, as the Directive allows for national schemes to run parallel to the Blue Card system. In 2019, for instance, only 36,806 Blue Cards were delivered, i.e. 30% of the total number of permits delivered to highly skilled workers by MS, with Germany alone issuing 80% of them.<sup>43</sup> The provisions of the Directive on intra-EU mobility have no

<sup>38</sup> European Commission, Europe 2020: A European strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, 3.3.2010.

<sup>39</sup> European Parliament, 2016 Mediterranean Resolution, paras 121-123.

<sup>40</sup> OECD and EU, Recruiting Immigrant Workers: Europe (OECD Publishing, 2016), p. 145.

<sup>41</sup> Directive 2011/98 of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, [2011] OJ L343/1, 23.12.2011.

<sup>42</sup> New Pact on Migration and Asylum, p. 26.

<sup>43</sup> Eurostat: Residence Permits – [statistics on authorisations to reside and work](#).



added value, since a Blue Card holder in one MS willing to move to another MS may have to fulfil the same conditions as a TCN applying for a first Blue Card from abroad.

Although the Commission considered in its 2014 report on the implementation of the Directive that '[o]n the basis of the available information and in view of the short time of application no amendments [were to be] proposed',<sup>44</sup> it still decided to table a new proposal to recast the Directive in 2016.<sup>45</sup> After four years of difficult negotiations, an agreement (still to be confirmed officially by the co-legislators) has been reached on 17 May 2021.<sup>46</sup>

The compromise text may substantially improve the current situation, in line with the European Parliament's 'holistic approach' to migration.<sup>47</sup> Regarding the basic conditions, the length of the required work contract has been reduced to six months; the requirement of five years professional experience is reduced for information and technology managers and professionals down to three years; and the salary threshold has also been reduced to a minimum of 1.0 times and a maximum of 1.6 times the average gross annual salary.

The possibility for MS to keep national schemes is maintained, but it will no longer be possible to treat Blue Card applicants or holders less favourably than highly skilled workers employed under a national scheme in a number of areas (procedural rights, application fees, fast-track applications, labour market access, equal treatment and family reunification), albeit excluding the substantive conditions for the delivery of a Blue Card. The provisions for mobility will equally improve as a result of the recast Directive. Short-term mobility for a maximum of 90 days will function on the basis of mutual recognition of Blue Cards for business activities. Long-term mobility will require 12 (instead of 18) months of residence in the first MS (or six months in case of subsequent mobility). Finally, the Blue Card holder will be authorised to work in a second MS 30 days after a successful application for a second Blue Card. The competition between the EU Blue Card and national schemes should accordingly diminish overtime.

As a consequence of the forthcoming reform, the number of Blue Card holders should increase with the improvements brought by the new Directive, which have gathered the support of the European Parliament. It should, in particular, be noticed that beneficiaries of international protection will fall within the scope of the new Directive.

For its part, the Directive on **intra-corporate transferees** aims at reducing the administrative burden of multinational companies by facilitating the transfer of personnel (managers, specialists, and trainees) between their different undertakings when one is located outside the Union, as well as between two undertakings located within the EU.<sup>48</sup> This sort of temporary migration concerns a very limited number of persons. The provisions regulating intra-EU mobility are particularly interesting because they are based on the mutual recognition of authorisations between MS (a simple notification to the destination MS can suffice).

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<sup>44</sup> European Commission, Communication on the implementation of Directive 2009/50 on the conditions of entry and residence of TCNs for the purpose of highly qualified employment, COM(2014) 287 final, 22.5.2014, p. 10.

<sup>45</sup> European Commission, Proposal for a directive on the conditions of entry and residence of TCNs for the purposes of highly skilled employment, COM(2016) 378 final, 7.6.2016.

<sup>46</sup> Confirmation of the final compromise text with a view to agreement, Council doc. 8585/21, [19.5.2021](#).

<sup>47</sup> European Parliament, 2016 Mediterranean Resolution, paras 131-133.

<sup>48</sup> Directive 2014/66 of 15 May 2014 on the conditions of entry and residence of TCNs in the framework of an intra-corporate transfer, [2014] OJ L157/1, 27.5.2014.

The Directive on **seasonal workers** is the only legislative instrument adopted to date that concerns non-skilled migration in sectors like agriculture and tourism.<sup>49</sup> It combines provisions regulating the admission procedure and the rights of seasonal workers (change of employer, accommodation, facilitation of complaints, etc.) that are important in combatting exploitation — another chief concern of the European Parliament that requires attention for compliance with the holistic approach to migration.<sup>50</sup> Seasonal migration is the best example of circular migration, as the workers are supposed to go back and forth between their country of origin and their host MS, where they can only stay between five and nine months in every twelve-month period.

Finally, the **researchers and students Directive** aims at making the EU an attractive destination for these two categories.<sup>51</sup> Its innovative admission mechanism for researchers is based on a host convention signed between the research organisation and the researcher, where all pertinent issues are addressed (object and duration of the stay, financial resources, etc.), while the ministry competent for migration only checks the aspects related to public order and public security. Regarding students, also considered temporary migrants that the EU wants to attract, the Directive regulates the basic admission conditions (being registered at a high education establishment before applying for admission to the territory and proof of sufficient financial resources) as well as the right to work for a minimum of 15 hours per week. The Directive also affords students a mobility right based on a simple notification to the second MS, although its applicability is limited to studies covered by multilateral agreements like Erasmus. Interestingly, the Directive indirectly creates a job-seeker permit by affording researchers and students the right to stay for up to nine months after the end of the research project or studies concerned in order to seek employment or set up a business. The efficacy of the scheme, however, is in question. Despite the existence of these instruments and the Blue Card Directive, the Commission has underlined in the New Pact that ‘the EU is currently losing the global race for talent’.<sup>52</sup>

A **fitness check** of all the legal migration Directives was completed in 2019.<sup>53</sup> The instruments were considered largely ‘fit for purpose’. The check identified several positive effects proving the added value of the EU framework: a certain degree of harmonisation of admission conditions; simplified administrative procedures; a right to intra-EU mobility (which was deemed too limited for researchers and intra-corporate transferees); and improved recognition of the rights of TCNs, who are to be treated equally to EU nationals in important areas — note, however, that different treatment of different categories of TCN workers is inbuilt in EU law, depending on the group to which they belong under the existing *acquis* (e.g. seasonal workers compared to intra-corporate transferees), which can be constitutive of discrimination. Nonetheless, the check emphasised that the current legal framework has a limited impact on the overall migration challenges Europe faces, identifying some critical shortcomings. For example, it highlighted the need to ensure stronger enforcement of the Directives’ provisions, and mentioned the limited material scope of the existing instruments (e.g. they do not cover problems occurring in migration phases such as entry visas) and their restricted personal scope (e.g. they do not include major categories of TCNs, as discussed above) that is an issue to be carefully evaluated on the basis of the principle of subsidiarity.

<sup>49</sup> Directive 2014/36 of 26 February 2014 on the conditions of entry and stay of TCNs for the purpose of employment as seasonal workers, [2014] OJ L94/375, 28.3.2014.

<sup>50</sup> European Parliament, 2016 Mediterranean Resolution, paras 126-130.

<sup>51</sup> Directive 2016/801 of 11 May 2016 on the conditions of entry and residence of TCNs for the purposes of research and studies, [2016] OJ L132/21, 21.5.2016.

<sup>52</sup> New Pact on Migration and Asylum, p. 25.

<sup>53</sup> European Commission, Fitness check on EU legislation of legal migration, SWD(2019)1056, 29.3.2019, Executive Summary.

**Legal migration policy should not be viewed in isolation**, as it is linked to other policies, in particular external relations with third countries, which we examine in detail in Chapter 6. In order to persuade third countries to collaborate in the fight against irregular migration (in particular by signing readmission agreements), their own interests should also be taken into consideration, entailing a **win-win approach that benefits the Union, third countries, and their citizens**. Such an approach is supported by the Parliament as part of its holistic vision of migration policy.<sup>54</sup> In particular, third countries generally demand **more opportunities** for their citizens **to migrate to EU MS**, including means to avoid risking their lives when crossing transit countries and the Mediterranean on their way to Europe, in line with the UN Global Compact for Migration.<sup>55</sup> But, except for short-term visa facilitation, the EU cannot offer such allowances, as labour migration quotas are an exclusive competence of the MS (Article 79(5) TFEU). Besides, many MS remain reluctant to offer more migration possibilities to TCNs. Contrary to the way the issue is commonly presented in public discourse, it is not about opening brand new pathways for admission to the EU, as all MS have channels for most categories of migrants to gain access to their territories, but about **increasing the number of available places and facilitating the migration process**.

**Legal migration lags behind the rest of EU migration policy, with a limited *acquis* and little impact on migration flows.**<sup>56</sup> **The external dimension of this policy has not yielded significant outcomes** to date. The Global Approach to Migration (GAM) initially focused on Africa and the Mediterranean and did not deal with the issue of legal migration.<sup>57</sup> A mobility dimension was added in 2011, creating the Global Approach to Migration *and Mobility* (GAMM).<sup>58</sup> This introduced legal migration as a component of the GAMM, with a view to improving access to information on the rights and opportunities available to TCNs. **Mobility Partnerships** (MPs) have been signed with nine third countries under the GAMM.<sup>59</sup> While no evaluation has been carried out by the Commission, the MP concluded in 2013 with Morocco, for instance, has apparently produced no positive results regarding legal migration.<sup>60</sup> Between 2010 and 2016 the number of Moroccan seasonal workers in the EU actually dropped from 10,416 to 3,781 and the number of persons admitted for other remunerated activities fell from 43,334 to 6,283.<sup>61</sup>

Under the 2015 European Agenda on Migration,<sup>62</sup> which we also discuss in Chapter 6, a 'new policy on legal migration' was announced but limited mainly to the reform of the Blue Card Directive and the creation of a pool for the registration of prospective EU migrants. The 2019 progress report on the implementation of the Agenda mentions that five **migration pilot projects** are under way.<sup>63</sup> But scant information is available, beyond the fact that eight MS are involved in six projects with Egypt, Morocco, Tunisia, Nigeria, and Senegal. Among these, the High Opportunity for Mediterranean Executive

<sup>54</sup> European Parliament, 2016 Mediterranean Resolution (n 24).

<sup>55</sup> UN Global Compact for Safe, Orderly and Regular Migration (n 3).

<sup>56</sup> European Commission, Fitness check on EU legislation on legal migration, SWD(2019)1055, 29.3.2019.

<sup>57</sup> European Council, Presidency Conclusions, Global approach to migration: priority actions focusing on Africa and the Mediterranean, Council doc. 15914/1/05 REV 1, Annex I, 30.1.2006 ('GAM').

<sup>58</sup> European Commission, Communication on the global approach to migration and mobility, COM(2011) 743 final, 18.11.2011 ('GAMM').

<sup>59</sup> See List of [Mobility Partnerships](#).

<sup>60</sup> Joint declaration establishing a mobility partnership between the kingdom of Morocco and the European Union and its Member States, Council doc. 6139/13 ADD 1 REV 3, 3.6.2013.

<sup>61</sup> Guild, 'Negotiating with third countries under the new pact: carrots and sticks', [EU Migration Law](#), 27.11.2020.

<sup>62</sup> European Commission, Communication on a European agenda on migration, COM(2015) 240 final, 13.5.2015.

<sup>63</sup> European Commission, Progress report on the implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019, p.19.



Recruitment (HOMERe) offers 250 students or graduates the opportunity to do a short traineeship in a transnational company that has committed to consider employment opportunities in their country of origin.<sup>64</sup> Even if such initiatives can be assessed favourably in themselves, the very limited number of persons involved makes them **insufficient to generate incentives for third countries to collaborate with the EU or to offer a credible alternative to irregular migration** that would ‘allow migrants to use formal entry and exit channels instead of having to resort to criminal smuggling networks’.<sup>65</sup>

The New Pact on Migration and Asylum is equally unambitious. It proposes to create **Talent Partnerships** involving social partners and the private sector, to support legal migration and mobility in cooperation with key third countries to better match labour and skills needs in the EU. The idea is that these partnerships ‘combine direct support for mobility schemes for work or training with capacity building in areas such as labour market or skills intelligence, vocational education and training, integration of returning migrants, and diaspora mobilisation’. But no details have been provided.<sup>66</sup> This is to be coupled with the revision of the Blue Card Directive, the reform of the Single Permit Directive with the aim to cover admission and residence conditions of low and medium skilled workers, and the creation of an **EU Talent Pool** that ‘operate[s] as an EU-wide platform for international recruitment’.<sup>67</sup> The later initiative is similar to the one under the EU Agenda on Migration, with which there has been no evident progress since its introduction.

### 2.3 Asylum Policy

In the aftermath of the ‘refugee crisis’, the CEAS suffered from an implementation gap.<sup>68</sup> The legislative instruments on asylum adopted during 2011-13 failed to address the deficit of solidarity and kept the implementation modes of the CEAS almost unaltered. So, in 2016, the European Commission released several legislative proposals as part of the European Agenda on Migration to reform EU asylum policy. However, despite intense negotiations, no text was adopted. Overall, there was limited progress towards a more holistic model that ensures that ‘the CEAS becomes a truly uniform system’.<sup>69</sup> The external dimension of EU asylum policy *stricto sensu*, i.e. **legal entry channels and safe pathways to protection**,<sup>70</sup> **remained underdeveloped**.<sup>71</sup> Correspondingly, the **externalisation of protection obligations flourished**,<sup>72</sup> with the EU viewing cooperation with third countries largely instrumentally and favouring the deflection and deterrence of asylum flows.<sup>73</sup>

Against this background, the following subsections focus on four related issues: the substantive legislative *acquis* (2.3.1.); the functioning of the EU’s responsibility sharing system (2.3.2.); developments in legal entry channels (2.3.3); and the externalisation of protection obligations (2.3.4). Chapter 3 tackles two further transversal elements: the expanding role of EU agencies and associated challenges; and the operationalisation of the principle of intra-EU solidarity.

<sup>64</sup> Mobility Partnership Facility, Project implemented in the framework of the [EU pilot projects on legal migration](#).

<sup>65</sup> European Parliament, 2016 Mediterranean Resolution, para 101.

<sup>66</sup> New Pact on Migration and Asylum (n 2), p. 23.

<sup>67</sup> *Ibid.*, p. 26.

<sup>68</sup> European Parliament, 2016 Mediterranean Resolution, paras 28-42.

<sup>69</sup> European Parliament, 2016 Mediterranean Resolution, para 28.

<sup>70</sup> Moreno-Lax, ‘External Dimension’, in Peers et al, *EU Immigration and Asylum Law*, Vol 3 (2<sup>nd</sup> edn, Brill 2015) 617.

<sup>71</sup> See European Parliament, 2016 Mediterranean Resolution, paras 20-27.

<sup>72</sup> Moreno-Lax, *Europe in Crisis: Facilitating Access to International Protection*, (Discarding) Offshore Processing and Alternatives for the Way Forward, Red Cross EU Office ([February 2016](#)).

<sup>73</sup> European Parliament, 2016 Mediterranean Resolution, paras 91-97.

### 2.3.1. Substantive Legislative Acquis

The **substantive asylum acquis as it currently stands consists of four Directives**, one of which (the Temporary Protection Directive) is effectively defunct.<sup>74</sup> The three main Directives are the Qualification Directive (2011);<sup>75</sup> the Procedures Directive (2013);<sup>76</sup> and the Reception Conditions Directive (2013).<sup>77</sup> MS had two years as of the adoption of these instruments to transpose them in their national law. These are **complemented by a Regulation on responsibility allocation for the examination of asylum claims**, the Dublin III Regulation,<sup>78</sup> which is accompanied by the Eurodac Regulation, establishing a fingerprint database.<sup>79</sup> These instruments recast previous versions (adopted during 2001-2005) that envisaged only 'minimum standards', by definition allowing MS to adopt more favourable standards.<sup>80</sup> The dynamics of this harmonisation led to mixed outcomes. Although the result was not a complete 'race to the bottom',<sup>81</sup> MS sought to share restrictive practices and maintain some of their domestic standards. This led, for example, to the establishment of controversial provisions in the 2005 Asylum Procedures Directive, prompting concerns that this instrument normalised exceptional procedures.<sup>82</sup>

The **Lisbon Treaty sought to realise a CEAS mainly through further legislative harmonisation**. Amendments in the recast asylum instruments (adopted during 2011-13) strengthened the level of coherence between instruments. Now there are more cross-references, and increasingly the legal instruments are best understood if 'read together'.<sup>83</sup> The level of overall harmonisation is certainly higher than that afforded by the minimum standards legislation. The co-legislators specified several areas, such as the instruments' scope; addressed ambiguities, such as the detailed regulation of detention grounds and detention conditions;<sup>84</sup> and established procedural safeguards, most notably for Dublin transferees.<sup>85</sup>

Nevertheless, the compromises reached during **drawn-out negotiations undermined the harmonising potential of the recast instruments** in several ways. First, several exceptional clauses

<sup>74</sup> 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, [2001] OJ L212/12 ('TPD'); Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2017); and Durieux, 'Temporary Protection', in Costello, Foster, and McAdam (eds), *Oxford Handbook of International Refugee Law* (Oxford University Press, 2021).

<sup>75</sup> 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, [2011] OJ L337/9 ('2011 EU Qualification Directive').

<sup>76</sup> 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 [2013] OJ L180/60 ('2013 Asylum Procedures Directive').

<sup>77</sup> Council and European Parliament Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection, [2013] OJ L180/96 ('2013 Reception Conditions Directive').

<sup>78</sup> Council and European Parliament Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), [2013] OJ L180/31 ('Dublin III Regulation').

<sup>79</sup> 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, [2013] OJ L180/1.

<sup>80</sup> See, e.g., Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L326/13, Art 5.

<sup>81</sup> De Bruycker and Urbano Dias De Sousa (eds), *The Emergence of a European Asylum Policy* (Bruylant, 2004).

<sup>82</sup> Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles', in Baldaccini, Guild, and Toner (eds), *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law after 1999* (Hart Publishing, 2007) 151.

<sup>83</sup> Reception Conditions Directive 2013, Art 3(1) read together with Art 2(a) and Rec 13; Dublin III Regulation, Rec 10 and Art 2(c) read together with Art 3; Asylum Procedures Directive 2013, Rec 11 and Art 2(c) read together with Art 3(1).

<sup>84</sup> Reception Conditions Directive 2013, Arts 8, 10 and 11.

<sup>85</sup> Recast Dublin Regulation, Arts 3-6.

were retained or introduced in the recast instruments, such as the lengthy list of cases contained in the recast Asylum Procedures Directive that can lead to accelerated border procedures.<sup>86</sup> Second, the instruments contain legally vague notions that allow considerable discretion to MS in defining the scope of their obligations, for example the level of provision of material reception conditions when offered in the form of financial allowances or vouchers.<sup>87</sup> Finally, they include inconsistencies, such as where the recast Reception Conditions Directive allows for the reduction or withdrawal of material reception conditions while claiming to ensure ‘a dignified standard of living for all applicants’.<sup>88</sup> Moreover, the legislative measures embody contradictory objectives between protection and deflection and mobility and immobility.<sup>89</sup>

However, the most pronounced problems in EU asylum policy do not stem from failings in the substantive *acquis*.<sup>90</sup> Rather, they stem from the **limits of legislative harmonisation in bringing about uniform, or at least comparable, outcomes**. These divergences remain in many fields and are arguably most marked in the area of reception conditions. According to the Reception Conditions Directive, MS must provide asylum applicants with an adequate standard of living, which guarantees their subsistence and protects their physical and mental health.<sup>91</sup> However, MS have different levels of economic development and conceptualisations of welfare, so diverse protection standards exist in practice.

**Protection capacity limitations are coupled with ‘practice dumping’, i.e. using substandard reception conditions as a deterrent, particularly in MS at the external borders of the EU.** In a series of restrictive moves, which have intensified since 2015, the Hungarian government has openly sought to curtail access to asylum and to deter arrivals.<sup>92</sup> In May 2020, the CJEU rejected the **Hungarian practice** of depriving large numbers of asylum seekers of their liberty in substandard conditions in border transit zones for months while processing their applications.<sup>93</sup> Meanwhile the European Court of Human Rights (ECtHR) has examined dozens of Rule 39 applications concerning the deliberate starvation of persons in these zones.<sup>94</sup> **Greece** also engages in ‘practice dumping’. As early as 2011, the ECtHR identified structural deficiencies in the country’s reception conditions,<sup>95</sup> which were also confirmed by the CJEU.<sup>96</sup> These were due to a mixture of Greece’s inability to protect (the country was hard hit by the financial crisis) and its unwillingness to protect, or to fully implement CEAS reception norms. This led to MS suspending transfers back to Greece. This was not agreed on an EU-wide level, as the Dublin Regulation does not contain such a mechanism. The suspension was decided at the

<sup>86</sup> Asylum Procedures Directive 2013, Art 43(3); Asylum Procedures Directive 2013, Art 31(8). For another example, see Reception Conditions Directive 2013, Art 11(6).

<sup>87</sup> Reception Conditions Directive 2013, Art 17(5); for another example, see Art 19.

<sup>88</sup> Reception Conditions Directive 2013, Art 20; Peek and Tsourdi, ‘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’ in Hailbronner and Thym, *EU Immigration and Asylum Law Commentary* (2<sup>nd</sup> edn, Beck/Hart Publishing 2016).

<sup>89</sup> Moreno-Lax, ‘Life after Lisbon: EU Asylum Policy as a Factor of Migration Control’, in Acosta and Murphy (eds), *EU Justice and Security Law* (Hart Publishing, 2014) 146.

<sup>90</sup> For analysis of the compatibility of the EU asylum *acquis* with the 1951 Refugee Convention, see Tsourdi, ‘Regional Refugee Regimes: Europe’, in Costello, Foster, and McAdam (eds), *Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 352.

<sup>91</sup> Reception Conditions Directive 2013, Art 17(2).

<sup>92</sup> Nagy, ‘From Reluctance to Total Denial: Asylum Policy in Hungary 2015–2018’, in Stoyanova and Karageorgiou (eds), *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (Brill, 2018) 17.

<sup>93</sup> CJEU, Joined Cases C-924/19 and 925/19 PPU, *FMS and Others*. [2020] ECLI:EU:C:2020:367.

<sup>94</sup> See the case compilation by the Hungarian Helsinki Committee ([updated as of April 2020](#)).

<sup>95</sup> ECtHR, *MSS v. Belgium and Greece*, App No 30696, 21.1.2011.

<sup>96</sup> CJEU, Joined Cases C-411/10 and 493/10 *NS & ME* [2011] ECLI:EU:C:2011:865.

national level, either as a matter of generalised administrative practice or on a case-by-case basis. However, the suspension of transfers did not mean that also newly arrived asylum seekers were to be relocated from Greece. In order to get to another MS, they had to perform unauthorised, and often dangerous, secondary movements. Greece has slowly been improving its national asylum system. Supported by EU funding, it has implemented programmes to provide urban accommodation and cash assistance to growing numbers of asylum seekers.<sup>97</sup> Nevertheless, deficiencies in reception conditions persist throughout the country, particularly as a result of Covid-19 and the EU-Turkey Statement, as further discussed in Chapters 4 and 6.

**In addition, significant variations persist in relation to the recognition of refugees and subsidiary protection beneficiaries across EU MS**, in spite of two iterations of harmonising the substance and procedures of asylum. For example, in 2019 recognition rates for Afghan nationals ranged from 32% in Belgium to 97% in Switzerland.<sup>98</sup> Variations are even more pronounced with reception conditions. The responsibility allocation system, whose fairness towards asylum seekers is premised on the existence of harmonised recognition rates and comparable material conditions, fuels an implementation gap and incentivises non-compliance.

### 2.3.2. Responsibility Allocation

The EU **responsibility allocation system**, the 'Dublin system', is still based on the tenets of the 1990 Dublin Convention.<sup>99</sup> Little has changed regarding its main principles. The premise of the system is that a single MS is responsible for each application.<sup>100</sup> The Regulation provides a hierarchy of criteria for identifying the responsible MS.<sup>101</sup> The first criterion relates to unaccompanied minors and safeguarding family unity. However, such cases are rare, and studies on the implementation of the criteria have found that these two are seldom used in most countries.<sup>102</sup> This entails that responsibility rests with the MS primarily 'responsible' for the person's presence in the EU,<sup>103</sup> which, **in practice, means the MS of first irregular entry to the EU, which disadvantages MS at the external borders of the Union**. If the asylum seeker is not present in the territory of the 'responsible' MS, Dublin envisages that the MS where s/he is present may seek to transfer him/her back to the responsible country. However, as a matter of human rights and EU law, MS must abstain from such a transfer when there is a real risk of a breach of the prohibition of inhuman or degrading treatment.<sup>104</sup> States may also forego a transfer for any other reason, including on humanitarian and compassionate grounds.<sup>105</sup> Finally, Dublin purports to enable MS to employ STC practices, subject to the rules of the Asylum Procedures Directive.<sup>106</sup>

In practice, this 'first entry' allocation principle has 'always been more ruse than reality', as MS evade their Dublin responsibility (by not fingerprinting asylum seekers, for example) and asylum seekers

<sup>97</sup> UNHCR Greece, *ESTIA Accommodation Capacity Weekly Update*, [4.5.2020](#); and UNHCR Greece, *Cash Assistance Update: March 2020*, [15.4.2020](#).

<sup>98</sup> EASO, Annual Report on the Situation of Asylum in the European Union, 2020, p. 72.

<sup>99</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997), [1997] OJ C 254/1.

<sup>100</sup> Dublin III Regulation, Art 3(1).

<sup>101</sup> Dublin III Regulation, ch III.

<sup>102</sup> See, e.g., ECRE, 'The implementation of the Dublin III Regulation in 2018' ([March 2019](#)), pp. 9-10.

<sup>103</sup> E.g., the MS that issued a residence document or a visa, Dublin III Regulation, Art 12.

<sup>104</sup> Dublin III Regulation, Art 3(2); *NS & ME* (n 96); Case C-578/16 PPU *CK v. Republika Slovenija* [2017] EU:C:2017:127.

<sup>105</sup> Dublin III Regulation, ch IV.

<sup>106</sup> *Ibid.*, Art 3(3); and 2013 Asylum Procedures Directive. For a critique, see Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Goodwin-Gill and Weckel (eds), *Migration and Refugee Protection in the 21<sup>st</sup> Century: Legal Aspects* (Brill, 2015) 665.

move clandestinely through the EU and evade Dublin procedures.<sup>107</sup> It is only the unlucky few who are ever the subject of a successful (or even attempted) transfer back to the responsible MS. **Even when implemented, there are a number of problems linked with the administrative operationalisation of the Dublin system**, such as the lack of a formal coordination mechanism at the national level to implement the required procedures, and very different capacities (e.g. staff, funding, etc.) across the MS.<sup>108</sup> This is coupled with a lack of compliance with procedural guarantees and safeguards for asylum applicants.<sup>109</sup> This leads to lengthy procedures and violations of fundamental rights.

**Most importantly, Dublin as currently designed does not aim to share responsibility fairly between MS**, virtually allocating most responsibility to MS at the EU's external maritime borders, notwithstanding that fair sharing is required under EU law.<sup>110</sup> Once responsibility has been assigned, the individual MS is expected to provide for the refugee. Refugee immobility permeates the system's design, hindering redistributive effects.<sup>111</sup> The regime expects applicants not to move to other countries through the duration of the asylum process, and upon recognition there are very limited opportunities for intra-EU movement. While recognised beneficiaries of international protection have access to LTR status, the strict criteria to which it is subjected make inter-MS mobility almost illusory. Also, EU support measures, such as funding, are limited. This legal design fuels an implementation gap, whereby MS seek to minimise their responsibilities, while asylum seekers conduct unauthorised 'secondary movements'.

**No lasting change has been made to the EU responsibility allocation system.** A temporary shift took place in 2015–17. Emergency relocation, meaning intra-EU transfer of asylum seekers between MS, was established through two Council decisions to benefit Italy and Greece.<sup>112</sup> It was undercut by several factors, including its own legislative and administrative setup.<sup>113</sup> Both emergency decisions numerically capped the beneficiaries concerned,<sup>114</sup> restrictively defined the eligible applicants for relocation,<sup>115</sup> and expired after two years.<sup>116</sup> As with the Dublin III Regulation, both decisions failed to take into account the preferences of asylum applicants. Certain MS simply refused to relocate asylum applicants. The CJEU ruled that this refusal violated EU law.<sup>117</sup> Despite these failings, **this time-limited scheme included binding obligations for MS** in the form of relocation quotas, which led to the

<sup>107</sup> Costello and Mouzourakis, 'The CEAS – Where Did It All Go Wrong?', in Fletcher, Herlin Karnell and Matera, *The European Union as an Area of Freedom, Security and Justice* (Routledge, 2017) 263, p. 264.

<sup>108</sup> See analysis in Scherrer, 'Dublin Regulation on international protection applications', PE 642.813 (European Parliamentary Research Service, 2020).

<sup>109</sup> Ibid.

<sup>110</sup> Art 80 TFEU; Tsourdi, 'Solidarity at Work?: The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law 667, pp. 673–75.

<sup>111</sup> Guild, 'The Europeanisation of Europe's Asylum Policy', (2006) 18 International Journal of Refugee Law 630.

<sup>112</sup> 1<sup>st</sup> Emergency Relocation Decision and 2<sup>nd</sup> Emergency Relocation Decision (n 12).

<sup>113</sup> De Witte and Tsourdi, 'Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v Council' (2018) 55 Common Market Law Review 1457, pp. 1459–67; Guild, Costello, and Moreno-Lax, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece*, PE 583 132 (European Parliament, 2017), pp. 42–44.

<sup>114</sup> 1<sup>st</sup> Emergency Relocation Decision, Art 4; and 2<sup>nd</sup> Emergency Relocation Decision, Art 4(1).

<sup>115</sup> 1<sup>st</sup> Emergency Relocation Decision, Art 3(2); and 2<sup>nd</sup> Emergency Relocation Decision, Art 3(2), establishing the notion of applicants 'in clear need of international protection'.

<sup>116</sup> The 1<sup>st</sup> Emergency Relocation Decision applied until 17.9.2017 and the 2<sup>nd</sup> Emergency Relocation Decision until 26.9.2017. See respectively 1<sup>st</sup> Emergency Relocation Decision, Art 13(2) and 2<sup>nd</sup> Emergency Relocation Decision, Art 4.

<sup>117</sup> CJEU, Joined Cases C-715/17, 718/17 and 719/17 *Commission v. Poland* [2020] ECLI:EU:C:2020:257.



relocation of around 35,000 asylum seekers from Greece and Italy to other MS.<sup>118</sup> In the wake of the pandemic, emergency relocation on Greece's behalf has consisted of a smaller-scale operation based on voluntary pledges.<sup>119</sup> The New Pact retains several basic premises of the Dublin system. Its departure from the *status quo* concerns the operationalisation of the principle of solidarity, as analysed in Chapter 3.

### 2.3.3 Legal entry channels

There are **few legal opportunities to access refugee protection within the CEAS**, without engaging in an illicit, very possibly life-endangering journey.<sup>120</sup> In this section we examine policy and legal developments around the two most significant means of granting refugee-specific access to the EU and illustrate the reluctance to adopt them in order to mitigate this fundamental tension in the CEAS. These means are refugee resettlement and 'protected-entry procedures', a term of art that includes 'humanitarian visas' and various types of *ad hoc* humanitarian admission schemes.<sup>121</sup> At present, these modes of granting access to the EU are negligible in scale and framed as entirely discretionary for MS. We explore their operationalisation as well as legal and policy efforts to expand their availability and render them obligatory.

#### - Refugee Resettlement

As with global resettlement efforts, **EU efforts are framed as an act of discretionary solidarity with refugees** as well as with overburdened host countries.<sup>122</sup> Between 2015-20, the Asylum, Migration and Integration Fund (AMIF) Regulation consolidated EU efforts to support and coordinate MS action on resettlement.<sup>123</sup> It defined refugee resettlement as the process whereby, upon a request from the UNHCR based on a person's need for international protection, TCNs are transferred from a third country and established in a MS where they are permitted to reside either as refugees, as subsidiary protection beneficiaries, or with 'any other status which offers similar rights and benefits under national and Union law'.<sup>124</sup> It provided targeted assistance in the form of financial incentives for each resettled person (€6,000), allocating additional funding when individuals were resettled under the common Union priorities (€10,000).<sup>125</sup> EU funding also supported resettlement activities in the broader sense, for example staff training and infrastructure development. Nevertheless, developing resettlement activities as part of national programmes remained optional.<sup>126</sup> In 2014, e.g., 13 MS were not involved

<sup>118</sup> European Commission, Progress Report on the Implementation of the European Agenda on Migration, COM(2018) 301 final, 16.5.2018.

<sup>119</sup> Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity', (2020) 31 International Journal of Refugee Law 374.

<sup>120</sup> European Parliament, 2016 Mediterranean Resolution, Rec R. For analysis, see Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press, 2017).

<sup>121</sup> For an overview, see Moreno-Lax, *A Model Instrument for an Emergency Evacuation Visa*, International Bar Association ([July 2019](#)), [Part I](#).

<sup>122</sup> Kneebone and Macklin, 'Resettlement', in Costello, Foster, and McAdam (eds), *Oxford Handbook of International Refugee Law* (Oxford University Press, 2021).

<sup>123</sup> Regulation No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, [2014] OJ L 150/168 ('2014 AMIF Regulation').

<sup>124</sup> 2014 AMIF Regulation, Arts 2(a)(i)-(iii).

<sup>125</sup> 2014 AMIF Regulation, Recs 41-43, and Arts 3(2), 7 and 17(3)-(7).

<sup>126</sup> *Ibid.*, Art 19(1)(a).

in any resettlement activities,<sup>127</sup> or resettled only a few persons, despite the enhanced financial incentives.

**The 2015-2016 ‘refugee crisis’ brought renewed attention to refugee resettlement.**<sup>128</sup> All MS apart from Hungary, together with Associated States, agreed in July 2015 to resettle, through multilateral and national schemes, 22,504 displaced persons from the Middle East, the Horn of Africa and North Africa within two years.<sup>129</sup> That same year, 1.4 million persons sought protection in the EU, many of them (383,710) fleeing the Syrian civil war.<sup>130</sup> Resettlement commitments, then, assisted only a fraction of those who requested help.

Resettlement also appeared in the EU’s principal policy response to the ‘refugee crisis’: the **EU-Turkey Statement**.<sup>131</sup> Resettlement featured therein through **the ‘one for one’ mechanism**.<sup>132</sup> Namely, the EU undertook to resettle a Syrian refugee from Turkey in exchange for every person returned from Greece to Turkey, up to 72,000 persons.<sup>133</sup> This framing of resettlement **reflects its overlap with containment**. The impact on EU resettlement was that most of the commitments were directed at resettling Syrians from Turkey,<sup>134</sup> notwithstanding that other countries, notably Lebanon, host many more refugees per capita than Turkey. Resettlement under the 2015 scheme was considered a success, with MS resettling a total of 27,800 persons.<sup>135</sup> Most of them were Syrian refugees resettled from Turkey. Following the expiry of the 2015 scheme, the Commission launched an even more ambitious scheme based on a Recommendation aimed at the voluntary resettlement of 50,000 persons between September 2017 and December 2019.<sup>136</sup> These two programmes combined led to the effective resettlement of around 65,000 persons to the EU by the end of 2019.<sup>137</sup> MS pledged an additional 30,000 places for 2020.<sup>138</sup> But due to disruption linked to the pandemic, only 1,875 persons were effectively resettled EU-wide that year.<sup>139</sup>

**While these numbers are more significant than previous figures, they should be compared with global resettlement needs**, which UNHCR projects at 1.44 million persons for 2020.<sup>140</sup> In addition, the voluntary nature of MS participation in these schemes has led to divergences within the EU, with 12 MS

<sup>127</sup> In 2014, the following MS did not resettle a single person according to EUROSTAT: Bulgaria, Czech Republic, Estonia, Greece, Croatia, Italy, Cyprus, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia. See EUROSTAT, [‘Resettled Refugees: Annual Data’](#).

<sup>128</sup> European Agenda on Migration (n 62), p. 4, where the Commission notes that ‘others offer nothing – and in many cases they are not making an alternative contribution in terms of receiving and accepting asylum requests or helping to fund the efforts of others’.

<sup>129</sup> Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, Council doc. 11130/15, 20.7.2015.

<sup>130</sup> EASO, Annual Report on the Situation of Asylum in the European Union, 2016, pp. 8-10.

<sup>131</sup> See EU-Turkey Statement (n 4) and the analysis in Chapter 6.

<sup>132</sup> For every Syrian returned to Turkey from the EU, another Syrian will be resettled from Turkey to the EU.

<sup>133</sup> EU-Turkey Statement, point 2.

<sup>134</sup> According to the Commission, when the Turkey Statement kicked in, 5,677 persons of the 22,504, had been resettled. See Second report on relocation and resettlement, COM(2016) 222 final, 12.4.2016, p. 2.

<sup>135</sup> European Commission, Managing Migration in All Its Aspects: Progress under the European Agenda on Migration, COM(2018) 798 final, 4.12.2018, p. 4.

<sup>136</sup> Commission Recommendation of 3.10.2017 on enhancing legal pathways for persons in need of international protection, C(2017) 6504.

<sup>137</sup> European Commission, ‘Delivering on Resettlement’ ([December 2019](#)).

<sup>138</sup> European Commission, Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 6.3.2019, p. 18.

<sup>139</sup> [Data gathered through Eurostat](#).

<sup>140</sup> UNHCR, *UNHCR Projected Global Resettlement Needs: 2020* ([July 2019](#)).



not resettling a single person in 2019.<sup>141</sup> The *ad hoc* and time-limited nature of these initiatives highlights that they are emergency-driven and exceptions to the rule. The most significant new feature of EU resettlement is that some MS without any prior history of resettlement now have resettlement programmes, in particular Ireland, Italy, and Portugal.<sup>142</sup>

In July 2016, the Commission proposed a Regulation establishing a Union Resettlement Framework that would create a shared framework for resettlement.<sup>143</sup> Negotiations about this instrument have stalled. The 2016 version of the proposal introduces a harmonised regime for key aspects of the resettlement process, such as status, eligibility criteria, and exclusion grounds.<sup>144</sup> The proposal envisages the participation of all MS in resettlement activities. It has been criticised for instrumentalising resettlement by explicitly linking it with third countries' effective cooperation in migration management objectives, such as increasing readmission rates and reducing irregular border crossings.<sup>145</sup> This dovetails with the EU's renewed focus on containment, as elaborated in Chapter 6.

#### - Protected-Entry procedures

**Protected-entry procedures** have been debated and operationalised *ad hoc* by individual MS, but **not implemented in a coordinated manner at EU level**. There is no EU definition for this term. A study undertaken for the European Commission defines protected-entry procedures as:

[A]n overarching concept for arrangements allowing a non-national to approach the potential host State outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.<sup>146</sup>

**Humanitarian visas** are an example. In this case, the entry permit is a visa granting access to a MS for the purpose of claiming asylum there. For example, UNHCR reported in 2015 that France had provided close to 1,400 such visas for Syrians, which enabled them to travel legally and safely to apply for asylum on arrival.<sup>147</sup> The practice also exists in Belgium, Germany, and Italy.<sup>148</sup>

As EU law regulates the issuance of other forms of visas, it had long been argued that EU fundamental rights obligations governed the visa process, and that the issuance of a 'humanitarian visa' would be required if the applicants' human rights would otherwise be violated.<sup>149</sup> The argument was litigated at the CJEU in a case concerning Syrian refugees who had approached the Belgian embassy in Lebanon. The EU Visa Code contains a provision for the exceptional issuing of 'limited territorial validity' (LTV)

<sup>141</sup> This according to [Eurostat statistics](#). The MS in question were Austria, the Czech Republic, Cyprus, Denmark, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

<sup>142</sup> Ibid.

<sup>143</sup> Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework' (Union Resettlement Framework Proposal), COM(2016) 468 final, 13.7.2016.

<sup>144</sup> Gatta, 'Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives' (2018) *European Journal of Human Rights* 163, pp. 180-185.

<sup>145</sup> See Union Resettlement Framework Proposal, Art 4(d) and ECRE, *Untying the EU Resettlement Framework: ECRE's Recommendations on Breaking the Link with Migration Control and Preserving the Humanitarian Focus of Resettlement*, [Policy Note 2016](#), p. 2.

<sup>146</sup> Noll, Fagerlund and Liebaut, *Study for the European Commission: On the Feasibility of Processing Asylum Claims Outside the EU against the Background of the Common European Asylum System and The Goal of a Common Asylum Procedure* (European Commission, 2002), p. 20.

<sup>147</sup> See UNHCR, *Resettlement and Other Forms of Admission for Syrian Refugees*, [18.3.2015](#).

<sup>148</sup> See chs by Bianchini (4), Endres de Oliveira (5), and Bodart (6), in Leboeuf and Foblets (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (Hart/Nomos, 2020).

<sup>149</sup> See Moreno-Lax, 'Must EU Borders Have Doors for Refugees?: On the Compatibility of Visas and Carrier Sanctions with Member State Obligations to Provide International Protection to Refugees' (2008) 10 *European Journal of Migration and Law* 315; see also Ibsen-Jensen, *Humanitarian Visas: Option or Obligation?*, PE 509.986 (European Parliament 2014).

visas where ‘necessary on humanitarian grounds ... or because of international obligations’.<sup>150</sup> The CJEU was asked to examine whether EU law may impose a duty to issue such a visa on account of *non-refoulement* obligations.<sup>151</sup> The CJEU cited the Dublin Regulation and the territorial scope of the CEAS and noted that the EU Visa Code covers stays of up to three months only. On this basis, it held that the EU Visa Code is not applicable to humanitarian visas requested by asylum seekers. This decision has been widely criticised, mainly on the basis of its unpersuasive interpretation of the scope of EU law.<sup>152</sup>

**The European Parliament has been proactive in seeking to overcome the deadlock through the adoption of relevant EU legislation.** It sought to introduce targeted amendments to the EU Visa Code, but was unsuccessful.<sup>153</sup> Following this, the LIBE Committee drew up an own-initiative report in November 2017, and on December 2018 the plenary adopted a Resolution with a recommendation to the Commission for the adoption of a dedicated legal instrument, a **Regulation establishing a European Humanitarian Visa**.<sup>154</sup> Rather than issuing a legislative proposal in response, the Commission pointed to the Union’s Framework Resettlement proposal. However, the latter does not create a subjective right to admission, nor does it generate a channel to access international protection for those yet to be recognised as refugees, who may still be trapped in their countries of origin.

Meanwhile, **MS have put in place further *ad hoc* humanitarian admission schemes.** For example, Germany implemented a programme to admit privately sponsored Syrians to live with relatives present in the country. The initiative was dependent on the existence of family members who could commit to covering the transport and living costs of their relatives for the duration of their stay.<sup>155</sup> Ireland launched a similar family reunification scheme to allow people affected by the Syrian conflict to join close relatives lawfully residing there.<sup>156</sup> Italy instated a ‘humanitarian corridors’ programme to ensure safe and legal entry to especially vulnerable asylum seekers.<sup>157</sup> But schemes like these invariably apply to very small numbers of refugees and are time bound.

Another idea is **making existing regular entry schemes, such as those for studies, research and work, accessible to refugees**,<sup>158</sup> but no formal action has been taken at EU level to enable refugee admission through these means yet. The New Pact submits that ‘Talent Partnerships’ be opened to refugees.<sup>159</sup> But initiatives like this are left to the discretion of the MS and it is unlikely there will be meaningful developments in this field in the short term. All of the above confirms the observation of the Fundamental Rights Agency (FRA) that legal and safe avenues to access protection in the EU remain

<sup>150</sup> EU Visa Code, Art 25(1)(a).

<sup>151</sup> CJEU, Case C-638/16 PPU *X and X* [2017] ECLI:EU:C:2017:173

<sup>152</sup> Moreno-Lax, ‘Asylum Visas as an Obligation under EU Law: Case PPU C-638/16, *X, X v Etat belge*’, *EU Migration Law*, [16.2.2017](#); Brouwer, ‘Een gemiste kans voor een uniforme en mensenrechtelijke uitleg van de Visumcode wat betreft de afgifte van een humanitair visum’ (2017) *Nederlands Tijdschrift voor Europees Recht* 69.

<sup>153</sup> For information on these legislative amendments, see [here](#).

<sup>154</sup> European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)). See also the EPRS Study, *European Added Value Assessment accompanying the European Parliament’s legislative own-initiative report* (Rapporteur: Juan Fernando López Aguilar), PE 621.823 (European Parliamentary Research Service, 2018), and, in particular, Moreno-Lax, *Annex I: Legal Aspects*, pp. 23-124.

<sup>155</sup> See the [website](#) of the Germany Ministry of the Interior for more details.

<sup>156</sup> Fundamental Rights Agency (FRA), *Legal entry channels to the EU for persons in need of international protection: A toolbox* (FRA 2015), p. 9.

<sup>157</sup> See the [website](#) of the Italian Ministry of Foreign Affairs and International Cooperation for more details.

and, for analysis, see Gatta, ‘Legal Avenues to Access International Protection in the European Union’ (n 144), pp. 197-199.

<sup>158</sup> See, e.g., European Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197, 6.4.2016, 15.

<sup>159</sup> New Pact on Migration and Asylum, p. 23.

'illusory' for most refugees.<sup>160</sup> EU law still does not regulate the area, despite the right to asylum being recognised as legally binding in Article 18 CFR.<sup>161</sup>

### 2.3.4 Externalisation of Protection Obligations

While the EU has engaged in voluntary and programmatic responsibility sharing commitments at the global level through the UN Global Compact on Refugees, in practice **it continues to institutionalise containment and externalisation in its relations with third States**. Migration management and protection obligations are often shifted to non-EU countries through soft law instruments within or outside the EU legal framework. This potentially bypasses political accountability via the European Parliament, transparency, and judicial oversight from the CJEU.<sup>162</sup>

**The 2016 EU-Turkey Statement**, further analysed in Chapter 6, **is emblematic of this approach**. Arguably a legally non-binding document,<sup>163</sup> this agreement explicitly references commitments of the EU and its MS towards Turkey as part of a cooperation arrangement, whereby all TCNs, including asylum seekers, arriving irregularly in the Greek islands after 18 March 2016 are to be returned to Turkey. In exchange, EU MS undertook to resettle Syrian refugees from Turkey to the EU, provide funding for refugee protection in Turkey, and consider exempting Turkish nationals from visa requirements for short stays in the EU.

The EU courts concluded that the EU had not authored the agreement, placing the question of compatibility with EU law outside the courts' remit. The General Court affirmed that it lacked jurisdiction to examine the legality of the Statement, as it had not been authored by the EU but by 'the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister'.<sup>164</sup> This reasoning has been widely criticised.<sup>165</sup> The CJEU dismissed an appeal against this decision as manifestly inadmissible,<sup>166</sup> which **does not mean that its implementation is also beyond scrutiny under EU law**. The EU-Turkey Statement involves MS actions under the EU asylum and return *acquis*, and therefore entails the applicability of the EU Charter of Fundamental Rights to those actions (Article 51 CFR).<sup>167</sup>

Is Turkey a STC under the EU's definition? **While this must be analysed on a case-by-case basis, the answer**, as discussed further in Chapter 6, **is arguably no**. The defects of the Turkish temporary protection regime, including the practical hurdles to accessing rights,<sup>168</sup> its limitation to Syrian refugees,<sup>169</sup> and instances of *refoulement* and other abuses of refugee rights,<sup>170</sup> indicate that Turkey

<sup>160</sup> FRA, *Fundamental Rights Report 2017* (FRA, 2017), pp. 133-134.

<sup>161</sup> This suggests that the current situation violates Art 18 CFR, see Moreno-Lax, *Accessing Asylum in Europe* (n 120) Ch 9.

<sup>162</sup> The European Parliament is critical of this approach, see Resolution of 19 May 2021 on Human rights protection and the EU external migration policy 2020/2116(INI).

<sup>163</sup> Cf. for the opposite opinion, den Heijer and Spijkerboer, 'Is the EU-Turkey Refugee and Migration Deal a Treaty?', *EU Law Analysis*, 7.4.2016.

<sup>164</sup> General Court, Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v. European Council*, 28.2.2017, para. 73.

<sup>165</sup> See, e.g., Gatti and Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law', in Carrera, Santos Vara and Strik, *Constitutionalising the external dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar, 2019) 175, pp. 179-182 and references therein.

<sup>166</sup> CJEU, Cases C-208-210/17 *NF, NG and NM v. European Council* [2018] ECLI:EU:C:2018:705.

<sup>167</sup> Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights*, PE 603.512 (European Parliament, 2020), pp. 43-44.

<sup>168</sup> See, e.g., UNHCR, 'Turkey: Regional Refugee and Resilience Plan in Response to the Syria Crisis' (2020) 3RP [Country Chapter](#).

<sup>169</sup> Law No 6458 on Foreigners and International Protection 2013 (as amended 29 Oct 2016) (Turkey) (unofficial UNHCR translation) ('LFIP'), Art 91; and Turkey: Temporary Protection Regulation [2014] OJ 29153 ('TTPR').

<sup>170</sup> See, e.g., ECRE, AIDA: Asylum Information Database - Country Report: Turkey ([March, 2019](#)).

does not meet the criteria.<sup>171</sup> Despite this, implementation continues and the Statement has been hailed as a success, although **both its effectiveness and its compatibility with human rights remain contested**.<sup>172</sup>

**Externalisation through soft law agreements** is increasingly becoming the new paradigm, with the Statement considered a blueprint for EU action. The streamlining of **refugee containment** in EU external relations policy, which the New Pact favours, is explored in detail in Chapter 6 in relation to cooperation with Turkey, Libya, and Niger.

## 2.4 Return Policy

The main EU instrument regarding return policy is the **2008 Return Directive**,<sup>173</sup> which provoked controversy upon its adoption. It was criticised as the ‘Directive of shame’, with particular reference to provisions allowing pre-return administrative detention of up to 18 months.<sup>174</sup> Since then, the emphasis has gradually been placed more on the guarantees for returnees provided by the Directive. In light of the absence of harmonised international standards, some observers have claimed that one should speak rather of the ‘Directive of pride’, or of protection. Its objective is twofold: to ensure an efficient return policy and to secure rights and guarantees for returnees.

As the proportion of effectively applied return decisions as a percentage of decisions taken remains low (29% in 2019),<sup>175</sup> the debate has focused on implementing decisions and the obstacles to removal, e.g. the non-cooperation of countries of return and returnees themselves. However, **in 2018, the Commission changed its strategy and tabled a proposal to recast the 2008 Return Directive** to make return policy more effective.<sup>176</sup> This proposal generated a debate that has been supplemented by a detailed opinion of the FRA,<sup>177</sup> an assessment of implementation,<sup>178</sup> and a substitute impact assessment, both by the European Parliament, that the Commission did not consider necessary.<sup>179</sup> In light of the numerous human rights issues in the proposal, all these evaluations were negative, and may lead the rapporteur of the LIBE Committee to conclude that the proposal should not be adopted without thorough revision.<sup>180</sup> It appears to be difficult to reach an agreement under the co-decision

<sup>171</sup> Asylum Procedures Directive 2013, Art 38(1). There is a legal debate on whether the term ‘in accordance with’ refers to ratification of the Refugee Convention itself, or merely to ‘equivalent protection’ to the Refugee Convention; Thym, in ‘Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction’, *EU Migration Law*, 11.3.2016, supports the equivalence standard; while Peers and Roman, in ‘The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?’, *EU Law Analysis*, 5.2.2016, support the ratification standard. In any case, protection in Turkey, even for Syrians benefitting from temporary protection status, arguably does not fulfil even the equivalence standard, given the practical difficulties in accessing rights. See Chapter 6 for further details.

<sup>172</sup> Cf. Spijkerboer, ‘Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?’, *Border Criminologies*, 28.9.2016; and Carrera, den Hertog and Stefan, ‘The EU-Turkey Deal: Reversing “Lisbonisation” in EU Migration and Asylum Policies’, in Carrera, Santos Vara and Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar, 2019) 155.

<sup>173</sup> Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L348/98.

<sup>174</sup> E.g., Migreurop, ‘La directive de la honte n’est pas conforme aux droits fondamentaux. Exigeons son retrait!’, 10.12.2008.

<sup>175</sup> European Commission, [Return Statistics](#).

<sup>176</sup> European Commission, Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, 12.9.2018.

<sup>177</sup> FRA, The recast Return Directive and its fundamental rights implications, FRA Opinion – 1/2019 ([January 2019](#)).

<sup>178</sup> Eisele, Majcher and Provera, *The Return Directive 2008/115: European Implementation Assessment*, PE 642.840 ([European Parliamentary Research Service, 2020](#)).

<sup>179</sup> Eisele et al., *The Proposed Return Directive (recast): Substitute Impact Assessment*, PE 631.727 ([European Parliamentary Research Service, 2019](#)).

<sup>180</sup> Draft report on the proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), Rapp: Tineke Strik, LIBE\_PR(2020)648370, 21.2.2020.

procedure, as the Council has adopted a partial general position aligned with most of the Commission proposal.

**The conversation is taking a new turn with the New Pact on Migration and Asylum.** The legislative proposals accompanying the pact include several provisions regarding return. This would result in the EU *acquis* in this area being scattered over six different instruments, making it much more difficult to grasp and negotiate. Apart from proposing the creation of a European Return Coordinator and a new solidarity mechanism, including the sponsorship of return (further discussed in Chapters 3 and 4), **the New Pact proposals impact return policy in three main ways:**

**1) By linking the return and asylum procedures,** first, by merging a negative asylum decision with the return decision, which could lead to *refoulement* as this risk is not always assessed by the authority in charge of return; second, by merging the two appeal procedures within a single border procedure that turns the automatic suspensive effect into an exception, which may lead to more violations of fundamental rights; and, third, by linking asylum and return detention, so that an asylum seeker detained during the border procedure whose application has been rejected may remain detained during the removal procedure, which increases the risk of arbitrary detention, particularly if legal aid is not effectively accessible.

**2) By making the border procedure mandatory and commonly applicable.** This entails the alignment of the review of return decisions and judicial review of asylum decisions, providing better guarantees than those of the 2018 Commission proposal on return (i.e. review exclusively by a court, extension of the timeframe for appeal from 48 hours to one week, and review on both fact and law) as long as the new rules are applied in practice.

**3) By promoting assisted voluntary return as the preferred option** and as the object of an EU strategy to be presented by the Commission. This is a more humane approach, if the return is really voluntary, while it is only in the sense that migrants accept to return by themselves without recourse to force but are actually obliged to leave due to the return decision that is mandatory.

Other issues deserving attention are: vulnerable persons, who are too often not identified; alternatives to detention, which are frequently unavailable in practice in many MS; and the detention of children, which, although considered not to be in the best interests of the child, is still permissible under Article 17 of the Return Directive.

## 2.5 Conclusion

The Treaty of Amsterdam officially launched the first EU migration and asylum policies twenty years ago. While twenty years might seem ample for constructing norms, in that time **truly common standards have not been established at the EU level, nor have they become an operational reality on the ground.** This is particularly true of asylum policy, which has not led to harmonised practices and standards regarding the processing of asylum claims and material reception conditions in the MS. The EU framework remains incomplete with regard to legal migration, many categories of workers not being covered by the EU *acquis*. This is also the case for refugee admission, as legal entry channels, such as protected-entry procedures and humanitarian visas, are not covered by EU law, despite the efforts of the European Parliament. There has been some progress with resettlement, but it remains a discretionary act.<sup>181</sup> It is therefore not surprising that intense legislative activity is either

<sup>181</sup> Cf. European Parliament, 2016 Mediterranean Resolution, para 22, calling for a 'mandatory' system.



ongoing, e.g. with asylum and return, or foreseen, e.g. with legal migration, with the exception of family reunification.

**The New Pact on Migration and Asylum puts several controversial proposals on the agenda that will feed the political debate, in particular:**

- **concerning legal migration:** the creation of true EU statuses of long-term resident and Blue card holder regarding intra-EU mobility and freedom of residence;
- **concerning asylum and return policy:** the preservation of the basic premises of the Dublin mechanism; the strong interplay between asylum and return; very limited proposals on ensuring legal access to protection.

The Pact's favoured *modus operandi* is the externalisation of protection obligations and the containment of protection seekers and migrants in transit states (like Turkey and Libya), as Chapter 6 elaborates. This renders the **EU hostage to the whims of foreign political leaders** and constitutes shaky ground for a redesign of its approach on migration and asylum, **making the realisation of the holistic approach advocated by the European Parliament impossible.**

### Recommendations:

*Regarding the current legislative acquis and ongoing practice*

1. Evaluate the Commission's practice regarding the **introduction of infringement procedures** against MS that do not fully apply the Directives in the area of legal migration and asylum;
2. Launch a study on the **discrimination risk that some categories of TCN workers compared to other categories of TCN workers** face under EU law due to differences in the scope of the equality principle between the category-specific Directives regarding legal migration;
3. Ensure that refugees and **migrants deprived of their liberty have access to an effective remedy** against the decision ordering the deprivation of liberty, as well as to a review at regular intervals;

*Regarding ongoing negotiations*

4. **Scrutinise the fundamental rights implications of the envisaged Asylum and Migration Management Regulation's proposals to curb secondary movements**, such as transferring unaccompanied minors to the MS of first entry, if no family criterion is applicable; and removing the entitlement to reception conditions in MS other than the 'responsible' MS;
5. Ensure that refugees and migrants subject to the envisaged asylum and return border procedures benefit from the **right to an effective remedy** against MS decisions;
6. Ensure that the **Union Resettlement Framework** will **not introduce negative conditionality** between MS resettlement commitments and third countries' adherence to EU migration management objectives;
7. Ensure the **fundamental rights compatibility of all legislative amendments to the CEAS** instruments, in particular with the principle of *non-refoulement*, the principle of non-penalisation for irregular entry, the principle of human dignity, the right to an effective remedy, the prohibition of arbitrary deprivation of liberty, and the right to asylum;

*Regarding future initiatives*

8. Ensure that the **status of legal migrants** (in particular long-term residents and Blue Card holders) **becomes genuinely European** on the basis of the principle of mutual recognition, in particular regarding mobility within the EU as required by Article 79(2)(b) TFEU;
9. Launch a European added value assessment report on the **extension of the EU *acquis* to categories of workers not currently covered** by it, to decide whether it is necessary or not to adopt further legislation in line with the principle of subsidiarity;
10. Launch an own-initiative report on **rendering existing regular admission schemes more accessible to international protection seekers**;
11. Launch an own-initiative report on **the mutual recognition of positive asylum decisions coupled with qualified free movement rights for recognised** beneficiaries of international protection, considering its potential impact on the reduction of secondary movements and the enhancement of compliance with the CEAS provisions, including the rights of TCNs;
12. Continue to pursue the **introduction of binding legislation on legal entry channels**, e.g. a European Humanitarian Visa, renewing the invitation to the Commission to table specific instruments that facilitate admission for the purposes of lodging an asylum application.



### 3. SITUATION AT THE EXTERNAL BORDERS OF THE UNION AND RECENT TRENDS IN THE MEDITERRANEAN: FROM THE 2015 CRISIS TO THE COVID-19 PANDEMIC

#### KEY FINDINGS

- While applications for international protection have significantly dropped since 2015, crisis discourse and crisis responses persist.
- EU agencies are now at the forefront of policy implementation and playing a key role in the Union's approach to migration in the Mediterranean.
- The operational expansion of EU agencies' mandates has led to patterns of joint implementation in border control, returns, and the processing of asylum claims.
- Agency deployees increasingly have executive powers, implement policy alongside national officials, and directly interact with refugees and migrants.
- Agencies' mandates have expanded to encompass functions that far exceed the provision of support, including quasi decision-making and monitoring-like functions.
- The de jure and de facto mandate expansion raises several challenges for Frontex and EASO, most notably independence, accountability, and respect for human rights.
- While contributing to the effective oversight of these agencies, existing accountability channels are also beset by pitfalls when it comes to ensuring fundamental rights.
- Despite Dublin's unequal distributive effects, the EU has only adopted partial and emergency-driven schemes for operationalising solidarity. This has led to the persistence of a solidarity deficit.
- A number of EU measures serve to operationalise solidarity. Frontex and EASO can be viewed as vessels of solidarity through their operational activities and patterns of joint implementation, alongside EU funding, and emergency relocation.
- The New Pact on Migration and Asylum fails to structurally embed fair sharing of responsibility and is unlikely to address the current redistributive malaise.
- Covid-19 presented novel challenges to border areas and migration. Border closures led to diminishing numbers of migrants and asylum applicants. Asylum seekers saw their right to asylum severely curtailed and in some cases their right to freedom of movement unjustifiably restricted, when limitations were lifted for the rest of the population.
- A number of positive measures, such as visa and residence permit extensions were also noted as a response to Covid-19.

### 3.1 Introduction: Migration at the Borders - State of Play

**2015-16 was a litmus test** for EU's asylum, migration and return policies. The **Mediterranean was the epicentre** of these developments, as the European Parliament noted several times, including in its 2016 Resolution on the situation in the Mediterranean, where it called for a 'holistic approach to migration'.<sup>182</sup> MS detected 1.82 million illegal border crossings in 2015, with the largest number reported on the Eastern Mediterranean route between Turkey and the Greek islands in the Aegean (885,386).<sup>183</sup> Further illegal border crossings occurred via the Central Mediterranean route to Italy (154,000).<sup>184</sup> Few applied for asylum in Greece. Instead, most crossed the border to North Macedonia and continued towards the Hungarian border with Serbia, and then to their final destinations in the EU. Those arriving in Italy also moved elsewhere. Frontex estimated there were close to one million secondary movements.<sup>185</sup> Of the approximately 1.4 million applications for international protection lodged in EU28 in 2015, 383,710 were filed by Syrian applicants escaping the civil war in their home country.<sup>186</sup>

These events triggered a number of **political and legal reactions at the national level**. Asylum seekers faced harsh material conditions at entry points, amounting to a humanitarian emergency. Some MS at the external borders raised physical barriers between their non-EU neighbours and themselves **in a bid to stop refugee movements**. Others refused to welcome refugees in the name of their national cultural and religious identities.<sup>187</sup> One after another, MS reinstated border controls at internal EU frontiers, eroding the Schengen *acquis*. But there were also mass shows of solidarity with refugees across many European cities, with thousands of volunteers mobilising to support their reception and integration.<sup>188</sup>

In light of this, **EU institutions adopted an array of policy, legal, and operational measures**. Emergency relocation, coupled with the rolling out of the hotspot approach to migration management,<sup>189</sup> was part of the immediate response to prevent a collapse of the CEAS and the unravelling of the EU's area of free movement. These measures spurred intense inter-agency collaboration, as well as patterns of joint implementation between EU agencies and national administrations. Further responses included boosting emergency funding under the AMIF, the creation of intra-EU humanitarian funding, and the activation of the Civil Protection Mechanism for migration-related purposes.

**Applications for international protection have dropped since then**, with almost 740,000 recorded in 2019.<sup>190</sup> This is reflected in the number of arrivals at EU external borders, with MS reporting 141,846 detections of irregular crossings in 2019, a 4.9% decrease compared with 2018 (and a 92% decrease compared with the 1.8 million detections in 2015).<sup>191</sup> **Despite this, crisis discourse and crisis**

<sup>182</sup> European Parliament, 2016 Mediterranean Resolution (n 24).

<sup>183</sup> Frontex, Risk Analysis for 2016, 2016, p. 6.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> EASO, Annual Report on the Situation of Asylum in the European Union, 2016, pp. 8-10.

<sup>187</sup> See, e.g., Karnitschnig, 'Orban says migrants threaten "Christian" Europe', *Politico*, [3.9.2015](#), referring to the Hungarian PM's op-ed for the German newspaper *Frankfurter Allgemeine Zeitung*.

<sup>188</sup> See, e.g., IOM, 'Standing in solidarity with migrants: Supporting civil society and other stakeholders in responding to the COVID-19 pandemic', Press Release, [7.8.2020](#).

<sup>189</sup> See Chapter 2 for analysis on the emergency relocation schemes and below for analysis of the operationalisation of the hotspot approach to migration management. For the consequences of the EU-Turkey Statement, see Chapter 6.

<sup>190</sup> EASO, Annual Report on the Situation of Asylum in the European Union, 2020, p. 57.

<sup>191</sup> Frontex, Risk Analysis for 2020, p. 22.

**responses persist**, with the externalisation of protection emphasised, rescue-related obligations (rescue, disembarkation, relocation) becoming points of contention, and the activities of humanitarian actors criminalised. **Covid-19 has further complicated the situation**, leading to border closures and jeopardising the rights of asylum seekers.

The following sections explore three key issues relating to migration at EU external borders: EU and MS responses to the pandemic; the operationalisation on the ground of the principle of intra-EU solidarity, which particularly impacts MS at EU external borders; and the evolution of EU agencies' powers, including the emergence of joint implementation and supervisory functions since the 'refugee crisis', the most important manifestations of which have occurred at the EU's external borders. Later chapters will explore maritime rescue (Chapter 4); the criminalisation of humanitarian assistance (Chapter 5); and co-operation with third countries, with a focus on Turkey, Libya, and Niger (Chapter 6).

### 3.2 The Effect of Covid-19: An Overview

**The Covid-19 crisis has resurrected the public health exception in EU migration policy.**<sup>192</sup> The most important measures relate to the EU borders, namely the reintroduction of controls at intra-EU borders and restrictions on exit and entry within the Schengen area; these decisions created disorder because they were taken unilaterally by MS.<sup>193</sup> As trans-border movers by definition, the measures have particularly affected migrants and asylum seekers. These groups are also more vulnerable to the virus than the average population due to several factors: They often work on short-term contracts that can easily be terminated; are employed in sectors that do not allow for teleworking; and tend to live in densely populated, low-income areas, where the virus is more easily transmitted.<sup>194</sup>

The crisis has been managed predominantly by MS, who are competent for most aspects of health policy, but the EU has not been inactive. **The Commission recommended various measures** within its competences, including free movement within the EU, in a March 2020 Communication providing guidance to the MS 'to protect health and ensure the availability of goods and essential services'. However, the document excluded migration and asylum considerations.<sup>195</sup>

Following reactions by other stakeholders, not least UNHCR, and in light of various developments, particularly at the Greek-Turkish border,<sup>196</sup> which we examine in detail in the following chapters, the Commission revised its approach. In April 2020, it issued **further guidance covering international protection issues**, indicating, in particular, that '[t]he exemptions to temporary restrictions on non-essential travel to the EU extend to persons in need of international protection or who must be admitted to the territory of the Member States for other humanitarian reasons', and that '**access to the asylum procedure [must] continue** to the greatest extent possible **during the COVID-19 pandemic**. In particular, all applications for international protection must be registered and processed, even if with certain delays'.<sup>197</sup> It is legally clear that border closures can never be absolute, since the principle of *non-refoulement*, the right to access asylum procedures, the prohibition of collective expulsion, the

<sup>192</sup> De Bruycker, 'The covid virus crisis resurrects the public health exception in migration law', *Frontiers in Political Science*, [11.2.2021](#).

<sup>193</sup> For details, see Carrera and Chun Luk, *In the name of Covid-19: An assessment of the Schengen internal border controls and travel restrictions in the EU*, PE 659.506 (European Parliament, 2020).

<sup>194</sup> For more information, see OECD, 'What is the impact of the COVID-19 pandemic on immigrants and their children?', [19.10.2020](#).

<sup>195</sup> European Commission, COVID-19: Guidelines for border management measures to protect health and ensure the availability of goods and essential services, C(2020) 1753 final, 16.3.2020.

<sup>196</sup> UNHCR, The Covid-19 crisis: Key protection messages, [31.3.2020](#).

<sup>197</sup> European Commission, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, [2020] OJ C 126/12.

best interests of the child, and the principle of non-discrimination must always be respected. All entry requests must be examined on the basis of these rights.<sup>198</sup>

The Commission also provided **financial support to MS**, particularly Greece, to which it allocated €700 million on the basis of an Action Plan adopted on 4 March 2020.<sup>199</sup> Relocation from Greece to 16 other MS benefited 2,050 unaccompanied children and other vulnerable migrants in 2020.<sup>200</sup> The International Organisation for Migration (IOM) relocated from Malta 270 migrants in 2020 with the support of the AMIF. These measures were directly linked to the health crisis; MS agreed to relocate unaccompanied minors and vulnerable asylum seekers as a contribution to the decongestion of overcrowded hotspots, where unsanitary conditions jeopardised health.<sup>201</sup>

Most of the internal border controls reintroduced by MS were quickly lifted. **So, the fear that they would constitute lasting supplementary measures** to the ones in place against terrorism, which could thereby bring to an end free circulation within the Schengen area, **has proven to be unfounded. Intra-EU border closures have quickly been replaced by health measures**, such as requirements to complete passenger locator forms, present negative Covid-19 tests, or remain in quarantine for a certain period upon arrival.

For our purposes, the most important consequence of Covid-19-inspired border closures has been a **significant decrease in the number of migrants and asylum applicants arriving in the EU**. Migration flows to OECD countries, measured by the number of new permits issued, are estimated to have fallen by 46% in the first half of 2020.<sup>202</sup> And there were 31% fewer new asylum applications in 2020 than in 2019.<sup>203</sup>

Although most of the measures taken to fight Covid-19 have been applicable to all persons, rather than specifically targeting migrants — their focus being on protecting public health in general — some **have nonetheless heavily impacted migration and asylum**.<sup>204</sup>

- MS offices responsible for receiving asylum applications were closed for several months during the first wave of the pandemic,<sup>205</sup> starting in March 2020, making it **impossible to lodge asylum claims**, leaving people destitute and without access to reception conditions, in violation of the Reception Conditions Directive.
- Consulates in charge of delivering visas and collecting applications for residence permits were also closed, **impeding regular travel**.<sup>206</sup> Nonetheless, the situation abroad has progressively improved, with services made available online.

<sup>198</sup> See further Chetail, 'Crisis without borders: what does international law say about border closure in the context of Covid-19?', *Frontiers in Political Science*, [3.12.2020](#).

<sup>199</sup> European Commission, 'Extraordinary Justice and Home Affairs Council: Commission presents Action Plan for immediate measures to support Greece', Press Release, [4.3.2020](#).

<sup>200</sup> European Commission, '2000 vulnerable asylum seekers and recognised refugees relocated this year from Greece', Press Release, [17.12.2020](#).

<sup>201</sup> Tsourdi, 'Covid-19, Asylum in the EU, and the Great Expectations of Solidarity' (n 119).

<sup>202</sup> IOM, Migration [data portal](#).

<sup>203</sup> EASO, Asylum Trends 2020: [Preliminary Overview](#).

<sup>204</sup> For more examples, see the series of documents published by FRA, Migration: Key fundamental rights concerns, Quarterly [bulletins 2019-2021](#). See also the series of EMN-OECD Informs on the impact of Covid-19 in the migration area, [2021](#).

<sup>205</sup> EASO, Covid-19 emergency measures in asylum and reception systems, [2.6.2020](#), p. 10.

<sup>206</sup> For an example of the situation in 2021 in the case of the Czech Republic, [see here](#).

- In Spain, Covid-19 **exacerbated the difficulties already faced by asylum seekers** in the countries, in terms of denial of access to territory, overwhelmed accommodation, etc.<sup>207</sup>
- In Cyprus, like in many other MS, the pandemic resulted in a **general deterioration of the quality of life of migrants and refugees**.<sup>208</sup>
- **Measures limiting freedom of movement** in Greece, for instance, were maintained for asylum seekers after they had been lifted for the general population. As a result, they continued facing unsanitary conditions in hotspots in Lesvos and elsewhere, kept in *de facto* detention during the examination of their asylum requests.<sup>209</sup>
- The **right to asylum** was **officially suspended in Greece** in the spring of 2020, leading to arbitrary detention, the *refoulement* of asylum seekers at the external borders, and other human rights violations in contravention of international and EU law, as we further examine in Chapters 4 and 5.
- Coastal MS like **Italy and Malta declared their ports unsafe for the disembarkation of persons rescued at sea due to the sanitary crisis**. In Italy, executive Decree No 150 of 7 April 2020 established that, for the entire duration of the national health emergency caused by Covid-19, Italian ports could not be classified as 'places of safety' in accordance with the Search and Rescue (SAR) Convention in all cases of rescue operations conducted outside the Italian SAR zone or by vessels flying the flags of foreign States.<sup>210</sup>
- The Italian Decree No 1287, adopted on 2 April 2020 by the Head of Office of Civilian Defence, established that **people rescued at sea can be quarantined on board ships located offshore** used as 'transit areas', while those able to reach Italy by their own means may be accommodated in reception centres on land for the duration of the quarantine. This has resulted in migrants rescued at sea being treated differently from migrants arriving on land on the basis of criteria like the mode of arrival that are unrelated to their protection needs. This has also led to *de facto* detention for prolonged periods on board ships located offshore in a manner that ignores human rights obligations, where detainees have faced inhuman or degrading treatment in contravention of international and EU norms.<sup>211</sup>

In contrast, **other measures adopted to alleviate the consequences of the pandemic have benefited migrants:**

- **Residence permits and visas** have often been **extended** by MS to prevent irregularity.<sup>212</sup>
- Many MS have made efforts to ensure that **healthcare** was **accessible** to all migrants, including those staying irregularly.<sup>213</sup>

<sup>207</sup> Panayotatos, 'Reform past due: covid-19 magnified need to improve Spain's asylum system', Refugees International Issue Brief, [27.7.2020](#).

<sup>208</sup> Morsheimer et al., 'A systematic analysis of the covid-19 pandemic on refugees, migrants and asylum seekers in Cyprus', Friedrich Ebert Stiftung ([October 2020](#)).

<sup>209</sup> For details, see Tsourdi and Vavoula, 'Killing Me Softly?: Scrutinising the Role of Soft Law in Greece's Response to COVID-19' (2021) 12 European Journal of Risk Regulation 59.

<sup>210</sup> Giuffré, 'From Port Closure to Refusal of a Safe Port' (manuscript with the authors).

<sup>211</sup> Ibid.

<sup>212</sup> European Commission, Extensions of legal stay related to covid-19 – National practices, [26.5.2020](#).

<sup>213</sup> European Migration Network (EMN), Inform No 1: EU and OECD Member States responses to managing residence permits and migrant unemployment during the covid-19 pandemic ([July 2020](#)).

- Some MS have made **unemployment benefits** easier to access for migrant workers.<sup>214</sup>
- Portugal even decided to **regularise all migrants who had an application pending** before 18 March 2020 in order to ensure their access to the national healthcare system.<sup>215</sup>
- The situation of TCNs subject to removal depended on the MS where they were detained pending expulsion. Some MS decided to **release detainees** on account of the sanitary conditions in detention centres and **in the absence of a reasonable prospect of removal**, while others have continued enforcing return decisions as much as possible.<sup>216</sup>

Finally, recruiting difficulties faced by farmers because of the pandemic, particularly in southern MS, underlined the positive contribution of seasonal migrant workers to the EU economy.<sup>217</sup>

### 3.3 Impact of the Principle of Solidarity and Fair Sharing of Responsibility in MS Responses: A Critical Assessment

Despite Dublin's unequal distributive effects, the EU has only adopted partial and emergency-driven schemes for operationalising solidarity. This has led to the persistence of a **solidarity deficit** felt more intensely by MS at the EU's external borders. After providing a sketch of the existing relationship between asylum and solidarity in EU treaties, this section will analyse initiatives that the Union and its MS have undertaken to realise solidarity, mostly targeting MS at the EU's external borders. The solidarity deficit fuels an implementation gap, meaning that MS may intentionally circumvent their obligations to avoid responsibilities they consider disproportionate.<sup>218</sup> The gap is not merely due to legal design and MS capacities, however. Recently, some MS express their disagreement with the aims of the EU's asylum and migration policies through both a refusal to implement the policies and a systemic erosion of procedural guarantees and other fundamental rights.<sup>219</sup> Pushbacks at the Union's sea and land borders, port closures, and some MS' refusal to participate in the intra-EU emergency relocation schemes are characteristic examples of this.

In EU asylum policy, there are **different solidarities at play**. First, **State-centred solidarity and fairness towards TCNs** underpins the entire AFSJ.<sup>220</sup> Article 80 TFEU also introduces a far-reaching clause on the principle of solidarity and fair sharing of responsibility that underpins (or should underpin) the EU asylum policy, which can be called **structural solidarity**.<sup>221</sup> Finally, Article 78(3) TFEU provides for the adoption of provisional measures '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', which can be called **emergency solidarity**. This constituted the legal basis of the emergency relocation schemes analysed in Chapter 2. All these are predominantly State-centred, intra-EU, forms of solidarity.<sup>222</sup>

<sup>214</sup> Ibid.

<sup>215</sup> Leitão, 'Regularisation in Times of COVID-19', Friedrich Ebert Stiftung, [18.5.2020](#).

<sup>216</sup> EMN, Inform No 5: impact of covid-19 pandemic on voluntary and forced return procedures and policy responses, ([January 2021](#)).

<sup>217</sup> EMN, Inform No 3: Maintaining labor migration in essential sectors in times of pandemic ([October 2020](#)).

<sup>218</sup> See, e.g., First report on relocation and resettlement, COM(2016) 165, 11-12.

<sup>219</sup> CJEU, Joined Cases C-924/19 PPU and C-925-19 PPU *FMS and Ors* [2020] ECLI:EU:C:2020:367; and Case C-808/18, *Commission v. Hungary* [2020] ECLI:EU:C:2020:1029.

<sup>220</sup> TFEU, Art 67(2).

<sup>221</sup> See Tsourdi, 'Solidarity at Work?' (n 110), pp. 673–675; See also Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) 24 Maastricht Journal of European and Comparative Law 740.

<sup>222</sup> See Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24 Maastricht Journal of European and Comparative Law 721, pp. 722-724.



As analysed in Chapter 2, the **Dublin system**, as currently designed, **does not aim to the fair-sharing of responsibility between the MS**, allocating most responsibility to MS at the EU's external maritime borders in practice. Moreover, despite the principle of structural solidarity in theory, solidarity measures in practice have largely been, and remain, emergency-driven.<sup>223</sup> Not all measures have been adopted on the basis of Article 78(3) TFEU, but they mainly consist of exceptional responses, instead of permeating the EU asylum policy as a whole. Structural shifts to the EU responsibility assignation system have yet to occur, and the CEAS still lacks a system to determine the individual share of responsibility of each MS based on objective indicators.

A number of EU measures can be seen as efforts to operationalise solidarity. **Frontex and EASO can be viewed as vessels of solidarity** through their operational activities and patterns of joint implementation. Operations are financed through the EU budget, as well as indirectly from MS that make national experts available. However, this response formally remains an emergency-driven measure. In practice, some MS, such as Greece, have continuously benefited from one or another type of EASO deployment since the agency's establishment, pointing to the structural, rather than exceptional, character of their needs.

**EU funding** also constituted **part of the EU's solidarity toolbox** for the increased arrivals in the Mediterranean in 2015. The centralised emergency funding component of the AMIF became somewhat more successful than shared management of national programmes. Emergency funding better serves the purpose of fair sharing, because it does not foresee co-financing from the recipient MS and is released based on migratory pressure. It can be activated swiftly and its implementation is more flexible, as it is not time-bound.<sup>224</sup> It should therefore come as no surprise that MS heavily relied on emergency funding during the 'refugee crisis'.<sup>225</sup> The new element is that, apart from the 'usual suspects', such as Greece and Italy, a host of MS with stronger national economies, such as France, Germany, and The Netherlands, have used emergency funding under AMIF to fulfil their obligations.<sup>226</sup> This points to an increasing demand for structural forms of European funding (as a form of solidarity and fair sharing of responsibility) in the asylum area.

There have been two further developments in terms of resources. First, several MS demanded for the first time the **activation of the Civil Protection Mechanism for migration-related purposes**.<sup>227</sup> This process allows for the pooling and transfer of non-financial resources through voluntary contributions by MS. During the 'refugee crisis', non-financial resources consisted of tents, blankets, etc. that were vital for emergency humanitarian assistance for those arriving. Such items were undersupplied compared to demand.<sup>228</sup> The second development was the **creation of an intra-EU humanitarian aid budget line**,<sup>229</sup> drawing from the general EU budget (and not specific to migration). However, its first

<sup>223</sup> See analysis in Tsourdi, 'Solidarity at Work?' (n 110), pp. 675-685.

<sup>224</sup> Under the previous financial framework, emergency funding came with strict requirements. MS had to implement actions 'immediately', and their duration could not exceed six months.

<sup>225</sup> By August 2018, a total of €7.5m in emergency funding under AMIF had been awarded. See European Commission, Managing the refugee crisis: State of play of the implementation of the priority actions under the European Agenda on Migration, COM(2015) 510 final, 14.10.2015, updated Annex 8, 25.6.2018.

<sup>226</sup> Ibid.

<sup>227</sup> Council Decision 1313/2013/EU, On a Union Civil Protection Mechanism, [2013] OJ L 347/924 ('Union Civil Protection Mechanism Decision').

<sup>228</sup> On the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, 10.2.2016, Annex 9, Accepted Member States' Support to Civil Protection Mechanism for Serbia, Slovenia, Croatia and Greece, p. 4.

<sup>229</sup> Council Regulation (EU) 2016/369, On the Provision of Emergency Support within the Union, [2016] OJ L 70/1 ('Humanitarian Assistance Regulation').



activation related to the 'refugee crisis'; several tranches of money were released for projects in Greece, mainly supporting reception capacity.<sup>230</sup>

Finally, **emergency relocation** was one of the means to operationalise solidarity. Since the expiry of the 2015-17 mechanism, solidarity operationalisation has been moving in a completely different direction. The co-legislators were unable to come to a compromise on a viable re-design of the Dublin system four years after the Commission published its 2016 proposals.<sup>231</sup> These proposals had foreseen mandatory relocation of applicants in situations of pressure, while the European Parliament in its position had called for the deletion of the 'irregular entry criterion' and for increased financial solidarity to the State of first application.<sup>232</sup> These proposals have now been superseded by the legislative proposals under the New Pact on Migration and Asylum.<sup>233</sup>

Instead, **the absence of an EU-coordinated response** to disembarkation of asylum seekers arriving by sea **has led MS**, such as Italy and Malta, **to act unilaterally** and declare a 'closed port' policy, as discussed in Chapter 4. When disembarkation and relocation take place, it is organised in an *ad hoc*, 'ship-by-ship' manner. À-la-carte solidarity, however, downgrades the consistency of the EU asylum *acquis* and fails to systematically protect individuals' fundamental rights.<sup>234</sup>

These processes are extremely time consuming, yet only lead to solutions for a few individuals.

**The New Pact on Migration and Asylum fails to structurally embed fair sharing of responsibility and is unlikely to address the current redistributive *malaise*.** Rather than establishing 'a binding mechanism for the distribution of asylum seekers among all the MS', as the European Parliament has been calling for since 2009,<sup>235</sup> it establishes an intricate system which boils down to 'half-compulsory' solidarity.<sup>236</sup> MS are obliged to cover at least 50% of the relocation needs set by the Commission through relocations or 'return sponsorships' and the rest through other contributions, such as capacity building, operational support, or cooperation with third countries, as we further explain in Chapter 4. This approach is problematic for several reasons. The first is the **lack of comparability between relocation and return sponsorships, and 'other contributions'**. For example, Italy has argued that it is under extreme migratory pressure due to the numbers of asylum seekers arriving in its territory compared to its capacities, and compared to what should be its share of an essentially 'common responsibility'. A contribution from Poland to capacity building activities in Niger would not be considered a straightforward equitable alternative to relocating asylum seekers from Italy.<sup>237</sup>

<sup>230</sup> See ICF, *Evaluation of the operation of Regulation (EU) 2016/369 on the provision of emergency support in the Union: Final Report* (November 2018).

<sup>231</sup> The now superseded proposal for the Dublin reform was European Commission, Proposal for a Regulation of the European Parliament and of the Council 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(2016) 270 final, 4.5.2016.

<sup>232</sup> See Report on the proposal for a regulation of the European Parliament and of the Council 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) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)).

<sup>233</sup> See all relevant legislative proposals [here](#).

<sup>234</sup> Carrera and Cortinovis, 'Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?', CEPS Paper in Liberty and Security No. 2019-10 ([June 2019](#)).

<sup>235</sup> European Parliament, 2016 Mediterranean Resolution, para. 13.

<sup>236</sup> Maiani, 'A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact', *EU Migration Law*, [20.10.2020](#).

<sup>237</sup> 'EU's southern states step up calls for 'solidarity' in managing mass migration', *The Guardian*, [21.3.2021](#).

The second problem is **the concept of return sponsorship itself**, introduced by the Pact. It is one of the solidarity tools envisaged by the proposed RAMM.<sup>238</sup> Through a return sponsorship, a MS (say Hungary) commits to support another MS, which faces 'migratory pressure' (say Greece), in legally returning irregularly staying TCNs.<sup>239</sup> Greece remains responsible for carrying out the return while the TCNs are present on its territory. However, if return has not taken place after 8 months (4 months in situations of crisis), Hungary becomes responsible for transferring the migrants and should relocate them to its territory while they await expulsion.<sup>240</sup> The Commission has broadened the scope of the redistributive net by encompassing the EU's return policy and its asylum policy under the same roof. The hope is that MS which ideologically oppose asylum provision might prefer to support the realisation of the EU's return policy instead. Yet, return sponsorship is **mired in operational complexities and fundamental rights compliance concerns**.<sup>241</sup> Conversely, as the European Parliament has pointed out, returns 'should only be carried out safely, in full compliance with the fundamental and procedural rights of the migrants in question' and only to third countries that are 'safe for them'.<sup>242</sup> The measure is economically unsound too, in that it duplicates removals, first within the EU and then to third countries. The initial burden on the beneficiary MS remains also unaddressed, which may create bottlenecks and impede smooth implementation. Whether the scheme is compatible with the prioritisation of voluntary return is in question as well.<sup>243</sup>

### 3.4 EU Agencies at the Forefront of Policy Implementation in the Mediterranean

**EU agencies** are now at the **forefront of policy implementation** regarding migration, asylum, and external border control, they are playing a **key role in the Union's approach to migration in the Mediterranean**, and are operationally present in the MS at the EU's external borders.<sup>244</sup> They have come to the forefront for two primary reasons: to overcome the policy implementation gap and to enhance inter-State solidarity, especially vis-a-vis MS at the EU's external borders. Solidarity should be 'at the heart of the whole of the Union system'.<sup>245</sup> The analysis below will focus on two EU agencies: EASO and the European Border and Coast Guard Agency (EBCG, commonly referred to as Frontex). First, we will examine the legal mandate of these key agencies, explaining the current legal status quo. We will then assess **two broad trends** that have become apparent. First, **the *de jure* or *de facto* expansion of the agencies' mandates to encompass functions that far exceed the provision of support**, including direct operational assistance and administrative cooperation; special reference will be made to monitoring-like functions. Second, the **operational expansion** resulting from the (*de jure* or *de facto*) expansion of their mandates **leading to patterns of joint implementation**, with the agencies' staff and experts deployed in fields such as border control, returns, and the processing of asylum claims. Finally, the analysis will critically reflect on the **main challenges** agencies face: balancing joint

<sup>238</sup> Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23.9.2020 ('RAMM Proposal').

<sup>239</sup> RAMM Proposal, Rec 27.

<sup>240</sup> RAMM Proposal, Art 55(2).

<sup>241</sup> See analysis in Tsourdi, , 'The New Pact and EU Agencies: an ambivalent approach towards administrative integration', *EU Migration Law*, [6.11.2020](#).

<sup>242</sup> European Parliament, 2016 Mediterranean Resolution, para. 60.

<sup>243</sup> Ibid.

<sup>244</sup> This and the following sections draw from: Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' (2020) 21 German Law Journal 506; Tsourdi, 'Beyond the migration crisis: the evolving role of EU agencies in the administrative governance of the asylum and external border control policies', Pollak and Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan, 2020) 171; and Tsourdi, 'EU Agencies', De Bruycker, De Somer and De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration* (European Policy Centre, 2019) 27.

<sup>245</sup> European Parliament, 2016 Mediterranean Resolution, Rec H and para 1.

implementation with supervision; ensuring oversight and accountability regarding fundamental rights; and squaring their internal governance structures, independence and transparency. We will highlight the role the European Parliament could play in addressing these challenges.

### 3.4.1 Legal status quo

There is a qualitative difference between the developments concerning **Frontex** and EASO; while the **mandate expansion** of the former has taken place *de jure*, **EASO's** mandate expansion has taken place *de facto*. The Frontex Regulation has undergone a series of legislative amendments since MS adopted the agency's founding document in 2004.<sup>246</sup> The instrument was amended consecutively in 2007,<sup>247</sup> 2011,<sup>248</sup> 2016,<sup>249</sup> and most recently in 2019;<sup>250</sup> the latter document is still in force. The 2016 amendment introduced a 'European Border and Coast Guard' (EBCG) which, despite its name, does not aim to replace national border guard units and centralise external border management, being essentially 'a new model built on an old logic'.<sup>251</sup> Nevertheless, the 2019 Regulation describes European integrated border management (IBM) as 'a *shared* responsibility of the Agency and of the national authorities responsible for border management', while recognising that 'Member States shall retain *primary* responsibility for the management of their sections of the external borders'.<sup>252</sup>

Meanwhile, EASO's founding Regulation, adopted in 2010, remains unaltered.<sup>253</sup> The Commission issued a proposal for a revamped European Union Agency on Asylum (EUAA) in 2016.<sup>254</sup> The two co-legislators, i.e. the Council and the European Parliament, reached a political agreement for the greatest majority of provisions of the EUAA proposal in late 2017.<sup>255</sup> In the meantime, the Commission released an amended proposal in 2018, containing only targeted amendments, reinforcing the operational tasks of the EUAA.<sup>256</sup> The amendments contained in this proposal have since been set aside by both co-legislators. **The New Pact** package did not aim to alter the legal mandate of EASO. The Commission did not release a new, or consolidated, proposal on the EUAA as part of the New Pact. Instead, it **urged co-legislators to swiftly adopt** (concluding negotiations by the end of 2020) **the new Regulation on the**

<sup>246</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L 349/1.

<sup>247</sup> Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, [2007] OJ L 199/30 ('2007 FRONTEX Regulation').

<sup>248</sup> Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2011] OJ L 304/1.

<sup>249</sup> Regulation (EU) No 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, [2016] OJ L 251/1 ('2016 EBCG Regulation').

<sup>250</sup> Regulation (EU) No 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) 1052/2013 and (EU) 2016/1624, [2019] OJ L 295/1 ('2019 EBCG Regulation').

<sup>251</sup> De Bruycker, 'The European Border and Coast Guard: A New Model Built on an Old Logic' (2016) 1 European Papers 559. See also, Moreno-Lax, *Assessing Asylum in Europe* (n 120) Ch 6.

<sup>252</sup> 2019 EBCG Regulation, Art 7(1) (italics added).

<sup>253</sup> Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 Establishing a European Asylum Support Office, [2010] OJ L 132/11 ('EASO Regulation').

<sup>254</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and Repealing Regulation (EU) 439/2010, COM(2016) 271 final, 4.5.2016 ('2016 EUAA proposal').

<sup>255</sup> The partial agreement was included as an Annex I to Council doc. 10555/17, 27.7.2017 ('EUAA partial agreement').

<sup>256</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2018) 633 final, 12.9.2018 ('2018 EUAA amended proposal').

**EUAA** based on the pre-existing proposals and interim political agreements.<sup>257</sup> This approach has **distinct disadvantages**.<sup>258</sup> EASO, and its envisaged successor the EUAA, play an increasingly pivotal role in the implementation of EU asylum policy and intra-EU solidarity. It had been impossible to conclude negotiations on the previous 2016 proposal because of politically salient issues. For example, MS at the external borders were unwilling to close negotiations on the envisaged monitoring-like functions of the agency, before they had concrete guarantees on enhanced solidarity. These salient issues remain pending, complicating the wishes of the Commission for a speedy adoption of the new Regulation. This is also why it became impossible for the German Presidency to achieve the progress it had hoped for in this area,<sup>259</sup> leaving the project of developing EASO into ‘a fully-fledged Union agency’ that eventually becomes the ‘principal coordinator of the CEAS’, as per the European Parliament’s wishes, unaccomplished.<sup>260</sup>

### 3.4.2 Key Trend: Joint Implementation

**The operational expansion of EU agencies’ mandates has led to patterns of joint implementation**, with their staff and experts deployed in fields such as border control, returns, and the processing of asylum claims, working alongside national administrations and authorities. This means that **agency deployees increasingly have executive powers**, implement policy alongside national officials, **and directly interact with refugees and migrants**.

Joint implementation patterns have been part of the functioning of **Frontex** from early on. Over time, the resources available to the agency, whether human or financial, have grown exponentially. By deploying operational personnel and equipment (made available through MS or from its own resources), Frontex enhances the human and financial resources of individual MS by drawing from the EU budget. Nevertheless, the **operational element was initially tied to the notion of emergency**, rendering it — in theory — an exception, given that the entire operationalisation of the solidarity principle under Article 80 TFEU was emergency driven.<sup>261</sup> **However, the EU seems to be moving away from emergency driven conceptions of agency involvement** (and indirectly of intra-EU solidarity and fair sharing as well). This is exemplified by Frontex’s move to increase its statutory staff to 3,000 by 2027, while the number of staff to be provided by MS for long-term secondments (i.e. for a minimum of 24 months, extendable once for an additional 12 or 24 months) should reach 1,500 by 2027, and for short-term deployments should reach 5,500 by 2027,<sup>262</sup> totalling 10,000. These numbers point to **structural involvement in policy implementation, and** consequently to structural forms of **interstate responsibility sharing**. The new role of Frontex in return policy, including in the coordination and organisation of return operations,<sup>263</sup> points in this direction too.

<sup>257</sup> New Pact on Migration and Asylum, pp. 3 and 10.

<sup>258</sup> See also Tsourdi, ‘The New Pact and EU Agencies’ (n 241).

<sup>259</sup> German Presidency, Presidency progress report on key elements of a European Migration and Asylum policy and the way forward, [2020](#).

<sup>260</sup> European Parliament, 2016 Mediterranean Resolution, para. 68.

<sup>261</sup> See Tsourdi ‘Solidarity at work?’ (n 110).

<sup>262</sup> See 2019 EBCG Regulation, Annex I.

<sup>263</sup> 2019 EBCG Regulation, Arts 51 and 54. See also commentary on the use of European-level resources in implementing return policy in Slominski and Trauner, ‘How do Member States Return Unwanted Migrants? The Strategic (non-)use of ‘Europe’ during the Migration Crisis’ (2018) 56 Journal of Common Market Studies 101.

Frontex-Budget Allocation Evolution						
	2005	2007	2011	2016	2019	2020
<b>Budget Allocation (in EUR)</b>	6,2 mil.	41,9 mil.	118,1 mil.	251 mil.	333,3 mil.	459,9 mil.

Figure 1: Frontex – Budget Allocation Evolution<sup>264</sup>

By contrast, the involvement of EASO in directly implementing the EU asylum policy, specifically in processing asylum applications, is new. EASO's Regulation foresees the deployment of Asylum Support Teams (ASTs).<sup>265</sup> ASTs are made up of seconded national experts, including interpreters.<sup>266</sup> The first such operations were launched shortly after the EASO's establishment and gradually grew in number and scope. The **EASO AST deployments were not operational like the border guard teams deployed by Frontex**, which interacted with individual migrants at external borders. ASTs' work originally consisted of expert advice in ministry departments or involved training and study visits by members of national administrations.<sup>267</sup> **However**, the operationalisation of **the hotspot approach changed this**.<sup>268</sup> **EASO employees** moved away from expert consulting and **began to undertake more hands-on tasks**, such as providing information to arriving TCNs and assisting with the emergency relocation process. As pressures increased, forms of common, rather than assisted, processing emerged in Greece. Deployed experts undertake admissibility interviews<sup>269</sup> and submit opinions that, despite being advisory and non-binding on national authorities, entail the exercise of administrative discretion which impacts decision-making.<sup>270</sup> Further developments include the involvement of EASO (deployed experts) in assessing the merits of asylum claims.<sup>271</sup> Some involvement in different stages of asylum processing, although less structural than in Greece, has taken place in Cyprus and Malta.<sup>272</sup>

**The provisional agreement on an EUAA confirms these integrative trends.** If adopted, elements of assisted and common processing would be ingrained in the Agency's mandate. The envisaged measures, as part of operational support, are varied. They include preparatory acts of the asylum procedure that do not involve administrative discretion, such as assistance with the identification and registration of TCNs, and the provision of information on the international protection procedure.<sup>273</sup> The

<sup>264</sup> Authors' reconstruction from information available in official Frontex [documentation](#).

<sup>265</sup> EASO Regulation, Art 10(a)–(c).

<sup>266</sup> EASO Regulation, Art 15.

<sup>267</sup> See McDonough, and Tsourdi, 'The 'Other' Greek Crisis: Asylum and EU Solidarity' (2012) 31 Refugee Survey Quarterly 67, pp. 80–96.

<sup>268</sup> The hotspot approach involves inter-agency collaboration, in which deployed national experts, under the coordination of a specific agency, operationally assist national administrations. See also European Commission, Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration, COM (2015) 490 final, 25.9.2015, Annex II. A hotspot is in essence an EU external border section facing high numbers of arrivals of TCNs. In practice, these arrivals most often present a mixture of individuals, some of whom qualify for international protection since they are fleeing persecution or generalised violence, and others who do not.

<sup>269</sup> Admissibility represents a preliminary stage in the asylum procedure, where a determination is made as to whether the asylum application should be examined on the merits, or whether the application should be discontinued as inadmissible, for instance, because the individual can safely be returned to a third country.

<sup>270</sup> See analysis in Tsourdi, 'Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office' (2016) 1 European Papers 997, pp. 1021–1026.

<sup>271</sup> See analysis of the latest legislative developments in Tsourdi, 'Holding the European Asylum Support Office Accountable' (n 244).

<sup>272</sup> See analysis in ECRE, The Role of EASO Operations in National Asylum Systems, [29.11.2019](#).

<sup>273</sup> EUAA Partial Agreement, Art 16(3)(a), (3), (h).



proposed Regulation also includes a form of common processing: migration management teams deployed in areas under pressure could potentially be tasked with the 'examination of such applications' where requested by the host MS,<sup>274</sup> though the final decision would remain the competence of MS authorities.

### 3.2.3 Key Trend: Monitoring Functions

**Frontex already carries out monitoring functions.** The EBCG Regulation states that one of the agency's tasks is to 'monitor the management of the external borders through liaison officers of the Agency in Member States'.<sup>275</sup> Liaison officers 'foster cooperation and dialogue between the Agency and the national authorities responsible for border management'.<sup>276</sup> Their tasks include: information collection; reporting on the execution of return operations; reporting on the situation at the external borders; and reporting on measures adopted by MS in urgent situations.<sup>277</sup>

The role of the liaison officers is intrinsically linked with the **vulnerability assessment** that the agency undertakes.<sup>278</sup> The main aims are to assess the capacity and readiness of the MS to face challenges at their external borders and to contribute to the standing corps and technical equipment pool; and to identify (especially for those MS facing specific and disproportionate challenges) possible immediate consequences at the external borders and subsequent consequences for the functioning of the Schengen area.<sup>279</sup> Vulnerability assessments can lead to recommendations; a binding decision of measures set out by its Management Board; or, in cases where the external borders require urgent action, a binding Council implementing act prescribing measures, including the roll out of agency-coordinated missions and deployment of the standing corps. The MS has an obligation to comply with the Council Decision and cooperate with the agency,<sup>280</sup> but in practice, if the MS refuses to cooperate, neither Frontex nor the EU institutions have a 'right to intervene' in a MS (e.g. enforcing deployments on the ground). The ultimate measure is the procedure to reintroduce internal border controls, as foreseen in the Schengen Borders Code.<sup>281</sup> **The role of Frontex is pivotal throughout.** It gathers the necessary information, including through its liaison officers. It can, through its Executive Director, propose measures and, in a later stage, through its Management Board, prescribe binding measures. These steps are necessary prerequisites to the adoption of a binding Council Decision, which takes into account the prior evaluations and assessments by the agency.

One observes the **same trends in EASO**. While in 2016 the Commission proposed a formal monitoring role for the EUAA, this was watered down in negotiations. Currently the agency does not undertake any activity that could be classified as monitoring. The partial agreement on an EUAA establishes a function to 'monitor the operational and technical application of the CEAS with a view to assisting MS to enhance the efficiency of their asylum and reception systems'.<sup>282</sup> The envisaged scope of this function was broader in the Commission proposal, wherein the agency was expected to: monitor the implementation and assess all aspects of the CEAS in MS; monitor compliance by MS with operational

<sup>274</sup> Ibid., Art 21(2)(d).

<sup>275</sup> 2019 EBCG Regulation, Arts 10(1)(d) and 31(1).

<sup>276</sup> Ibid., Art 31(3).

<sup>277</sup> See for the full list of tasks, 2019 EBCG Regulation, Art 31(3)(a)-(k).

<sup>278</sup> Ibid., Rec 42.

<sup>279</sup> Ibid., Art 32(4).

<sup>280</sup> Ibid., Art 42(8).

<sup>281</sup> 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), [2016] OJ L 77/1, Art 29.

<sup>282</sup> EUAA partial agreement, Art 2 (italics added).

standards, indicators, guidelines, and best practices on asylum; and verify asylum and reception systems, including staffing and financial resources.<sup>283</sup> The Council passed some amendments, which greatly **align the EUAA monitoring mechanism to the 'vulnerability assessment' process in the EBCG Regulation**. The current aim of monitoring is to 'prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems'.<sup>284</sup> It is envisaged that information would come mainly through the MS themselves, but that the agency 'may also take into account information provided by relevant intergovernmental organisations or bodies, in particular UNHCR, and other relevant organisations'. Based on amendments put forward by the Parliament, the EUAA would gain the capacity to conduct on-site visits and case sampling.<sup>285</sup> The mechanism also foresees a gradation of measures that could lead to recommendations by the Management Board and the Commission. Finally, based on EP amendments, the Council would prescribe measures through a legally binding implementing act.<sup>286</sup>

### 3.2.4 Challenges and European Parliament's Role

The *de jure* and *de facto* **mandate expansion raises several challenges for Frontex and EASO**. Some are practical, for example, the existence of sufficient financial and human resources to realise their expanded mandate. While politically sensitive, these challenges are straightforward. Instead, our analysis focuses on a set of challenges that are harder to tackle and revolve around balancing **independence, accountability, and respect for fundamental rights**.

#### - Fundamental rights oversight and accountability

The exercise of **executive powers** through tasks entailing executive discretion by deployed EU agency staff results in greater direct interaction with individual migrants, potentially affecting their fundamental rights. Agency deployments in third countries also **raise fundamental rights concerns** and the need to coordinate action with international stakeholders. These developments bring into sharp relief the necessity to hold EASO and Frontex accountable alongside MS involved in these operational activities. Most recently, Frontex has been facing intense scrutiny for its role in pushbacks from Greece to Turkey,<sup>287</sup> as we expound in Chapter 4, and had to suspend its operations in Hungary in relation to pushbacks to Serbia.<sup>288</sup>

**EASO and Frontex are subject to multiple accountability processes**. First, there are political processes: before the agencies' own Management Board;<sup>289</sup> before the Council;<sup>290</sup> before the Commission;<sup>291</sup> and before the European Parliament.<sup>292</sup> The Parliament has the possibility to influence the appointment of agencies' Executive Directors, to interact with Executive Directors during the presentation of their respective agencies' annual reports, and to invite them to report on the performance of their duties at any moment.<sup>293</sup> These processes are crucial in scrutinising fundamental

<sup>283</sup> 2016 EUAA proposal, Art 13(1)(a)-(c).

<sup>284</sup> EUAA partial agreement, Art 13.

<sup>285</sup> EUAA partial agreement, Art 13 (4).

<sup>286</sup> EUAA partial agreement, Art 22 (1).

<sup>287</sup> 'Frontex in illegale Pushbacks von Flüchtlingen verwickelt', *Der Spiegel*, [23.10.2020](#).

<sup>288</sup> 'Frontex Suspends Operations in Hungary', *EU Observer*, [27.1.2021](#).

<sup>289</sup> See, e.g., EASO Regulation, Art 29; EBCG 2019 Regulation, Art 106(5).

<sup>290</sup> See, e.g., EASO Regulation, Art 31(3); EBCG 2019 Regulation, Art 106(2).

<sup>291</sup> See, e.g., EASO Regulation, Arts 7(1) and 12(2); EBCG 2019 Regulation, Art 106(3).

<sup>292</sup> See, e.g., EASO Regulation, Art 30(1); EBCG 2019 Regulation, Art 106(2).

<sup>293</sup> Ibid.



rights compliance in multi-actor situations where agencies are operational, as the recent example of the alleged implication of Frontex in pushbacks illustrates.<sup>294</sup> Beyond these processes, MEPs can initiate ad hoc investigations, such as the 'Frontex Scrutiny Working Group' that MEPs from the LIBE Committee established in January 2021.<sup>295</sup>

Other than its role as a **political accountability** forum, the Parliament can impact the legislative design of the agencies' instruments to ensure enhanced fundamental rights standards. It has been pivotal in introducing amendments to the EUAA Regulation to propose a Fundamental Rights Officer and an individual complaints mechanism, mirroring the Frontex Regulation.

Second, the agencies' Regulations envisage **judicial accountability** through the CJEU. For example: through actions for annulment against agency decisions relating to access to documents,<sup>296</sup> and jurisdiction to determine issues of contractual liability,<sup>297</sup> as well as of non-contractual liability (e.g. an action for damages in relation to 'any damage caused by its departments or by its staff in the performance of their duties'<sup>298</sup>).

The Commission, the Council, the European Court of Auditors (ECA), and the Parliament ensure **financial accountability**.<sup>299</sup> The Parliament has not shied away from exercising its competence in discharging the agencies' budgets. For example, in October 2019 it refused to discharge EASO's Executive Director in respect of the implementation of the Office's budget for 2017. This was based on material and systematic non-compliance of payments with the EASO Financial Regulation and other rules, mainly relating to public procurement and recruitment procedures, and underlying payments that had been flagged up by the ECA.<sup>300</sup> The same had happened in relation to the 2016 budget.<sup>301</sup> Most recently, the Parliament postponed the discharge of the 2019 Frontex budget for a number of reasons, including complicity of the agency in fundamental rights violations concerning its involvement in migrant pushbacks (see further Chapter 4).<sup>302</sup>

**Social accountability processes** are most arguably lacking in EASO. The agency's Consultative Forum is not conceptualised as an accountability forum; the agency does not have to report, or explain its actions, to representatives of civil society. The main aim of the Forum is to promote dialogue, exchange of information, and pooling of knowledge.<sup>303</sup> In contrast, the processes established by the Frontex Regulation are arguably genuine accountability processes. Frontex is obliged to provide its Consultative Forum with 'access in a timely and effective manner to all information concerning the

<sup>294</sup> See, e.g., LIBE Committee, 'MEPs to grill Frontex director on agency's role in pushbacks of asylum-seekers', Press Release, [30.11.2020](#).

<sup>295</sup> See, e.g., LIBE Committee, 'First meeting of the Frontex Scrutiny Group with Leggeri and Johansson', Press Release, [3.3.2021](#).

<sup>296</sup> EASO Regulation, Art 42(3); EBCG 2019 Regulation, Art 114(5), and TFEU, Art 263.

<sup>297</sup> EASO Regulation, Art 45(2); EBCG 2019 Regulation, Art 97(3).

<sup>298</sup> EASO Regulation, Art 45(3); EBCG 2019 Regulation, Art 98 and TFEU, Art 340(2).

<sup>299</sup> EASO Regulation, Arts 34 and 36; EBCG 2019 Regulation, Art 116.

<sup>300</sup> European Parliament, Decision of 23 October 2019 on discharge in respect of the implementation of the budget of the European Asylum Support Office for the financial year 2017 (2018/2208(DEC)); See also the previous decision of the EP by which it had postponed the discharge of the 2017 budget; European Parliament Decision of 26 March 2019 discharge in respect of the implementation of the budget of the European Asylum Support Office (EASO) for the financial year 2017 (2018/2208(DEC)).

<sup>301</sup> European Parliament, Decision of 24 October 2018 discharge in respect of the implementation of the budget of the European Asylum Support Office for the financial year 2016 (2017/2177(DEC)).

<sup>302</sup> European Parliament, Resolution of 29 April 2021 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (2020/2167(DEC)).

<sup>303</sup> EASO Regulation, Art 51(2).

respect for fundamental rights including by carrying out on-the-spot visits'.<sup>304</sup> In addition, the Frontex Consultative Forum prepares an annual report of its activities, which becomes publicly available.<sup>305</sup> It may 'pass judgment' on the agency's fundamental rights record and the agency may suffer reputational sanctions as a result.<sup>306</sup>

Finally, the EASO Regulation contains a **general provision on extra-judicial accountability**, stating that '[t]he activities of the Support Office shall be **subject to the controls of the Ombudsman** in accordance with Article 228 of the TFEU'.<sup>307</sup> It also contains an additional reference to the European Ombudsman's (EO) mandate specifically in relation to access to documents.<sup>308</sup> The Frontex Regulation contains a set of similar clauses.<sup>309</sup> Extra-judicial accountability thus emerges as a promising avenue to ensure procedural fundamental rights compliance. For example, the EO has scrutinised the role of EASO in asylum processing at the hotspots.<sup>310</sup> Her scrutiny of the first such complaint was arguably superficial, dismissing constitutional-level challenges based on uncertain future legislative amendments and placing the entire burden of safeguarding procedural standards on the Greek administrative authorities that EASO experts had deployed to assist.<sup>311</sup> However, in the treatment of the second complaint, the EO recommended the adoption of concrete procedural safeguards, such as obligations to notify national authorities of errors identified by the agency, and the establishment by EASO of an internal individual complaints mechanism.<sup>312</sup>

While they certainly contribute to the effective oversight of these agencies, **accountability processes are also beset by pitfalls when it comes to ensuring the respect of individuals' fundamental rights**. For example, judicial accountability at EU level remains largely inaccessible to individual asylum seekers and migrants due to the strict rules on admissibility, standing, and establishment of liability.<sup>313</sup> Social accountability processes in the framework of EASO fall short of being genuine accountability processes, as they remain at the level of information exchange. Financial accountability is particularly effective,<sup>314</sup> but it is mainly aimed at sound management of public funds and can only indirectly address broader fundamental rights concerns. **Internal accountability mechanisms**, such as the individual complaints mechanism of Frontex,<sup>315</sup> could complement accountability through external fora, provided they are well functioning, well-resourced, and benefit from sufficient independence. To date,

<sup>304</sup> EBCG 2019 Regulation, Art 108(5).

<sup>305</sup> Ibid., Art 108(4).

<sup>306</sup> On reputational sanctions, see Busuioc and Lodge, 'The Reputational Basis of Public Accountability' (2016) 29 Governance 247.

<sup>307</sup> EASO Regulation, Art 47.

<sup>308</sup> Ibid., Art 42(3).

<sup>309</sup> EBCG 2019 Regulation, Arts 114(5) and 119.

<sup>310</sup> European Ombudsman, Decision of European Ombudsman in Case 735/2017/MDC on the European Asylum Support Office's (EASO) involvement in the Decision-Making Process Concerning Admissibility of Applications for International Protection Submitted in the Greek Hotspots, in particular Shortcomings in Admissibility Interviews (Case 735/2017/MDC), 13.7.2017; as well as European Ombudsman, Decision of the European Ombudsman in Case 1139/2018/MDC on the Conduct of Experts in Interviews with Asylum Seekers Organised by the European Asylum Support Office (Case 1139/2018/MDC), 30.9.2019.

<sup>311</sup> Case 735/2017/MDC and Tsourdi 'Holding the European Asylum Support Office Accountable' (n 244).

<sup>312</sup> Case 1139/2018/MDC and Tsourdi 'Holding the European Asylum Support Office Accountable' (n 244).

<sup>313</sup> On EASO, see, e.g., Lisi and Eliantonio, 'The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in the Hotspots' (2019) 4 European Papers 589, p. 599; and, on FRONTEX, Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press, 2018).

<sup>314</sup> For example, in October 2019 the European Parliament refused to grant EASO's Executive Director discharge in respect of the implementation of the Office's budget for the financial year 2017 (n 300).

<sup>315</sup> EBCG 2019 Regulation, Art. 111.

there are deficiencies on these points, which have led the EO to open an enquiry on Frontex's 'complaints mechanism'.<sup>316</sup>

#### *- Joint implementation and supervision*

The 2019 EBCG Regulation introduced **European IBM as a shared responsibility**. Increased Frontex resources and the executive powers foreseen for its statutory staff and deployed national personnel (subject to the authorisation of the host MS) can be understood as effective means by which the EU can operationalise European IBM. No legal text sets out this conception of shared responsibility in the context of asylum; not even the proposal for a revamped EUAA.<sup>317</sup> However, the increased operational role foreseen for deployed experts and EASO staff — whether *de jure*<sup>318</sup> or *de facto* — is moving in the same direction.

**The monitoring functions of EU agencies** (e.g. Frontex' vulnerability assessment and the role of its liaison officers, as well as the EUAA's monitoring mechanism) follows a different trend. These processes **can be seen as supplemental to the Commission's supervision mandate**. They are limited in their focus to technical and operational aspects (i.e. the existence of capabilities, infrastructure, etc.). They serve a dual purpose. They identify particular pressures and weaknesses to assistance mobilisation in order to remediate them and are also linked to the gradation of enforcement-type measures that can indirectly lead to the commencement of infringement proceedings or supplement ongoing proceedings.

**The supervision and operational limbs of the expanded mandates are linked.** Structural shortcomings and capacity issues first identified through supervision processes could be (partially) overcome through the additional deployment of human and technical resources, and the enhancement of joint implementation actions. If these monitoring functions gradually expand to the supervision of the implementation of the policies themselves, as was the European Commission's initial conception of the EUAA monitoring mechanism,<sup>319</sup> **the agencies would be called on to play a double and, at times, contradictory role:** implementing jointly, while simultaneously supervising the implementation of joint action, becoming judge and party at the same time. The current operationalisation of the 'hotspot approach' in Greece is an example.<sup>320</sup>

#### *- Internal governance and independence*

To fulfil their mandate effectively, agencies must be independent from national interests and political influences. Independence is highlighted in the agencies' founding Regulations, albeit with different nuances.<sup>321</sup> EU agencies are both institutionally and functionally dependent on EU institutions and MS. This is evident in the design of their governance structures, specifically the MS-dominated management boards,<sup>322</sup> and the collaborative process by which they discharge their mandate. Management boards have far-reaching powers regarding the planning and operationalisation of the agencies' mandates, including pivotal roles in the monitoring functions.

<sup>316</sup> European Ombudsman, How the European Border and Coast Guard Agency (Frontex) deals with complaints about alleged fundamental rights breaches through its 'Complaints Mechanism', Case OI/5/2020/MHZ, opened on 10.11.2020.

<sup>317</sup> 2016 EUAA proposal.

<sup>318</sup> Ibid., Arts 19 and 21.

<sup>319</sup> Ibid., Art 13.

<sup>320</sup> See Luyten and Orav, *Hotspots at EU external borders: State of play*, PE 652.090, ([European Parliament, 2020](#)).

<sup>321</sup> See, e.g., EASO Regulation, Art 2(4); EBCG 2019 Regulation, Art 93(3).

<sup>322</sup> See, e.g., EASO Regulation, Arts 25-27; EBCG 2019 Regulation, Art 99.

**There is an underlying tension between the agencies' supervision functions and the strong role of their Management Boards in these processes.** Since the monitoring functions of an EUAA are still at the proposal stage, this point is best illustrated through Frontex. As already stated, Frontex' vulnerability assessments can lead to a binding decision endorsed by the Management Board, and, at later stages, concrete measures can be introduced through a Council implementing act. Thus, the monitoring process could eventually lead to concrete obligations for MS, including to allow deployments on its territory. A MS-dominated Management Board is thus called upon to play pivotal roles in actions that could lead to politically sensitive outcomes. But it is possible that MS will opt for a 'hands off' approach to avoid political controversy.

### 3.5 Conclusions

**Five years after the 'refugee crisis', the number of asylum applications and arrivals at EU external borders has significantly decreased. Nonetheless, crisis responses and crisis discourse persist,** in defiance of the 'holistic approach to migration' propounded by the European Parliament. **Solidarity** continues to consist of emergency-driven schemes and responses and **has not been structurally embedded** in the common asylum and external border control policies. Unable to agree on legislative reform and policy initiatives, MS have resorted to unilateral actions or *ad hoc* cooperation frameworks, all of which have failed to address in a sustainable manner the root causes of EU policy's ills.

The **powers of Frontex and EASO**, the EU's border and asylum agencies, expanded with a view to enhancing MS implementation capacities and addressing the solidarity gap in the design of asylum and external border control policies. This expansion has led to significant shifts in the implementation modes of EU asylum and external border control policies. Patterns of joint implementation have emerged. Moreover, these agencies are **increasingly vested with functions that have the potential to steer and monitor policy implementation.** These developments were intensified by the 'refugee crisis' but were neither exclusively due to the crisis, nor were they limited to the duration of the crisis. They rather point to deeper shifts in the implementation and enforcement modes of these policies and signal that EU agencies are here to stay. The tension brought about by the mandate expansion of these agencies is tangible. There is a **friction between jointly implementing while simultaneously having a pivotal role in supervising implementation.** The mandate expansion has not been coupled with a radical redesign of the internal governance structure of the agencies in what concerns the composition and role of their MS-dominated Management Boards, raising the **challenge of independence.** Finally, the exercise of **executive powers** means greater direct interaction with individual migrants and asylum seekers, potentially affecting their fundamental rights. This **raises the challenge of accountability for fundamental rights violations.**

Finally, **Covid-19 presented novel challenges** to border areas and migration. Border closures led to diminishing numbers of migrants and asylum applicants. Asylum seekers saw their **right to asylum severely curtailed**, and in some cases, their **right to freedom of movement arguably unjustifiably restricted**, when limitations were lifted for the rest of the population. Yet, a number of positive measures, such as visa and residence permit extensions, were also noted.

#### Recommendations:

*Regarding the current acquis and practice*

13. Launch a study to analyse the **accountability mechanisms** pertaining to Frontex and EASO to ensure effectiveness and avoid duplication;

14. Launch a study on MS' asymmetric responsibilities in border and asylum policies, to **concretely evaluate the breadth of the solidarity gap** between the current situation and the desirable size of EU compensation mechanisms;
15. **Scrutinise the compatibility of MS' Covid-19 responses at the borders with EU and international refugee law and human rights**, specifically the principle of human dignity (Article 1 CFR), the right to asylum (Article 18 CFR), and the prohibitions of inhuman and degrading treatment (Article 4 CFR), arbitrary detention (Article 6 CFR), collective expulsion (Article 19(1) CFR), and *refoulement* (Article 19(2) CFR).

*Regarding ongoing negotiations*

16. Ensure the European Parliament's involvement in the **monitoring mechanism of the new EUAA** to render it more objective and impartial, e.g. through the possibility of Parliament delegations being present in on-site visits, or through reporting obligations, especially regarding escalation measures;
17. **Ensure that the Consultative Forum of the EUAA is vested with adequate capacities** (e.g. through agency reporting obligations, and allowing the EUAA to conduct on-site visits during operations), making it an independent monitor and a meaningful accountability forum;

*Regarding future initiatives*

18. Revise the **composition of the management boards of the agencies**, e.g., foreseeing a role for the European Parliament as a non-voting member, at the very least, to enhance political accountability and scrutiny channels;
19. **Strengthen the role of the European Parliament as a political accountability forum** for agencies, by increasing its ability to influence agency dynamics (e.g. answering ad-hoc questions in writing, keeping comprehensive records of Management Board meetings, and taking a role in the dismissal of Executive Directors);
20. **Establish political accountability arrangements before national parliaments** (e.g. reporting obligations or hearings) and/or joint accountability mechanisms involving both the European Parliament and national parliaments, along the lines of the European Union Agency for Law Enforcement Cooperation's (Europol) Joint Parliamentary Scrutiny Group;
21. **Actively follow up on implementing the internal fundamental rights oversight mechanisms** included in the EUAA, such as hiring a Fundamental Rights Officer and resourcing their office, and running the individual complaints mechanism in a manner that guarantees compliance with the rights to good administration (Article 41 CFR) and an effective remedy (Article 47 CFR), including through effective judicial protection, to ensure adequate redress of any violations;
22. **Evaluate the legal and practical feasibility**, alongside the financial and operational implications, **of new solidarity mechanisms** under the New Pact, including 'return sponsorships', considering both the horizontal and vertical dimensions (i.e. inter-State and *vis-à-vis* refugees and migrants) to ensure full compliance with the relevant standards.

## 4. MARITIME SEARCH AND RESCUE (SAR)

### KEY FINDINGS

- SAR obligations under international law and equivalent provisions under EU law include the duty to render assistance and to arrange for rescue and disembarkation at a 'place of safety', bearing in mind the human rights of refugees and migrants, in particular the rights to life and to *non-refoulement*. Obligations begin on receipt of a signal from any source that persons are in distress and in danger of being lost.
- These obligations apply to all vessels, everywhere at sea, including to EU/MS vessels within Frontex or EUNAVFORMED missions as well as to SAR NGO and private shipping boats, regardless of the nationality, status, and circumstances of the persons concerned.
- Coastal States have, in addition, a duty to ensure the necessary arrangements for coast watching and the searching and rescuing of persons in distress around their coasts, including through the establishment of SAR facilities, the delimitation of search and rescue regions (SRR), and the coordination of effective SAR services.
- The availability of rescue cannot be characterised as a pull factor. Available data shows that maritime crossings primarily track weather and sea conditions and patterns of border surveillance. However, even if constitutive of a pull factor, rescue cannot be withheld on these grounds, given the absolute character of the right to life.
- Both the 2015 'refugee crisis' and the Covid-19 pandemic have led to the emergence of new practices that fail to comply with the relevant standards. These include unresponsiveness to distress calls, port closures, 'privatised pushbacks', 'aerial refoulement', 'floating' detention centres, and the suspension of the right to asylum.
- Frontex as well as EUNAVFORMED assets appear to have been involved in interdiction incidents causing the violation of migrants' rights, including through illegal pushbacks and other infringements of the prohibitions of *refoulement* and collective expulsion.
- Cooperation arrangements with third countries for preventing boat departures to the EU, including the EU-Turkey Statement and the MoUs with Libya of Italy, Malta and the EUNAVFORMED, have had particularly deleterious effects on the rights of TCNs.
- A common disembarkation mechanism that fulfils the requirements of EU and international law has yet to materialise. Past proposals, including the Malta Declaration scheme and ad hoc arrangements supporting Italy and Malta have been unsuccessful. The Commission's plan for compulsory solidarity relocations of asylum seekers arriving by sea, proposed as part of the New Pact on Migration and Asylum, is also bound to fail. It is too complex and fragmented to deliver swift and predictable outcomes.
- Rather than improving SAR capacity, the Commission's new SAR Recommendation's effect risks being the opposite. In the name of safety of navigation, the document proposes several measures that will subject SAR NGO vessels to obstructive scrutiny, if not pre-emptive criminalisation, which may lead to the preclusion of their activities.



## 4.1 Introduction

This chapter builds on Chapter 3, introducing the situation in the Mediterranean, and focuses on the **issues pertaining to search and rescue (SAR) at sea**.<sup>323</sup> It provides an overview of the development and current status of SAR capacities in the Mediterranean, paying particular attention to **Frontex-coordinated operations**, including *Poseidon* in the Aegean and *Themis* in the Central Mediterranean, and the **EUNAVFORMED mission *Sophia*** and its successor **IRINI**, assessing emerging practices in light of the relevant EU and international standards.

The chapter first defines **SAR obligations under international law and equivalent provisions under EU law** and assesses the extent to which SAR can be characterised as a ‘pull factor’ for irregular migration. It considers the duties to provide assistance and to arrange for disembarkation at a ‘place of safety’, bearing in mind the human rights of refugees and migrants and assessing their applicability to EU/MS vessels operating within Frontex-coordinated or EUNAVFORMED missions as well as to SAR NGO boats and private merchant ships. **The implications of the new Commission Recommendation on cooperation among MS concerning operations carried out by vessels owned or operated by private entities for the purpose of SAR activities (SAR Recommendation) are also taken into account.**<sup>324</sup>

The chapter **examines allegations of human rights violations**, including illegal pushbacks and other infringements of the prohibitions on *refoulement* and collective expulsion, paying particular attention to the EU actors’ contribution to these violations. It pays particular attention to the situations in the Aegean and the Central Mediterranean, exploring the **effects of cooperation arrangements with third countries** for preventing boat departures to the EU, focusing on the EU-Turkey Statement and the MoUs with Libya concluded by Italy, Malta and the EUNAVFORMED, complementing the assessment undertaken in Chapter 6. The **impact of the measures adopted** since the 2015 crisis and **during the Covid-19 pandemic**, including port closures, ‘privatised pushbacks’,<sup>325</sup> ‘aerial *refoulement*’,<sup>326</sup> the establishment of ‘floating’ detention centres at sea, and the suspension of the right to asylum, are assessed for compliance with the relevant norms. They constitute forms of interception/interdiction that impede access to safety and international protection<sup>327</sup> — while ‘pushbacks’ are typically performed by the authorities or agents of a country of destination to impede arrivals, ‘pullbacks’ are undertaken by the authorities or agents of a third country of origin or transit to

<sup>323</sup> This chapter draws on Moreno-Lax, ‘Protection at Sea and the Denial of Asylum’ in Costello, Foster and McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 483; and Moreno-Lax, ‘A New Common European Approach to Search and Rescue? Entrenching Proactive Containment’, *EU Migration Law*, [3.2.2021](#).

<sup>324</sup> Commission Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, C(2020) 6468 final, 23.9.2020 (‘SAR Recommendation’).

<sup>325</sup> This term is used to denote pushbacks assisted or performed by private merchant ships on behalf or at the behest of the Italian MRCC, the Maltese RCC, and/or the LYCG. The practice has been documented by Heller, ‘The Nivin: Migrants’ resistance to Italy’s strategy of privatized push-back’, *Forensic Oceanography* ([December 2019](#)).

<sup>326</sup> This term is used to denote *refoulement* practices assisted by European aerial assets that detect migrant boats and relay location information to the LYCG and other actors ending in the return of the migrants concerned back to Libya. See further ‘Respingimenti per via aerea, la nuova strategia europea’, *Open Migration*, [17.6.2020](#) and ‘*Migrant drone surveillance from Malta: MEP questions information-sharing with “pull-back” countries*’, *Malta Today*, [8.5.2021](#).

<sup>327</sup> ‘Interception’ is defined by UNHCR as: ‘encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination’, in Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, [EC/50/SC/CRP.17, 9.6.2000, para 10](#). The Law of the Sea uses the term ‘interdiction’ to denote unilateral enforcement action against foreign or flagless vessels that impedes navigation. See, e.g., Guilfoyle, ‘Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force’ (2007) 56 *International and Comparative Law Quarterly* 69 and references therein.



counter departures at the behest of the authorities of the country of destination.<sup>328</sup> Recommendations by the Council of Europe, UNHCR, and others regarding disembarkation and reception during the pandemic are taken in consideration.

Finally, the chapter evaluates the **practicability of options for a common disembarkation mechanism** that fulfils the requirements of EU and international law, taking account of past proposals, like the Malta Declaration scheme, and ad hoc arrangements supporting Italy and Malta. The Commission's **new plan for compulsory solidarity relocations** of asylum seekers arriving by sea is scrutinised in detail under the terms of the proposed Regulations attached to the New Pact on Migration and Asylum.<sup>329</sup>

## 4.2 SAR Obligations and Human Rights Duties Applying at Sea

The **duty to rescue is international customary law** and part of the most 'elementary considerations of humanity'.<sup>330</sup> It binds all States, whether or not they have ratified the relevant Conventions. As will be shown in the next sections, the Law of the Sea places **duties on flag and coastal States** that **have been transposed into EU law**, which the European Parliament has explicitly endorsed.<sup>331</sup>

### 4.2.1 SAR Obligations of Flag States

The UN Convention on the Law of the Sea (UNCLOS) codifies the **obligation** on 'every State' to require ships flying its flag **'to render assistance to any person found at sea in danger of being lost' and 'to proceed to the rescue of persons in distress'**, insofar as this can be done 'without serious danger to the ship, the crew, or the passengers'.<sup>332</sup> The Search and Rescue (SAR) Convention and the Safety of Life at Sea (SOLAS) Conventions reiterate this duty, clarifying that **the obligation begins on receipt of 'a signal from any source'** that persons are in distress'.<sup>333</sup>

The **personal scope** of application of the duty to render assistance is **universal**. It concerns 'any person' irrespective of nationality or legal status,<sup>334</sup> and it **extends 'throughout the ocean'**.<sup>335</sup> The use of the generic 'at sea' in the relevant provisions means that a vessel is obliged to assist a ship in distress no matter where it encounters it. The material object of the obligation is determined by the notions of 'distress' and 'rescue', which have been clarified by the 2004 amendments to the SAR and SOLAS Conventions.<sup>336</sup>

These define '**distress**' as '**a situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger**', and therefore requires 'immediate

<sup>328</sup> For an illustration, see 'Revealed: 2,000 refugee deaths linked to illegal EU pushbacks', *The Guardian*, [5.5.2021](#).

<sup>329</sup> RAMM Proposal (n 238); Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612, 23.9.2020 ('Pre-entry Screening Proposal'); and Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final, 23.9.2020 ('CFMR').

<sup>330</sup> *The Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4, 22, para 215.

<sup>331</sup> European Parliament, 2016 Mediterranean Resolution, para 3.

<sup>332</sup> Convention on the Law of the Sea, 1833 UNTS 3 ('UNCLOS'), Art 98.

<sup>333</sup> International Convention for the Safety of Life at Sea, 1184 UNTS 278 ('SOLAS Convention'), Ch V, Reg 33(1) (italics added).

<sup>334</sup> International Convention on Maritime Search and Rescue, 1405 UNTS 119 ('SAR Convention'), Annex, para 2.1.10.

<sup>335</sup> Nandan and Rosenne, *UN Convention on the Law of the Sea 1982 - A Commentary*, Vol III (Martinus Nijhoff, 1995), 177.

<sup>336</sup> IMO, 'Amendment to the International Convention on Maritime Search and Rescue, 1979', Res MSC.155(78), 20.5.2004; IMO, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974', Res MSC.153(78) 20.5.2004. See also IMO, 'Guidelines on the Treatment of Persons Rescued at Sea', Res MSC.167(78) (20 May 2004) ('IMO Guidelines'). Although IMO Guidelines are not strictly binding, they must 'be taken into account' according to SAR Convention, Annex, para 3.1.9.

assistance'.<sup>337</sup> This has been interpreted in different ways by different actors.<sup>338</sup> But the interpretation that best serves the purpose of preserving human life at sea — the object of the maritime Conventions<sup>339</sup> — is the one that focuses on the foreseeability of life-threatening danger.<sup>340</sup> This interpretation also takes account of the positive obligations attaching to the right to life, which require States to take active steps to prevent and protect from life-threatening situations.<sup>341</sup> Thus, **unseaworthiness**, e.g. due to over-crowding or a lack of equipment, provisions, or qualified personnel, **should be considered a form of 'distress'**. According to the European Commission, 80% of the unauthorised traffic across the Mediterranean towards the EU employs small unseaworthy vessels that put the lives of passengers 'objectively in danger'.<sup>342</sup> **Persons on board such vessels should be deemed in distress by definition** and thus in need of assistance. 'Rescue', meanwhile, denotes a three-step operation: 'to retrieve persons in distress', to 'provide for their initial medical or other needs', and 'to deliver them to a place of safety'.<sup>343</sup> **It is only upon disembarkation at 'a place of safety' that a rescue operation is considered to terminate**,<sup>344</sup> which requires cooperation from coastal States.

#### 4.2.2 SAR Obligations of Coastal States

**Coastal States** have a **duty to ensure** the necessary arrangements are made for coast watching and searching and rescuing persons in distress around their coasts. These arrangements include the **operation and maintenance of SAR facilities**,<sup>345</sup> the **delimitation of search and rescue regions** (SRR), and the **establishment and coordination of SAR services** with other countries.<sup>346</sup> The objective is to develop a SAR system that makes emergency response effective. This requires adequate communication and operational infrastructure, including a Rescue Coordination Centre (RCC) responsible for receiving and recording distress signals and coordinating assistance.<sup>347</sup> Rescue units attached to RCCs must be suitably equipped, staffed, and managed.<sup>348</sup>

**Awareness of a distress situation through whatever means** (e.g. satellite imagery, radar detection, drone surveillance, etc.) **triggers the obligation to assist**.<sup>349</sup> The State responsible for the SRR where the incident occurs bears 'primary responsibility' for the cooperation necessary for the survivors to be 'delivered to a place of safety'.<sup>350</sup> While the 2004 amendments do not extend this duty to allowing

<sup>337</sup> SAR Convention, Annex, para 1.3.13.

<sup>338</sup> Noyes, 'Ships in Distress' in Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2007), para 1; Walker, *Definitions of the Law of the Sea* (Martinus Nijhoff, 2012), p. 169.

<sup>339</sup> SOLAS Convention, Annex, Ch V, Reg 7(1); SAR Convention, Preamble, paras 1, 3, Annex, para 2.1.1.

<sup>340</sup> E.g. English High Court of Admiralty, *The Eleanor* (1809) Edwards Rep 135, 161.

<sup>341</sup> Human Rights Committee, 'General Comment No 36, Article 6: Right to Life', CCPR/C/GC/36, 3.9.2018. See also Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas', in Moreno-Lax and Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill, 2016) 222.

<sup>342</sup> Study on the international law instruments in relation to illegal immigration by sea, SEC(2007) 691 final, 15.5.2007, pp. 9 and 28.

<sup>343</sup> SAR Convention, Annex, para 1.3.2.

<sup>344</sup> *Ibid.*, Annex, Ch 3, para 3.1.9; SOLAS Convention, Annex, Ch V, Reg 33 (1–1).

<sup>345</sup> SOLAS Convention, Ch V, Reg 7(1); UNCLOS, Art 98(2).

<sup>346</sup> SAR Convention, Annex, Chs 2, 3.

<sup>347</sup> *Ibid.*, Annex, paras 2.1.3, 2.3, 2.1.8, 3.1.

<sup>348</sup> *Ibid.*, Annex, paras 2.4.1.1, 2.5.

<sup>349</sup> *Ibid.*, Annex, paras 4.2.1, 4.3; Papastavridis, 'The ECHR and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 German Law Journal 417.

<sup>350</sup> SAR Convention, Annex, para 3.1.9; SOLAS Convention, Ch V, Reg 33 (1–1).

disembarkation within the State's own territory, they require that survivors be taken to landfall.<sup>351</sup> **A SAR operation will not be completed unless survivors are effectively disembarked.** Identifying the appropriate port of disembarkation has proved problematic.<sup>352</sup> It can be the vessel's next port of call, the geographically closest, one within the SRR, or one provided by the flag State of the rescuing vessel. But there is no residual rule to establish the preferred port in each case. The International Maritime Organization (IMO) has recommended that '[i]f disembarkation ... cannot be arranged swiftly elsewhere', the SRR State '*should* accept the disembarkation of the persons rescued ... into a place of safety under its control'.<sup>353</sup> However, this has not crystallised into binding law, leaving space for negotiations, delays, and disputes.

**The port needs to be one that can be considered a 'place of safety'.** Although neither 'place of safety' nor 'safety' itself has been defined, the 2004 amendments indicate that both individual circumstances and the IMO Guidelines have to be taken into account when evaluating locations.<sup>354</sup> The Guidelines specify 'a place where the survivors' safety of life is no longer threatened and where their basic human needs ... can be met'.<sup>355</sup> Because '[e]ach case is unique', the selection 'may need to account for a variety of important factors',<sup>356</sup> in particular any risk of *refoulement*, which 'is a consideration in the case of asylum-seekers ... recovered at sea'.<sup>357</sup> Therefore, **States cannot circumvent their international protection obligations by classifying interdiction activities as rescue operations.**<sup>358</sup> Equating interdiction to rescue, without ensuring compliance with 'place of safety' and related human rights and refugee law guarantees has no basis in international law.<sup>359</sup> **Whether rescue creates a 'pull factor'** (an assumption we contest below) **is immaterial.** The duties to render assistance and deliver survivors to a 'place of safety' cannot be overridden by national interest or policy considerations.

#### 4.2.3 SAR Obligations under EU Law

The EU and all its MS have ratified UNCLOS.<sup>360</sup> However, **the EU** is not a party to the IMO and has not acceded to the SAR and SOLAS Conventions, although it **has transposed the core content of SAR obligations in the Maritime Security Regulation 656/2014 (MSR), governing Frontex-coordinated missions.**<sup>361</sup> The latter establishes that when participating MS encounter persons in distress, they 'shall observe their obligation to render assistance' and 'ensure that their participating units comply with

<sup>351</sup> Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 International Journal of Marine and Coastal Law 523, p. 524.

<sup>352</sup> UNHCR, 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea', EC/SCP/18, 26.8.1981.

<sup>353</sup> IMO, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea', FAL.35/Circ.194 (2009) (italics added).

<sup>354</sup> SAR Convention, Annex, para 3.1.9; SOLAS Convention, Ch V, Reg 33 (1–1).

<sup>355</sup> IMO Guidelines, para 6.12.

<sup>356</sup> Ibid., para 6.15.

<sup>357</sup> Ibid., para 6.17. See also IMO and UNHCR, 'Rescue at Sea: A Guide to Principles and Practices as Applied to Migrants and Refugees' (2015).

<sup>358</sup> Fischer-Lescano, Lohr, and Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 International Journal of Refugee Law 256, p. 291.

<sup>359</sup> *Hirsi Jamaa v Italy* (2012) 55 EHRR 21; Moreno-Lax, 'Seeking Asylum in the Mediterranean' (2011) 23 International Journal of Refugee Law 174.

<sup>360</sup> See [status of the Convention](#) and Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 Dec. 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, [1998] OJ L 179/1.

<sup>361</sup> Regulation 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by [Frontex], [2014] OJ L 189/93 ('MSR').

that obligation', regardless of the persons' nationality or status or the circumstances in which they are found.<sup>362</sup> It is not essential that an explicit request for assistance be received.<sup>363</sup> Other factors must also be considered, including the seaworthiness of the vessel, the number and medical condition of persons on board, the availability of water, fuel and food supplies, the presence or absence of qualified crew and equipment, and the weather and sea conditions.<sup>364</sup> The special needs of vulnerable persons, including pregnant women, minors, and 'persons with international protection needs', must be addressed 'throughout' the operation.<sup>365</sup> Participating units must transmit all relevant details to the responsible RCC and put themselves at its disposal.<sup>366</sup> Pending instructions, they must take all measures necessary to preserve human life.<sup>367</sup>

The modalities for disembarkation should be agreed in advance as part of the operational plan. The MSR foresees that when rescue occurs in the territorial waters or contiguous zone of a coastal MS, if that State is participating in the operation or otherwise consents, then disembarkation should normally take place there.<sup>368</sup> If rescue happens on the high seas, the preferred place of disembarkation is 'the third country from which the vessel is *assumed* to have departed'.<sup>369</sup> **It is for the coordinating RCC to identify an appropriate 'place of safety'.**<sup>370</sup> Following the maritime Conventions, **the 'place of safety' under EU law** must be a 'location where rescue operations are considered to terminate and where the survivors' safety of life is not threatened', a place 'where their basic human needs can be met'. In accordance with the fundamental rights *acquis*, it **must also be a location where protection and compliance with the principle of non-refoulement is guaranteed.**<sup>371</sup> The *non-refoulement* principle 'shall apply to all measures taken by Member States or the Agency', explicitly binding Frontex to the associated obligations.<sup>372</sup> Frontex must 'guarantee the protection of fundamental rights in the performance of its tasks',<sup>373</sup> including the right to life at play in the context of maritime (interdiction/rescue) operations.

This entails that, as a matter of EU law, **rescued persons cannot be 'disembarked in', nor can they be 'forced to enter, conducted to or otherwise handed over to the authorities of', a country where there are serious risks of persecution or ill treatment**, whether directly or via indirect *refoulement*.<sup>374</sup> So when considering third-country cooperation that may lead to disembarkation in contravention of this provision, the prevailing situation must be taken into account.<sup>375</sup> 'The possible existence of an arrangement between a [MS] and a third country does not absolve [Frontex] or the [MS] from their obligations'.<sup>376</sup> Before disembarkation, participating units must: (1) 'use all means to identify the ... rescued persons'; (2) 'assess their personal circumstances'; (3) 'inform them of their destination'; and, crucially, (4) 'give them an opportunity to express any reasons [against] disembarkation' (or

<sup>362</sup> MSR, Art 9(1). See also MSR, Rec 14.

<sup>363</sup> MSR, Art 9(2)(f)(i).

<sup>364</sup> MSR, Art 9(2)(f).

<sup>365</sup> MSR, Art 4(4).

<sup>366</sup> MSR, Art 9(2)(a).

<sup>367</sup> MSR, Arts 3 and 9(2)(g) and (h).

<sup>368</sup> MSR, Art 10(1)(a).

<sup>369</sup> MSR, Art 10(1)(b) (*italics added*).

<sup>370</sup> MSR, Art 10(1)(c).

<sup>371</sup> MSR, Art 2(12). See also MSR, Rec 12.

<sup>372</sup> MSR, Art 4(7). See also MSR, Rec 10.

<sup>373</sup> 2019 EBCG Regulation, Art 80(1).

<sup>374</sup> MSR, Art 4(1); and 2019 EBCG Regulation, Art 80(2).

<sup>375</sup> MSR, Art 4(2). See also MSR, Rec 13.

<sup>376</sup> 2019 EBCG Regulation, Rec 84. See also Arts 36(2), 71(2), and 72(3).

conduction to, or hand-over to the authorities of, the third country concerned).<sup>377</sup> Although the MSR does not mention procedural safeguards, '[t]he obligation to render assistance ... in accordance with requirements concerning the protection of fundamental rights',<sup>378</sup> makes EU Charter guarantees relevant, including the obligation to provide fair processing and an effective remedy to '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated'.<sup>379</sup> Insofar as they fail to comply with EU Charter standards, **'pushbacks', 'pullbacks', and similar practices constitute a violation not only of SAR obligations but of EU fundamental rights as well.**

### 4.3 SAR Capacities and Infringements since the 'Refugee Crisis'

**In the aftermath of the 'refugee crisis',** following calls to 'save lives' and step up the 'fight against smugglers',<sup>380</sup> **the EU has enhanced its presence at sea.** As discussed in Chapter 3, Frontex has been given increased means and powers in two legislative reforms of 2016 and 2019, facilitating its role in coordinating joint maritime border surveillance operations. Meanwhile, EUNAVFORMED missions have been launched to reinforce the EU's security response. **But no dedicated SAR capacity has been deployed.** According to Frontex's Executive Director, 'proactive' SAR action is 'not in the mandate of the European Union' and can act as a 'pull factor', 'fuel[ing] the business of traffickers', which explains why 'saving migrants' lives ... should not be the priority'.<sup>381</sup> The Commission seems to affirm this approach. Positing that 'Frontex is neither a search and rescue body nor does it take up the functions of a Rescue Coordination Centre', it deems its mission to be assisting the MS so they 'fulfil *their* obligations under international maritime law'.<sup>382</sup> As a result, **only unintended rescue has been performed,** ancillary to the EU's primary border surveillance and maritime security objectives.

#### 4.3.1 Frontex-coordinated Operations: *Triton*, *Themis* and *Poseidon*

**JO Triton, renamed Themis** in February 2018,<sup>383</sup> is the EU border control operation that replaced the Italian security-rescue mission *Mare Nostrum* in the Central Mediterranean,<sup>384</sup> launched in response to repeated mass drownings off Lampedusa and following the *Hirsi* judgment's condemnation of Italy's pushback collaboration with Libya. The *Hirsi* judgment rejected the proposition that interdiction operations amount to rescue missions, considering that the former do not lead to delivery to a 'place of safety' in line with international human rights and refugee law standards; it declared pushbacks a violation of the prohibitions on ill-treatment and collective expulsion, clarifying the extraterritorial reach of *non-refoulement* at sea.<sup>385</sup> However, *Triton's* (now *Themis*) **underpinning assumption** is still that **interdiction may be considered akin to rescue, in that it prevents loss of life by preventing departures.**<sup>386</sup> The mission's operational area, naval assets and financial means were expanded in 2015, to help Frontex 'fulfil its dual role of co-ordinating operational border support ... and helping to

<sup>377</sup> MSR, Art 4(3).

<sup>378</sup> MSR, Rec 15.

<sup>379</sup> CFR, Art 47(1).

<sup>380</sup> Former Justice and Home Affairs (JHA) Commissioner Avramopoulos, 'Recent Human Smuggling Incidents in the Mediterranean', Speech, [13.1.2015](#).

<sup>381</sup> 'EU borders chief says saving migrants' lives "shouldn't be priority" for patrols', *The Guardian*, [22.4.2015](#).

<sup>382</sup> Frontex Joint Operation "Triton" – Concerted efforts to manage migration in the Central Mediterranean', European Commission MEMO, 7.10. 2014 (italics added).

<sup>383</sup> [Frontex Press Releases](#).

<sup>384</sup> 'Mare Nostrum Operation', *Marina Militare*, [undated](#).

<sup>385</sup> *Hirsi Jamaa v Italy* (2012) 55 EHRR 21; Moreno-Lax, 'Hirsi v Italy or the Strasbourg Court v Extraterritorial Migration Control?' (2012) 12 Human Rights Law Review 574.

<sup>386</sup> EC, Presidency Conclusions, EUCO 169/13, 25.10.2013, para. 46.



save the lives of migrants at sea'.<sup>387</sup> Yet, in practice, the agency's SAR mandate remained unchanged. While saving lives was designated 'an absolute priority', the **focus** stayed '**primarily [on] border management**'.<sup>388</sup> Accordingly, **Frontex-coordinated assets have undertaken only a fraction of all Central Mediterranean rescues**. Although in absolute terms, Frontex rescues total 267,223 for the period 2015-21,<sup>389</sup> in relative numbers the Agency's share has been the smallest compared to other SAR actors. At the peak of their activity, during 2016-17 (before the adoption of the Italian Code of Conduct discussed in Section 4.3.3), SAR NGOs were the most important single rescue provider, with a 26% share of total rescues in the Central Mediterranean, followed by the Italian Navy (21%), the Italian Coastguard (20%), and EUNAVFORMED (17%), with Frontex following with only 8%.<sup>390</sup> This is the consequence of *Triton's/Themis'* operational area being far from Libyan jurisdictional waters, where most distress incidents occur, and of the strategic choice that '**instructions to move ... outside [the JO's] operational area**' for the purpose of rendering assistance to migrant vessels would '**not be considered**'.<sup>391</sup> The **manifest breach of SAR and EU fundamental rights obligations** that this practice involves is presented as necessary to avoid creating a 'pull factor'.<sup>392</sup> Frontex has thus been **accused of ignoring direct calls for assistance**. This is illustrated by an incident of April 2021 involving a mass drowning documented by Alarm Phone, where up to 130 persons have been reported dead or missing as a result of a lack of coordination between Frontex, the Italian and Maltese rescue authorities, and SAR NGOs.<sup>393</sup>

**Rather than launching a rescue response, the Agency has predominantly performed aerial sightings of distress situations** through its Multipurpose Aerial Surveillance (MAS) scheme in the Central Mediterranean.<sup>394</sup> MAS information is routinely notified to several actors, including the Libyan authorities, but without taking any steps to ensure that pullbacks do not ensue.<sup>395</sup> Most SAR NGOs report that the Agency rarely refers to them, instead liaising directly with the LYCG.<sup>396</sup> Recent investigations, in fact, appear to establish **Frontex' complicity in interceptions and returns to Libya**.<sup>397</sup>

In the Eastern Mediterranean, Frontex has coordinated its **JO Poseidon-Sea** since 2006, which became a permanent operation in 2011.<sup>398</sup> The mission is 'increasingly becoming a multipurpose operation', covering several elements, including 'search and rescue' at 'the Greek sea borders with Turkey and the Greek islands'.<sup>399</sup> Its operational practices have been heavily criticised, both before and after the

<sup>387</sup> European Agenda on Migration (n 62), p. 3.

<sup>388</sup> 'Frontex launches call for participation of the EU Member States in Joint Operation Triton', [26.9.2014](#). This is still the case under *Themis*.

<sup>389</sup> European Council, *Infographic - Lives saved in EU Mediterranean operations (2015-21)*.

<sup>390</sup> MSF, 'Humanitarian NGOs conducting Search and Rescue Operations at Sea: A "pull factor"?' Issue Brief ([August 2017](#)), p. 3. For a contextualisation of the statistics, see Cusumano, 'Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control' (2019) 54 *Cooperation and Conflict* 3, pp. 10–11.

<sup>391</sup> Letter by Frontex Director of Operations, Mr Klaus Rösler, to Italian General Director of Immigration and Border Police, Dr Giovanni Pinto ([Ref 19.846/25.11.2014](#)).

<sup>392</sup> Frontex, *Risk Analysis for 2017* ([2017](#)), p. 33.

<sup>393</sup> Alarm Phone, 'Coordinating a maritime disaster: Up to 130 people drown off Libya', [22.4.2021](#).

<sup>394</sup> 'Multi-Purpose Aerial Surveillance', Frontex Situation Centre ([2018](#)).

<sup>395</sup> Amnesty International (AI), Letter to European Commissioner for Home Affairs Ylva Johansson, [Ref. B1996/21.5.2020](#).

<sup>396</sup> The Civil Fleet, 'Why did Frontex help an NGO ship rescue refugees in the Mediterranean?', [7.12.2020](#).

<sup>397</sup> ECRE, 'Med: Investigations Reveal Frontex' Complicity in Interceptions and Returns to Horrors in Libya', *Weekly Bulletin*, [30.4.2021](#) and sources referred to therein. See also Branco, Shatz et al., SciencesPo Paris Legal Clinic, *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute* ([June 2019](#)).

<sup>398</sup> [Frontex Press Releases](#).

<sup>399</sup> 'Main Operations: Operation Poseidon (Greece)', Frontex Press Release, [undated](#).



conclusion and implementation of the EU-Turkey Statement.<sup>400</sup> The use of firearms by Frontex patrols seems to be 'part of the "standard rules of engagement" for stopping boats at sea',<sup>401</sup> which has led to migrants being injured or even killed. **Instances of refoulement and pushbacks to Turkey** have proliferated particularly since the beginning of the Covid-19 pandemic.<sup>402</sup> Revelations by *Der Spiegel*,<sup>403</sup> *The New York Times*<sup>404</sup> and others have disclosed the agency's direct participation in illegal tactics. An **internal inquiry** has been conducted by the Management Board,<sup>405</sup> at the behest of the European Commission and following criticism by the European Parliament,<sup>406</sup> and **an investigation has been opened by OLAF**.<sup>407</sup> Frontex is accused of ignoring reports of serious violations, advising participating units to not denounce abuses or to rename them to deflect attention, failing to appoint a new Fundamental Rights Officer and to hire the necessary fundamental rights monitors,<sup>408</sup> and directly aiding pushbacks by blocking, manoeuvring or making waves around migrant dinghies to repel them. Whistle-blowers report that, in early March 2020, a Danish patrol ship participating in the operation disobeyed direct orders from *Poseidon's* command 'to put the migrants back into their dinghy and tow it out of Greek waters'.<sup>409</sup> While the internal inquiry's findings are inconclusive, the **EU Ombudsman has started a separate investigation** into the adequacy of Frontex procedures for dealing with complaints and ensuring redress.<sup>410</sup> The **European Parliament** has set up a **Frontex Scrutiny Working Group** (FSWG) to '[m]onitor all aspects of the functioning of Frontex', including compliance with fundamental rights, internal mechanisms for reporting and resolving complaints, and transparency and accountability processes. The FSWG is due to undertake a fact-finding mission and relay its conclusions in the summer of 2021.<sup>411</sup> In the meantime, Frontex has been brought to the General Court and requested to terminate all its activities in the Aegean Sea region for lack of compatibility with EU fundamental rights.<sup>412</sup>

The **Management Board** established a dedicated *Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea* to investigate the relevant incidents and issued its **conclusions** on the Working Group's final report<sup>413</sup> on 5 March 2021.<sup>414</sup> Therein the Management Board

<sup>400</sup> EU-Turkey Statement (n 4).

<sup>401</sup> 'Shoot First: Coast Guard Fired at Migrant Boats, European Border Agency Documents Show', *The Intercept*, [22.8.2016](#).

<sup>402</sup> For a thorough account, capturing nearly 1,000 instances along the entire Balkan route, see *The Blackbook of Pushbacks*, Vols I and II ([December 2020](#)).

<sup>403</sup> 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign', *Der Spiegel*, [23.10.2020](#).

<sup>404</sup> 'E.U. Border Agency Accused of Covering Up Migrant Pushback in Greece', *New York Times*, [26.11.2020](#).

<sup>405</sup> 'Frontex launches internal inquiry into incidents recently reported by media', Frontex Press Release, [27.10.2020](#).

<sup>406</sup> European Parliament, 'MEPs to grill Frontex director on agency's role in pushbacks of asylum-seekers', Press Release, [30.11.2020](#).

<sup>407</sup> 'EU anti-fraud office launches probe into Frontex', *EU Observer*, [11.1.2021](#).

<sup>408</sup> The process of appointment of a new Fundamental Rights Officer has stalled for a protracted period. Frontex has only issued a vacancy announcement in December 2020, for the appointee to join the Agency 'ideally as from March 2021'. See Vacancy Notice Reference number: [RCT-2020-00078](#). Further on the recruitment failures, see Statewatch, 'EU: Pushbacks scandal: Internal letters shed light on Frontex's fundamental rights recruitment failures', [25.3.2021](#).

<sup>409</sup> 'Danish boat in Aegean refused order to push back rescued migrants', *Politico*, [6.3.2020](#).

<sup>410</sup> EU Ombudsman, 'Ombudsman opens inquiry to assess European Border and Coast Guard Agency (Frontex) "Complaints Mechanism"', [12.11.2020](#). The Greek Ombudsman has opened a parallel investigation revealing the Greek authorities' involvement in serious human rights violations, see Statewatch, 'Pushbacks from Greece to Turkey: Ombudsman's report highlights obstruction of investigations', [30.4.2021](#).

<sup>411</sup> MEP Juan Fernando López Aguilar, Chair of LIBE Committee, 'Setting up a temporary or standing working group on Frontex to further investigate the serious allegations of pushbacks and the management concerns', [29.1.2021](#).

<sup>412</sup> Front-Lex and Legal Centre Lesbos, *Preliminary Action Pursuant to Article 265 TFEU*, [15.2.2021](#). See also Statewatch, 'EU: Legal actions pile up against Frontex for involvement in rights violations', [23.2.2021](#).

<sup>413</sup> Final Report of the Frontex Management Board Working Group, [1.3.2021](#).

<sup>414</sup> 'Conclusions of the Management Board's meeting on 5 March 2021 on the report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea', Frontex Management Board Updates, [5.3.2021](#).

establishes that in 8 out of the 13 cases investigated ‘no [TCNs] were turned back in violation of the principle of *non-refoulement*, or otherwise in violation of Article 80(2) of [the Frontex] Regulation’, without, however, specifying how this finding was arrived at or what evidence was used to offset plentiful allegations to the contrary. It simply states that ‘6 out of these 8 incidents took place entirely in Turkish Territorial Waters’, erroneously assuming that this may render the relevant obligations not applicable. The fact that Frontex-coordinated assets **operate extraterritorially**, and even with the consent or acquiescence of the third country with which they cooperate, **does not exempt** the agency or the MS **from compliance with the fundamental rights acquis** (Article 51(1) CFR).<sup>415</sup> As for the remaining cases, the Board states that, ‘despite the additional evidence gathered and reviewed by the Group, it has not been possible to establish the facts’, revealing **serious gaps in the human rights reporting and monitoring mechanisms of the agency**, which is the area where recommendations concentrate. The Board admits that ‘the reporting systems currently in place are not systematically applied, do not allow the Agency to have a clear picture of the facts relating to (potential) serious incidents and do not allow for a systematic analysis of fundamental rights concerns’. The question is whether the ‘urgent improvements’ the Board proposes will effectively address these shortcomings. As discussed in Chapter 3, **without an independent system of monitoring and reporting that is external to Frontex and the MS, the basic requirements of impartiality and due process cannot be met**. The Board’s conclusions reveal that there can be instances where a ‘Serious Incident Report [is] followed-up by a letter from the Executive Director to the authorities of the host MS’, but ‘no further follow-up [is] undertaken following the receipt of the letter’, which highlights the limitations of internal procedures and non-independent monitoring. **None of these mechanisms can replace, nor do they effectively protect, the legally binding rights to good administration and judicial protection** in case of a violation (Articles 41 and 47 CFR).

#### 4.3.2 EUNAVFORMED Operations: *Sophia* and *IRINI*

**EUNAVFORMED Operation *Sophia***<sup>416</sup> was deployed in 2015 to support *Triton* and ‘save lives by reducing crossings’.<sup>417</sup> Its mission was to engage in a ‘systematic effort to capture and destroy vessels used by the smugglers’,<sup>418</sup> so as ‘**to better contain the growing flows of illegal migration across the Central Mediterranean**’.<sup>419</sup> A UN Security Council Resolution provided the legal backing, authorising MS to intervene on the high seas using ‘all measures commensurate to the specific circumstances’ to ‘inspect’, ‘seize’ and ‘dispose of’ migrant vessels, so as to ‘disrupt the organised criminal enterprises engaged in migrant smuggling and human trafficking’ off Libya.<sup>420</sup> In the course of their interventions, *Sophia* assets were occasionally requested to assist migrant vessels in distress. Although the operation played a relatively minor role in total rescues,<sup>421</sup> such that *Sophia*’s command considered it could not be ‘regarded as decisive in terms of a pull factor’,<sup>422</sup> discontent among participating MS led to the

<sup>415</sup> Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights* (n 167), pp. 14-21. See also, Moreno-Lax and Costello, ‘The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model’, in Peers et al. (eds), *The Charter of Fundamental rights of the European Union: A Commentary* (Hart Publishing, 2014) 1657.

<sup>416</sup> Council Decision 2015/778/CFSP of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFORMED), [2015] OJ L122/31.

<sup>417</sup> European External Action Service (EEAS), ‘European Union Naval Force: Mediterranean Operation *Sophia*’, [15.9.2016](#).

<sup>418</sup> European Council, Statement, EUCO/18/15, 23.4.2015.

<sup>419</sup> European Council, Presidency Conclusions, EUCO 22/15, 26.6.2015.

<sup>420</sup> United Nations Security Council (UNSC) Resolution 2240(2015), S/RES/2240 (2015), paras 5, 8, 10–12.

<sup>421</sup> Cusumano, ‘Migrant Rescue as Organized Hypocrisy’ (n 390), pp. 13–14.

<sup>422</sup> EEAS, EUNAVFOR Med Op *Sophia*—Six monthly report 1 January–31 October 2016, [30.11.2016](#), pp. 7–8.

**withdrawal of naval assets.**<sup>423</sup> From March 2019 until the end of the operation a year later,<sup>424</sup> it was conducted without a naval deployment so as **to avoid direct contact with migrant vessels and evade rescue responsibilities.** Instead, surveillance drones were used to capture relevant **information,**<sup>425</sup> which was **communicated to the LYCG for its intervention.**<sup>426</sup> Intercepted migrants were pulled back to Libya, **in disregard of 'place of safety' and non-refoulement provisions.**<sup>427</sup>

**Mission IRINI**, which took over from *Sophia* on 31 March 2020,<sup>428</sup> has re-incorporated maritime assets, but EU High-Representative Borrell, echoing concerns by contributing MS, warns that '[they] will be withdrawn from the relevant areas' if they prove attractive to boat migrants.<sup>429</sup> To minimise the chance of encountering vessels in distress, ships have been deployed 'at least 100 kilometres off the Libyan coast, where chances to conduct rescue operations are lower'.<sup>430</sup> The mission is primarily mandated to inspect vessels on the high seas suspected of carrying arms or related material to and from Libya.<sup>431</sup> As 'secondary tasks', however, *IRINI* is supposed to **contribute 'to the capacity building and training of the Libyan coastguard and Navy' and 'to the disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling by planes.'**<sup>432</sup> In these 'secondary tasks', *IRINI* appears to be **replicating *Sophia's* modus operandi.** It concluded an agreement with Frontex in January 2021 on information exchange and the training of Libyan officials,<sup>433</sup> and it appears to have adopted a **similar approach to facilitating pullbacks.**<sup>434</sup> MEP questions reveal that *IRINI* transmitted information to Libya regarding vessels in distress at least eight times during March-July 2020.<sup>435</sup> In his replies, EU High-Representative Borrell inaccurately claims this is in line with the SAR and SOLAS Conventions,<sup>436</sup> which constitutes an alarming trend.

#### 4.3.3 Member States' Actions: MoUs with Libya and Pushbacks to Turkey

**MS have drastically reduced their SAR capacity in recent years**, which has led to repeated tragedies and a sharp increase in death rates, earning the Mediterranean the title of 'deadliest frontier' worldwide.<sup>437</sup> Over 20,000 fatalities have been recorded since 2014.<sup>438</sup> **SAR NGOs have emerged** in response to the 'refugee crisis' to try to fill the gap in SAR provision. Although their presence was initially welcomed and their cooperation with MS coastguards ran smoothly at first, this changed when

<sup>423</sup> European Council, 'EUNAVFORMED Operation Sophia: Mandate Extended until 30 September 2019', [29.3.2019](#).

<sup>424</sup> European Council, 'EU Launches Operation IRINI to Enforce Libya Arms Embargo', [31.3.2020](#).

<sup>425</sup> 'Once Migrants on Mediterranean Were Saved by Naval Patrols. Now They Have to Watch as Drones Fly Over', *The Guardian*, [4.8.2019](#).

<sup>426</sup> Letter of Ms Paraskevi Michou, Director-General for Migration and Home Affairs, to Mr Fabrice Leggeri, Frontex Executive Director, Ref Ares(2019)1755075, [18.3.2019](#).

<sup>427</sup> The practice has been denounced. See ECtHR, *S.S. and Others v Italy*, App 21660/18 (pending), with Moreno-Lax acting as lead counsel on behalf of the applicants.

<sup>428</sup> 'EU launches Operation IRINI to enforce Libya arms embargo', [31.3.2020](#).

<sup>429</sup> 'Operation Sophia to be closed down and replaced', *Politico*, [17.2.2020](#).

<sup>430</sup> EEAS Non-paper on EUNAVFORMED Op. Sophia, (RESTRICTED) 5995/20, [12.2.2020](#), p. 3.

<sup>431</sup> UNSC Resolution 2292(2016), S/RES/2292 (2016).

<sup>432</sup> EUNAVFORMED Operation IRINI, 'About Us', [undated](#).

<sup>433</sup> 'Libya: Operation Irini and Frontex boost cooperation', *ANSAMed*, [18.1.2021](#).

<sup>434</sup> 'EU military mission aids pull-backs to Libya, with no avenues for legal accountability', *Statewatch*, [27.10.2020](#).

<sup>435</sup> See, e.g., Parliamentary Question by MEP Özlem Demirel (GUE/NGL), E-003730/2020, [23.6.2020](#).

<sup>436</sup> See, e.g., Answer given by High Representative/Vice-President Borrell, [24.8.2020](#).

<sup>437</sup> 'The Mediterranean is now the world's deadliest frontier for huge army of refugees', *Evening Standard*, [22.4.2015](#). See also Albahari, *Crimes of Peace: Mediterranean Migrations at the World's Deadliest Border* (University of Pennsylvania Press, 2015).

<sup>438</sup> IOM, *Missing Migrants database*.

they were **accused of generating a ‘pull factor’**.<sup>439</sup> The argument is that smugglers adapt their tactics and exploit the availability of rescue to their advantage, so that irregular flows and associated risks increase through the presence of SAR NGOs at sea. **The claim has, however, been refuted by research** revealing that the number of attempted crossings remains constant regardless of SAR NGO operations. Comparing equivalent timeframes *before* and *during* SAR NGO operations in 2016, the detected variation was just +1.6%.<sup>440</sup> More recent studies show that, even if nearly all SAR NGO operations were suspended in the wake of the pandemic, departures from Libya and Tunisia in January-May 2020 more than doubled compared to the same period during 2019.<sup>441</sup> Looking at the number of arrivals to the EU, these were higher *before* SAR NGOs started operating, which reinforces the lack of any decisive influence of SAR NGO presence on irregular crossings.<sup>442</sup> Considering smugglers’ tactics, according to a leaked EUNAVFORMED report, these started to change from 2015, which is also *before* most SAR NGOs came into being. Smugglers started to retreat from international waters, where they could be apprehended under the UN Security Council Resolution buttressing the *Sophia* operation, and tended to remain within Libyan territorial waters instead, using lower quality and less expensive rubber boats to transport the migrants.<sup>443</sup> These changing patterns have been observed independently from SAR NGOs’ behaviour,<sup>444</sup> allowing for the conclusion that ‘push factors’, including war, persecution, instability, etc. are actually the most significant drivers of maritime crossings, with ‘launches’ of dinghies tracking weather conditions and patterns of control by national and international authorities, rather than the availability of rescue by SAR NGOs.<sup>445</sup>

**But even if SAR NGOs did hypothetically create a pull factor, as a matter of principle, they would still need to be protected and their activities could not be dismantled.** As we discuss in Chapter 5, as human rights defenders, they fulfil an essential watchdog function of the values on which the EU is founded and have fundamental rights of their own that must be taken into account when regulating their conduct. Nonetheless, the ‘pull factor’ rhetoric took hold, leading to the adoption of increasingly restrictive measures in their regard, particularly after the conclusion of the **Italy-Libya MoU** of February 2017,<sup>446</sup> **followed by a controversial Code of Conduct (CoC)** in July 2017, which required them ‘not to obstruct [SAR] operations by official coastguard vessels, including the Libyan coastguard’.<sup>447</sup> **Both instruments disregard the grave and widespread human rights abuses committed against migrants both in Libya and at sea,**<sup>448</sup> which may amount to atrocity crimes, as indicated by the

<sup>439</sup> Frontex, *Risk Analysis for 2017*, p. 32; House of Lords, *Operation Sophia, the EU’s naval mission in the Mediterranean: An impossible challenge*, HL Paper 144 ([May 2016](#)), p. 18, n. 88.

<sup>440</sup> Arsenijevic, Manzi and Zachariah, ‘Are dedicated and proactive search and rescue operations a “pull factor” for migration and do they deteriorate maritime safety in the Central Mediterranean?’ ([MSF, 2017](#)), p. 2.

<sup>441</sup> Cusumano and Villa, ‘Over troubled waters: maritime rescue operations in the Central Mediterranean Route’, in Farges and Rango (eds), *Migration in West and North Africa and Across the Mediterranean: Trends, Risks, Development and Governance* (IOM, 2020) p. 210.

<sup>442</sup> Steinhilper and Gruijters, ‘Border Deaths in the Mediterranean: What We Can Learn from the Latest Data?’, *Border Criminologies* ([March 2017](#)).

<sup>443</sup> EUNAVFORMED Op Sophia, Six Monthly Report 22 June – 31 December 2015, EEAS(2016)126, [27.1.2016](#).

<sup>444</sup> Cf. Heller and Pezzani, ‘Blaming the Rescuers’, *Forensic Oceanography* ([June 2017](#)).

<sup>445</sup> Cusumano and Villa, *Sea Rescue NGOs: a Pull Factor of Irregular Migration?*, EUI Migration Policy Centre Policy Brief, Issue 2019/22 ([November 2019](#)).

<sup>446</sup> Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (Italy-Libya MoU), 2.2.2017 ([unofficial translation](#)).

<sup>447</sup> Code of Conduct for NGOs involved in migrants’ rescue operations at sea, [undated](#), para. 9.

<sup>448</sup> UNHCR, ‘Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea’, [1.9.2020](#).

International Criminal Court (ICC) Prosecutor in her investigation.<sup>449</sup> **A wave of criminalisations has followed**, targeting those who refused to sign the CoC or to cooperate in facilitating pullbacks.<sup>450</sup>

Italy's special Security Decree of 2018 further delegitimised maritime arrivals implementing a '**closed ports' policy** banning SAR NGOs from entering Italian ports and disembarking survivors, notwithstanding Italy's obligations under international and EU law.<sup>451</sup> This triggered a series of 'crises' in which rescues were left incomplete, with rescue ships wandering for long periods until voluntary, ad hoc solutions, including rerouting and relocation to other MS, were agreed.<sup>452</sup>

**Italy renewed its MoU with Libya in 2019**,<sup>453</sup> despite calls to suspend its cooperation on human rights grounds,<sup>454</sup> and **Malta signed one of its own** in the midst of the Covid-19 pandemic.<sup>455</sup> Both have used quarantine arrangements as a pretext to declare their ports 'unsafe' for disembarkation, eschewing their rescue and international protection obligations.<sup>456</sup> As further discussed in Chapter 6, Malta has been using unsuitable government-chartered pleasure boats as 'floating' detention facilities, where rescuees have been *de facto* imprisoned for prolonged periods in highly precarious, incommunicado conditions and without judicial oversight.<sup>457</sup> Like Italy,<sup>458</sup> it has been accused of assisting the LYCG to pull migrants back,<sup>459</sup> outsourcing pushbacks to private ships,<sup>460</sup> and denying assistance to persons in distress at sea,<sup>461</sup> if not 'actively hindering rescue'.<sup>462</sup> Italy has been **condemned by the UN Human Rights Committee** for violating the prohibition of ill-treatment and the right to life of 'boat refugees',<sup>463</sup> while Malta has only escaped condemnation for formal reasons (the non-exhaustion of domestic remedies by the claimants in the same case).<sup>464</sup>

**Greece**, for its part, has been **heavily criticised for suspending the right to asylum and engaging in violent forms of refoulement**, prompting UNHCR to remind the government that neither international refugee law nor EU law 'provides any legal basis for the suspension of the reception of asylum applications'.<sup>465</sup> Journalists have revealed how over 1,000 refugees were secretly expelled to the rim of Turkish territorial waters, then abandoned in inflatable life rafts, during the summer of

<sup>449</sup> ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970(2011), [5.5.2020](#).

<sup>450</sup> FRA, *Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea*, [15.12.2020](#).

<sup>451</sup> 'Matteo Salvini: Italian ports closed to migrants', *Politico*, [23.12.2018](#).

<sup>452</sup> E.g., 'Aquarius instructed to sail to Spain to reach a port of safety: 629 people rescued in the Mediterranean to be disembarked in Valencia', *SOS Méditerranée*, [12.6.2018](#).

<sup>453</sup> 'Anti-migration deal between Italy and Libya renewed', *Al Jazeera*, [2.11.2019](#).

<sup>454</sup> CoE Commissioner for Human Rights, 'Commissioner calls on the Italian government to suspend the co-operation activities in place with the Libyan Coast Guard that impact on the return of persons intercepted at sea to Libya', [31.1.2020](#).

<sup>455</sup> Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration (Malta-Libya MoU), [28.5.2020](#).

<sup>456</sup> 'Europe's migrant crisis is worsening during the pandemic. The reaction has been brutal', *CNN*, [1.9.2020](#).

<sup>457</sup> 'Illegal floating prisons', *Malta Today*, [2.6.2020](#).

<sup>458</sup> Heller, 'The Nivin Case' (n 325).

<sup>459</sup> 'Libyan coastguard stopped 2000 migrants from reaching Malta', *Times of Malta*, [23.6.2020](#). 'Neville Gafà says he coordinated migrant pushback "under Libyan jurisdiction"', *Times of Malta*, [19.5.2021](#).

<sup>460</sup> 'Revealed: 2,000 refugee deaths linked to illegal EU pushbacks', *The Guardian*, [5.5.2021](#).

<sup>461</sup> 'Malta "complicit" in Libya rights violations', *Times of Malta*, [10.12.2020](#). See also '97 rescued from wooden boat drifting in Malta's SAR', *Times of Malta*, [1.5.2021](#).

<sup>462</sup> 'Malta "actively hindering rescue" of 270 people in distress in SAR zone – NGOs', *Malta Today*, [3.4.2021](#). See also 'Armed Forces of Malta denies hindering migrant rescues but gives no information', *Malta Today*, [5.4.2021](#).

<sup>463</sup> HRC, *A.S. and Others v. Italy*, Comm. No 3042/2017, CCPR/C/130/D/3042/2017, 27.1.2021.

<sup>464</sup> HRC, *A.S. and Others v. Malta*, Comm. No 3043/2017, CCPR/C/130/D/3042/2017, 27.1.2021.

<sup>465</sup> UNHCR, 'Statement on the situation at the Turkey-EU border', [2.3.2020](#).



2020.<sup>466</sup> Survivors of similar incidents claim to have been forced at gunpoint to tie their dinghy to a coastguard speedboat that subsequently towed them to Turkey.<sup>467</sup> All these practices disregard European Commission and UNHCR Guidelines on Covid-19, migration management, and access to asylum and must be deemed **in violation of SAR and human rights obligations**,<sup>468</sup> as per the observations of the UN Special Rapporteur on the Rights of Migrants.<sup>469</sup>

#### 4.4 Proposed Changes: The Common European Approach to SAR

**The Malta Declaration** of September 2019 represented a first attempt to remedy **the unsatisfactory situation prevailing at sea** by addressing repeated standoffs over disembarkation. **It aimed at a structural, Europeanised solution** that would stabilise the system.<sup>470</sup> **The outcome, however, failed** to bring the scheme within the EU legal framework, making no provision for safeguards or remedies to guarantee compliance with fundamental rights. Instead, it reinforced the trend of informal ‘ship-by-ship’ solutions and legitimised the Italian approach, endorsing both the MoU with Libya and the Code of Conduct for NGOs, despite criticism by the Human Rights Commissioner of the Council of Europe and other organisations.<sup>471</sup>

**The Malta Declaration provides the basis for the ‘common European approach to SAR’ in the New Pact on Migration and Asylum.** Two instruments proposed by the European Commission, the SAR Recommendation and the Criminalisation Guidance, constitute the main foundations of the common approach,<sup>472</sup> which still fail to provide for detailed rescue and disembarkation arrangements — in fact, Italy has called for reviving the Malta Declaration scheme instead.<sup>473</sup> The measures proposed **centre on ‘ensuring effective migration management’**.<sup>474</sup> Five elements are expected to achieve this objective: (1) a solidarity mechanism for disembarkation; (2) enhanced cooperation and coordination among MS; (3) more involvement from Frontex through increased operational and technical support; (4) the fight against the facilitation of irregular entry; and (5) strengthened cooperation with countries of origin and transit to prevent arrivals.<sup>475</sup> These measures may possibly ‘contribute to saving lives at sea’,<sup>476</sup> but their priority is to curb ‘dangerous journeys and irregular crossings’.<sup>477</sup>

<sup>466</sup> ‘Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea’, *New York Times*, [14.8.2020](#). See also ‘Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations’, *Just Security*, [22.5.2020](#). The practice appears to persist, see, e.g., ‘Greece accused of “shocking” illegal pushback against refugees at sea’, *The Guardian*, [26.4.2021](#).

<sup>467</sup> *Der Spiegel* (n 403). See also ‘Samos And The Anatomy Of A Maritime Push-Back’, *Bellingcat*, [20.5.2020](#).

<sup>468</sup> European Commission, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, [2020] OJ C 126/02; UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, [16.3.2020](#).

<sup>469</sup> OHCHR, ‘Greece: Rights violations against asylum seekers at Turkey-Greece border must stop – UN Special Rapporteur’, [23.3.2020](#).

<sup>470</sup> Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism (‘Malta Declaration’), [23.9.2019](#).

<sup>471</sup> CoE Commissioner for Human Rights, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, [\(June 2019\)](#); AI, ‘EU Governments Face Crucial Decision on Shared Sea Rescue Responsibility’, [3.10.2019](#); OHCHR, *“Lethal Disregard” Search and rescue and the protection of migrants in the central Mediterranean Sea (May 2021)*.

<sup>472</sup> SAR Recommendation (n 324); Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (‘Criminalisation Guidance’), C(2020) 6470 final, 23.9.2020.

<sup>473</sup> ‘Italy hopeful of reviving EU’s “Malta agreement” on migrant burden sharing’, *Times of Malta*, [13.5.2021](#).

<sup>474</sup> New Pact on Migration and Asylum, p. 14.

<sup>475</sup> New Pact on Migration and Asylum, pp. 13-14.

<sup>476</sup> New Pact on Migration and Asylum, p. 13.

<sup>477</sup> New Pact on Migration and Asylum, p. 14 and Sections 5 and 6.



#### 4.4.1 The SAR Recommendation: Policing Humanitarianism

The **SAR Recommendation** limits itself to acknowledging that rescue is 'an obligation under international law', highlighting that '[t]he EU is a contracting party to UNCLOS',<sup>478</sup> but without elaborating on the concrete repercussions of this statement. Instead, it appears to rely on the increased rescue capacity stemming from 'the ... involvement of private and commercial vessels', including those operated by NGOs; it praises the 'significant contributions from coastal States' and Frontex,<sup>479</sup> but **without calling on them for additional efforts**, despite referring to the European Parliament's explicit request to that effect and directly alluding to the maritime Conventions 'obligat[ing] contracting parties to participate in the development of SAR services and to take urgent steps to ensure that the necessary assistance is provided to any person ... in distress at sea'.<sup>480</sup> **No additional assets or resources are requested or organised, against the views of the European Parliament**, which has explicitly called for 'a permanent, robust and effective Union response ... to prevent[] an escalating death toll of migrants attempting to cross the Mediterranean Sea', suggesting that 'SAR capacities must be strengthened, and that MS' governments must deploy more resources — in terms of financial assistance and rescue assets — in the context of a **Union-wide humanitarian operation** dedicated to finding, rescuing and assisting migrants in peril and bringing them to the closest place of safety'.<sup>481</sup> The only provision made by the Commission is for an Interdisciplinary Contact Group of stakeholders to develop best practices, exchange information, and reinforce cooperation between flag and coastal MS<sup>482</sup> — which, however, since inception in March 2021, has been accused of failing to meet its own transparency requirements and discharge its mandate as originally intended.<sup>483</sup>

The Recommendation also contains a **veiled critique of NGO rescues**. First, it embraces the 'pull factor' rhetoric when it states that 'it is essential to avoid a situation in which migrant smuggling or human trafficking networks ... take advantage of the rescue operations conducted by private vessels'.<sup>484</sup> It is unclear whether this implies that rescue should not be performed if it risks jeopardising 'effective migration management',<sup>485</sup> since 'continued disembarkations ... have direct consequences on [MS'] migration management systems and place increased and immediate pressure on [them]'.<sup>486</sup>

**Rather than increasing SAR capacity**, the Recommendation's effect **could well be the opposite** by subjecting SAR NGO vessels to stricter scrutiny. Citing '**safety of navigation**' to justify policing the vessels' activity,<sup>487</sup> the document proposes several **measures** for the purpose — which in themselves **may amount to forms of criminalisation of humanitarianism** in the broad sense.<sup>488</sup> Because SAR NGOs might conduct 'consecutive rescue operations before disembarking [survivors]' and act on their own initiative, which is assumed to 'trigger[] specific operational needs of enhanced coordination' with

<sup>478</sup> SAR Recommendation, Rec 1.

<sup>479</sup> SAR Recommendation, Recs 4 and 5.

<sup>480</sup> SAR Recommendation, Recs 6 and 10.

<sup>481</sup> European Parliament, 2016 Mediterranean Resolution, paras 4-5.

<sup>482</sup> SAR Recommendation, Recs 15-16 and paras 1-2.

<sup>483</sup> Statewatch, 'Mediterranean: European Contact Group on Search and Rescue failing to meet transparency requirements', [23.4.2021](https://www.statewatch.org/news/2021/apr/23-4-2021/).

<sup>484</sup> SAR Recommendation, Rec 9.

<sup>485</sup> SAR Recommendation, Rec 13.

<sup>486</sup> New Pact on Migration and Asylum, p. 14, and SAR Recommendation, para. 1.

<sup>487</sup> For analysis, see Carrera et al., *Policing Humanitarianism* (n 5).

<sup>488</sup> Carrera, Vosyliūtė, Allsopp, and Sánchez, *Updated Study: Fit for purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, PE 608.838 (European Parliament, 2018).

the authorities concerned,<sup>489</sup> this seems to require special rules of control, even though such actions conform to international law.<sup>490</sup> The assumption appears to be that the fact that SAR NGOs may conduct large and complex rescues could — in itself and without further substantiation — occasion ‘public policy, including safety’ concerns, making it necessary to closely monitor that their vessels are ‘suitably registered and properly equipped to meet the relevant safety and health requirements associated with [their] activity’.<sup>491</sup> However, there are no past examples of any SAR NGO vessel failing to comply with registration or safety of navigation rules — all prosecutions on these grounds have ended in acquittal (see Annex, Table I). It is also telling that the same level of scrutiny is not applied to the LYCG or similar actors with which the coastal MS, Frontex and the EUNAVFORMED routinely cooperate, including private merchant vessels.<sup>492</sup> The Recommendation also ignores the fact that the complexity of rescues is frequently compounded by the refusal to allow disembarkation at safe ports on the EU side.

In addition, the **rules in the maritime Conventions concerning rescue capacity specifications for the performance of SAR duties are primarily addressed to the State parties’ fleets**. They primarily concern State-run rescue services rather than private vessels, which are supposed to only sporadically engage in SAR action — on the assumption that coastal States fulfil their duties and run effective SAR services within their SRRs. **The proposal to turn the scheme upside down and enforce the rules on NGO vessels, while withholding official SAR services,<sup>493</sup> is inadequate**, particularly when used in a bid to obstruct their intervention. In the same vein, the Recommendation appears to imply that the Italian Code of Conduct may provide a model for the coordination framework to be established by the Interdisciplinary Contact Group for the purposes of ‘increase[ing] safety at sea’ and ‘monitor[ing] and verify[ing] compliance with standards for safety at sea as well as the relevant rules on migration management’.<sup>494</sup> To that end, it establishes that the framework should aim to provide ‘appropriate information as regards the operations and the administrative structure’ of SAR NGOs,<sup>495</sup> hence **Europeanising policing practices** that restrict rather than facilitate their rescue activities. The proposed common European approach to SAR, therefore, presents a paradox: it relies on the enhanced SAR capacity represented by vessels operated by NGOs, while raising suspicion of their undertakings, which it attempts to control, police, and restrict. This is particularly evident in the manner in which the Commission Guidance against the criminalisation of humanitarian assistance has been framed, discussed in Chapter 5.<sup>496</sup>

#### 4.4.2 Disembarkation and Relocation

**Regarding disembarkation**, there is **no proposal** within the common European approach to SAR clarifying where survivors should be taken when rescued within operations not coordinated by Frontex (which is the only scenario regulated by the MSR and to which the Commission proposals make no reference). Instead, the Commission alludes to ‘strengthen[ed] cooperation with countries of origin and

<sup>489</sup> SAR Recommendation, Recs 8 and 11.

<sup>490</sup> For elaboration, see Moreno-Lax, Ghezelbash and Klein, ‘Between life, security and rights: Framing the interdiction of ‘boat migrants’ in the Central Mediterranean and Australia’ (2019) 32 *Leiden Journal of International Law* 715.

<sup>491</sup> SAR Recommendation, Rec 12.

<sup>492</sup> On their situation, see Gauci, *When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, British Institute of International and Comparative Law ([November 2020](#)).

<sup>493</sup> For a recent example, see ‘Italy, Malta and Libya slow to react to deadly shipwreck, analysis finds’, *Euronews*, [4.5.2021](#).

<sup>494</sup> SAR Recommendation, Recs 14-16 and para. 2.

<sup>495</sup> SAR Recommendation, Rec 15.

<sup>496</sup> Criminalisation Guidance (n 472).

transit to prevent ... irregular crossings, including through tailor-made Counter Migrant Smuggling Partnerships with third countries'.<sup>497</sup> Although no direct mention is made of Libya or Turkey, these (with Tunisia and Morocco) are the main countries of provenance of rescued persons disembarked in the EU.<sup>498</sup> It is striking that the human rights implications of collaboration with these countries are not discussed, and that the proposal disregards the EU and MS' extraterritorial obligations vis-à-vis TCNs.<sup>499</sup>

**Only if disembarkation takes place in an EU MS is there a specific system of solidarity relocations,** which may be activated through the new provisions in the proposed Regulation on Asylum and Migration Management (RAMM).<sup>500</sup> The proposed system has 'basic', 'pressure', and 'crisis' modes. In its **basic variant**, designed to replace the current *ad hoc* solutions,<sup>501</sup> the Commission assesses, in its yearly Migration Management Report,<sup>502</sup> whether a MS faces 'recurring [maritime] arrivals' following rescue operations, and determines its solidarity needs in terms of relocations and other contributions (potentially return sponsorships or capacity-building measures).<sup>503</sup> The other MS are then 'invited' to notify the 'contributions they intend to make'.<sup>504</sup> If offers are sufficient, the Commission adopts a 'solidarity pool'.<sup>505</sup> If not, it convenes a 'Solidarity Forum' and asks MS to adjust their pledges.<sup>506</sup> If the offer still falls 'significantly short' of the needs, the Commission adopts an implementing act identifying relocation targets for each MS according to a distribution key that weighs total population and GDP.<sup>507</sup> MS may respond by offering other contributions instead, provided they are considered 'proportional'. If the relocations offered still fall 30% short, each MS will be obliged to meet at least 50% of their quota via relocations or return sponsorships.<sup>508</sup> If the solidarity pool risks being exhausted, the Commission can revise it and set out additional relocations, which, however, may be 'capped to 50%' of the original amount.<sup>509</sup> If these, too, are insufficient, then the **'pressure' or 'crisis' mode** of the solidarity system may be activated.<sup>510</sup>

The relocation scheme can also be triggered by a 'request for solidarity support' from a MS faced with repeated arrivals. In such cases, the Commission draws on the solidarity pool and coordinates the implementation of the solidarity measures 'for *each* disembarkation or group of disembarkations'<sup>511</sup> — which **may replicate still prevailing 'ship-by-ship' formulas**. It is then for the Commission, with Frontex and EASO, 'to draw up a list of eligible persons to be relocated', indicating their distribution amongst contributing MS, taking account of their nationalities and any 'meaningful links' with the country of relocation, prioritising vulnerable persons.<sup>512</sup>

<sup>497</sup> New Pact on Migration and Asylum, p. 14.

<sup>498</sup> UNHCR, *Mediterranean Situation* ([constantly updated](#)).

<sup>499</sup> Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights* (n 167), pp. 20-21.

<sup>500</sup> RAMM Proposal (n 238).

<sup>501</sup> RAMM Proposal, Arts 47-49. *Ad hoc* solutions continue to prevail, see, e.g., 'Migrants relocated to Ireland from Malta', *Malta Today*, [25.3.2021](#).

<sup>502</sup> RAMM Proposal, Art 6(4).

<sup>503</sup> RAMM Proposal, Arts 47(1) and 45.

<sup>504</sup> RAMM Proposal, Art 47(3)-(4).

<sup>505</sup> RAMM Proposal, Arts 48(1) and 49.

<sup>506</sup> RAMM Proposal, Arts 46 and 47(5).

<sup>507</sup> RAMM Proposal, Arts 48 and 54.

<sup>508</sup> RAMM Proposal, Explanatory Memorandum, p. 19.

<sup>509</sup> RAMM Proposal, Explanatory Memorandum, p. 19.

<sup>510</sup> RAMM Proposal, Arts 49(3) and 50-53.

<sup>511</sup> RAMM Proposal, Art 49(1) (*italics added*).

<sup>512</sup> RAMM Proposal, Art 49(2).

**The proposed system is overly complex and contains several shortcomings.** First, it is **unclear what happens if MS fail to engage** with the SAR Solidarity Response Plan or do not comply with the Commission indications.<sup>513</sup> What **if there are conflicts between MS or if they contest the way in which their quotas have been calculated?** There are no conciliation procedures or sanctions envisaged. It is also unclear how long the Solidarity Forum may deliberate for and under what rules; this **ambiguity may thwart the objective of 'rapid' relocations**, which could result in disembarkations being withheld. The system depends on constant negotiation and relies on a level of good faith and mutual trust among the MS that has yet to materialise.

The **implications for applicants** need to be considered as well. Although one may think relocations will be positive for the individuals concerned, it is striking that their **agency, voice, and preferences will not be taken into account**. Although they will be able to oppose a relocation decision (on the same limited basis as they could challenge a Dublin transfer<sup>514</sup>), it is unclear the degree to which extended family links, support networks and other relevant connections will be taken into account, considering the 'swiftness' with which the pre-screening and relocation procedures are supposed to take place. The **'meaningful links'** that need to be factored into relocation decisions **have not been defined** in the proposed Regulation,<sup>515</sup> beyond an allusion to 'diploma[s] or qualification[s] issued by an educational institution established by a Member State' and the *'targeted extensions of the family definition'*.<sup>516</sup> The fact that some relocations (or return sponsorships) will, therefore, be arranged against their will entrench, rather than reduce, possibilities for supposed abuses by individual beneficiaries and **boost the much-despised secondary movements** of protection seekers within the Schengen area.<sup>517</sup> Another issue the Commission proposals fail to address is the potential **incompatibility of these arrangements with Articles 3 and 31 of the 1951 Refugee Convention**, which forbid discrimination amongst refugees and enshrine the principle of non-penalisation for irregular entry. This system singles out maritime rescuees on the basis of their mode of arrival, putting them at a potential disadvantage, when compared to other asylum seekers, on grounds unrelated to their protection needs and disregarding the rights to which they are entitled.<sup>518</sup>

There are also significant **hidden costs for benefitting MS**, who will need to undertake **substantial processing of SAR arrivals before relocation can be pursued**, including (1) for pre-entry screening purposes, entailing health and security checks,<sup>519</sup> which may exclude applicants from relocation<sup>520</sup>; (2) for the registration of asylum applications<sup>521</sup>; (3) to carry out some form of abbreviated Dublin processing, at least, to establish whether family criteria may make the MS of disembarkation

<sup>513</sup> RAMM Proposal, Art 47(4) and Annex I.

<sup>514</sup> See, e.g., Case C-163/17 *Jawo* ECLI:EU:C:2019:218. For analysis, see Moreno-Lax, 'Mutual (Dis-)Trust' (n 33).

<sup>515</sup> RAMM Proposal, Arts 2 and 49(2).

<sup>516</sup> RAMM Proposal, Rec 50 and Explanatory Memorandum, p. 24 (*italics added*).

<sup>517</sup> Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum', *EU Migration Law*, [28.9.2020](#).

<sup>518</sup> One of the consequences is that they may be processed through the new border procedure, which entails lesser procedural safeguards and increases the risk of *refoulement*. See further, Vedsted-Hansen, 'Border Procedure: Efficient Examination or Restricted Access to Protection?', *EU Migration Law*, [18.12.2020](#).

<sup>519</sup> Pre-entry Screening Proposal (n 329), Arts 6(6), 9 and 11.

<sup>520</sup> RAMM Proposal, Art 57(2) and Explanatory Memorandum, p. 12.

<sup>521</sup> Pre-entry Screening Proposal, Arts 10 and 14(6).

responsible for the potential candidate<sup>522</sup>; and (4) regarding the recast border procedure, if persons fall within its remit,<sup>523</sup> since this disqualifies them from relocation too.<sup>524</sup>

#### 4.4.3 Pressure, Crisis and Force Majeure Situations

Outside SAR and disembarkation situations, there can be cases of special '**migratory pressure**', assessed on account of the total numbers of asylum applicants, irregular migrants, return decisions, Dublin transfers, etc. In such scenarios, the Commission is required to issue a dedicated report, specifying the capacity of the MS concerned and the appropriate measures to be adopted, with an indication of the relevant timeframe.<sup>525</sup> MS may, however, consider they are facing a full-blown '**crisis**', in which case they can submit a reasoned request to the Commission, which, if considered 'justified', will allow the MS concerned some flexibility to comply with its migration management obligations, e.g. regarding registration or transfers, or it may authorise certain derogations to extend periods of detention or relax procedural safeguards within border procedures.<sup>526</sup> In both circumstances, the MS affected become recipients, rather than providers, of solidarity measures.<sup>527</sup> This means that the **relocation pool will have to be shared** between MS receiving maritime arrivals and those under 'migratory pressure' or in a 'crisis' situation, which may **complicate allocations** and **give rise to distributive frictions**.

These **shortcomings** are **exacerbated in situations of force majeure**, where additional exceptions to solidarity contributions may be accorded for extended periods of time.<sup>528</sup> One key problem regards definitions. While crisis scenarios are characterised by a 'mass influx of third-country nationals ... arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale ... and nature that it renders the Member State's asylum, reception or return system non-functional',<sup>529</sup> what constitutes *force majeure* has not been specified. The Preamble of the proposed instrument relates generally to 'abnormal and unforeseeable circumstances outside [MS'] control the consequences of which could not have been avoided in spite of all due care',<sup>530</sup> and alludes to the Covid-19 pandemic and lessons to be learnt from it.<sup>531</sup> But **rather than condemning the violations witnessed throughout this period**<sup>532</sup> — vaguely referring to the unlawful suspension of the right to asylum by the Greek authorities in March 2020 as a 'political crisis',<sup>533</sup> **the Commission proposes to entrench them as valid derogations from the applicable rules** — ignoring the impact these will have on absolute rights, like the prohibition of ill-treatment and *refoulement*, which do not allow for proportionality reasoning or any limitations or derogations whatsoever.<sup>534</sup>

<sup>522</sup> RAMM Proposal, Art 57(3).

<sup>523</sup> Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final, 23.9.2020, Art 41.

<sup>524</sup> RAMM Proposal, Art 45(1)(a).

<sup>525</sup> RAMM Proposal, Arts 50-51.

<sup>526</sup> CFMR Proposal (n 329), Arts 3-6.

<sup>527</sup> RAMM Proposal, Art 52(1); and CFMR, Art 2.

<sup>528</sup> CFMR Proposal, Art 9.

<sup>529</sup> CFMR Proposal, Art 1(2).

<sup>530</sup> CFMR Proposal, Recital 7.

<sup>531</sup> CFMR Proposal, Explanatory Memorandum, pp. 4 and 9-11.

<sup>532</sup> UNHCR, 'UNHCR statement on the situation at the Turkey-EU border', [2.3.2020](#); and UNHCR, 'UNHCR issues recommendations for EU to ensure refugee protection during the pandemic and beyond', [1.7.2020](#).

<sup>533</sup> CFMR Proposal, Explanatory Memorandum, p. 9.

<sup>534</sup> ECHR, Art 15; and ICCPR, Art 4.



An extra complication stems from the new *force majeure* framework as currently envisaged, which can be triggered on a simple notification.<sup>535</sup> **What will happen if a majority of MS unilaterally declare themselves to be faced with a *force majeure* situation**, such as an additional wave of Covid-19 infections? The current proposal allows them to do so, simultaneously and without any democratic or legal oversight by the European Parliament or the Commission. This will put on hold solidarity mechanisms for months,<sup>536</sup> and exempt MS from Dublin transfers for an unspecified period, since there is no deadline applicable to the length of a declared *force majeure* situation.<sup>537</sup> This **can paralyse the system** and lead to a **legalised form of fragmentation or *de facto* de-harmonisation** of the legal and policy framework.<sup>538</sup>

**It is also unknown how concurrent situations** of ‘recurring arrivals’, ‘migratory pressure’, ‘crisis’ or ‘force majeure’ arising simultaneously in different MS **would be reconciled**. The Commission promises ‘reductions’ of up to 10% of contributing MS’ quotas under certain conditions,<sup>539</sup> but it remains silent on the coordination of simultaneous emergencies. Overall, it seems unrealistic to expect MS to cede the required power to the Commission to force them into accepting relocations of disembarked migrants. The possibility of a repeat of the legal proceedings against the Visegrád States concerning the 2015 relocation scheme cannot be discarded.<sup>540</sup> The proposals give the Commission the power to make every key decision: what the solidarity needs are and how these should be distributed; whether MS are confronted with ‘recurring arrivals’, ‘pressure’ or a ‘crisis’; how solidarity contributions should be calculated and what shape they should take. It is unclear whether this system will be any more predictable, swift or foreseeable than the current *ad hoc* arrangements, especially if the *force majeure* regime is finally adopted.

#### 4.5 Conclusions

The **Commission’s plan** for a new common approach to SAR leaves much to be desired. It **structuralises current malpractices**, including those whose legitimacy and legality have been challenged in European courts and other fora. This will create more problems than will solve, since both MS and EU actions have been shown not to comply with the relevant international and EU legal obligations, having a particularly deleterious effect on the rights of TCNs.

**Rescue**, in current practice and in the New Pact, has been **designed as an exception to the general rule of containment of unwanted arrivals**. The focus is on ‘help[ing] partner countries manage irregular [flows]’, by ‘strengthening [their] capacities for border management including by reinforcing their search and rescue capacities at sea’.<sup>541</sup> **Maritime SAR is thereby framed as a function of border control**. It is configured as a tool of containment that has become undistinguishable from interdiction; used to spare the dangers of deadly crossings, to be performed pre-emptively to avoid loss of life, but in a way that impedes arrival and access to protection in the EU.<sup>542</sup> Therefore, **pullbacks and related**

<sup>535</sup> CFMR Proposal, Art 7(1).

<sup>536</sup> CFMR Proposal, Art 3(4).

<sup>537</sup> CFMR Proposal, Art 7(2).

<sup>538</sup> See further, De Bruycker, ‘The New Pact on Migration and Asylum: What it is not and what it could have been’, *EU Migration Law*, [15.12.2020](#).

<sup>539</sup> RAMM Proposal, Art 52(5).

<sup>540</sup> CJEU, Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council* [2017] ECLI:EU:C:2017:631.

<sup>541</sup> New Pact on Migration and Asylum, p. 20.

<sup>542</sup> See further Moreno-Lax ‘The EU Humanitarian Border and the Securitisation of Human Rights: The “Rescue-through-Interdiction/Rescue-without-Protection” Paradigm’ (2018) 56 *Journal of Common Market Studies* 119.



**abuse** risk becoming **normalised** as a legitimate migration management technique, regardless of its human rights implications.<sup>543</sup>

Contrariwise, the **Charter of Fundamental Rights binds all EU institutions, bodies and agencies as well as the MS whenever they implement EU law, whether territorially or extraterritorially**. Action on the high seas, within the territorial waters of third countries or in cooperation with their authorities does not exempt from the duty to protect the fundamental rights of those concerned, including their rights to life, to asylum, and to *non-refoulement*.

### Recommendations:

#### *Regarding ongoing practice*

23. The European Parliament should **extend the terms of the Frontex Scrutiny Working Group** to cover not only incidents in the Aegean, but also facilitation of pullbacks by the LYCG in the Central Mediterranean. A **similar investigation** should be opened **into** the workings and effects of **EUNAVFORMED Operations** to elucidate potential legal responsibilities;
24. The European Parliament should **establish a permanent SAR Observatory for the Mediterranean** to monitor human rights violations occurring in the course of, or as a result of, maritime interventions.<sup>544</sup> Collaboration with third countries' authorities should be closely monitored to prevent instances of unlawful pullbacks/pushbacks and related practices. The work of the Observatory can feed into ongoing and future investigations and support the work of FRA, the Consultative Forum of Frontex, and the agency's Fundamental Rights Officer;

#### *Regarding ongoing negotiations*

25. **All seafarers**, including IRINI and Frontex-coordinated assets, **are subject to the customary international legal duty to rescue**. They cannot refuse requests for assistance on convenience or 'pull factor' considerations, and should **pro-actively engage in SAR**, searching for persons in distress, retrieving survivors, and delivering them to a **'place of safety'**, **in line with the principle of non-refoulement**. The European Parliament should request the European Commission to **revise the SAR Recommendation** in this regard;
26. The **SAR Recommendation should be redrafted to guarantee that the activities of SAR NGOs are not hindered** by the adoption of administrative, technical or criminal measures impeding or significantly obstructing their work. Unproven 'pull factor' rhetoric should be abandoned and replaced with compliance with the SAR Conventions and the rights of SAR NGOs under the **EU human rights defenders framework**;
27. Upon disembarkation, **TCN** rights must be duly considered in any reception/relocation system, factoring in their **needs, preferences, and entitlements**, and **taking account of MS capacities** in line with the principle of solidarity and fair-sharing of responsibility. The **solidarity mechanisms proposed** as part of the New Pact **should be revisited** to guarantee compliance with Article 80 TFEU and the CFR, avoiding discriminatory outcomes on account of refugees' mode of arrival, in fulfilment of the principles of **non-discrimination** and **non-penalisation** for irregular entry enshrined in Articles 3 and 31 of the 1951 Geneva Convention;

<sup>543</sup> Moreno-Lax and Lemberg-Pedersen, 'Border-induced displacement: The ethical and legal implications of distance-creation through externalization' (2019) 56 Questions of International Law 5.

<sup>544</sup> The Search and Rescue Observatory for the Mediterranean ([SAROBMED](#)) project, recording SAR and interdiction incidents during 2015-19 through a consortium of researchers and civil society organisations, offers a model that could be replicated.

*Regarding future initiatives*

28. In line with its previous Resolutions, the European Parliament should prepare an own-initiative report on the **launch of an integrated SAR response in the Mediterranean**, involving Frontex, the EUNAVFORMED, and the EU MS. Whether it takes the form of dedicated MS missions or an EU-wide SAR operation, the deployment should aim at restoring SAR capacity and activity at sea in line with the EU *acquis* and the international maritime Conventions. SAR responsibility cannot continue to primarily rest on the shoulders of private actors.

## **5. THE CRIMINALISATION OF HUMANITARIAN ASSISTANCE**

### KEY FINDINGS

- NGOs occupy an important but fragile position as humanitarian providers and human rights watchdogs in the Mediterranean and the Aegean.
- Although it is an EU-wide phenomenon, most cases of criminalisation of SAR activities concern the Italian and Greek authorities.
- The criminalisation of humanitarian assistance encompasses the policing, intimidation and establishment of administrative sanctions or criminal proceedings against citizens, volunteers or employees of NGOs and private sector actors, including merchant vessels, who have assisted migrants and asylum seekers for humanitarian motives.
- The criminalisation of humanitarian assistance stems from the potentially far-reaching scope of criminalisation of the EU legal instruments on facilitation of irregular migration.
- Recent Guidance by the European Commission on this issue has proven insufficient to eliminate ambiguity in this area of law.
- The Covid-19 crisis has exacerbated and provided new justifications for obstacles to the provision of humanitarian assistance by civil society at sea and on land, including port closures, due to health and safety concerns.
- Criminal smuggling related investigations and charges against NGOs, volunteers and individuals have dramatically increased since 2015.
- Of 28 NGO SAR vessels that operated in the Mediterranean since January 2015, 18 have faced administrative and criminal investigations and spent time impounded or unable to sail on instruction by Italian, Greek, Maltese, German and Dutch authorities.
- As of December 2019, there have been at least 60 cases of formal criminalisation, involving at least 171 individuals in 13 MS. 44 cases were based on crimes of facilitation of entry or transit, 10 on crimes of facilitation of residence, and six on multiple grounds in which smuggling charges were accompanied by accusations of other crimes including money laundering, membership of a criminal organisation, and espionage.
- Even where administrative and criminal charges are discontinued, the fact of being investigated is traumatic for the individuals and organizations involved, has a 'chilling effect' on life-saving work, and undermines their position as human rights defenders.
- There is an evidence gap concerning the extent to which policing humanitarianism dynamics are being exported to transit countries such as Libya, Niger, and Turkey.
- The criminalisation of humanitarian assistance fosters mistrust in EU and MS authorities and their powers in enforcing the relevant standards and distorts public narratives about human rights, eroding democratic values and the rule of law.
- MS and the Union as a whole have the knowledge and wherewithal to counter the harmful effects of this phenomenon and should act in line with the EU founding values.

## 5.1 Introduction

The **criminalisation of humanitarian assistance** to irregular migrants is an **EU-wide phenomenon**.<sup>545</sup> It concerns the **policing, intimidation and establishment of administrative sanctions or criminal proceedings against citizens, migrants, and volunteers or employees of NGOs and private sector actors** who have **assisted migrants and asylum seekers for humanitarian motives**. It is a longstanding concern of the European Parliament, spearheaded by the LIBE committee,<sup>546</sup> and one that has come increasingly to the fore in recent years, particularly during the Covid-19 crisis.

This study adopts a broad understanding of criminalisation, in keeping with the **'policing humanitarianism' framework** developed for previous LIBE Committee studies.<sup>547</sup> This includes instances of **criminal conviction** as well as the experience of being subjected to **police investigations and detention**. Other restrictive measures classed under 'policing' include the **seizure of ships and vital humanitarian equipment**, including medical tools and provisions, cooking facilities for soup kitchens, tents, sleeping bags, etc.; **administrative sanctions**, including on the grounds of breaches of health and safety regulations, occupation of public spaces, or failure to present documentation or permits on request; and **strict monitoring requirements**, such as through new NGO registration databases in certain MS (see below on Greece and Italy) and requirements for **permits to perform certain day-to-day activities**. Individually and through their cumulative impact, **these measures limit the capacity of private actors to act freely and perform rescue**, providing life-saving humanitarian assistance. They also serve to **dissuade such operations from taking place altogether**.

The criminalisation of humanitarian assistance has wider societal impacts. It fosters **mistrust in EU and MS authorities, distorts public narratives about migrants, asylum seekers and human rights defenders, and undermines the credibility of national authorities and the European Commission in enforcing the relevant standards**.

This chapter takes stock of current developments in the Mediterranean, considering the impact of criminalisation measures on rescuers, individuals rescued, and the broader public. It assesses the **effects of these measures on the rule of law, fundamental rights, and democracy, exploring issues of legality and legitimacy under EU and international law**.

## 5.2 Context: An Acute Humanitarian Need

Since the publication of two previous reports for the LIBE Committee,<sup>548</sup> cases of policing and criminalisation of humanitarian assistance have continued to take place inland. However, they have been shown to have **particularly insidious consequences for 'boat refugees' and migrants at sea** who have been overwhelmingly dependent on civil society-led SAR in the Mediterranean and the

<sup>545</sup> The following section draws from Allsopp, Vosyliūtė and Smialowski, 'Picking 'Low-Hanging Fruit' While the Orchard Burns: The Costs of Policing Humanitarian Actors in Italy and Greece as a Strategy to Prevent Migrant Smuggling' (2020) 27 European Journal on Criminal Policy and Research 65; Carrera, Allsopp and Vosyliūtė, 'The Effects of Anti-Migrant Smuggling Policies on Humanitarian Assistance in the EU' (2018) 3 International Journal of Border and Migration Studies 236; Vosyliūtė and Conte, 'Crackdown on NGOs assisting refugees and other migrants', ReSOMA Discussion Brief ([July 2018](#)); Vosyliūtė and Conte, 'Crackdown on NGOs assisting refugees and other migrants', ReSOMA Policy Options Brief ([March 2019](#)); Vosyliūtė and Conte, 'Final Synthetic report on Crackdown on NGOs assisting refugees and other migrants', ReSOMA ([June 2019](#)); and Moreno-Lax, 'A New Common European Approach to Search and Rescue?' (n 323).

<sup>546</sup> Carrera, Guild, Aliverti, Allsopp, Manieri and Levoy, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*, PE 536.490 (European Parliament, 2016); and Carrera et al., *Updated Study: Fit for purpose?* (n 488).

<sup>547</sup> Carrera et al., *Policing Humanitarianism* (n 5).

<sup>548</sup> Carrera et al., *Fit for Purpose?* (n 546); and Carrera et al., *Updated Study: Fit for purpose?* (n 488).

Aegean.<sup>549</sup> **Among the 28 NGO-operated SAR vessels that have been operational in the Mediterranean and Aegean since January 2015, 18 have faced administrative and criminal investigations and spent time impounded or unable to sail on instruction by Italian, Greek, Maltese, German, and Dutch authorities.** A second important actor in this space is private or 'merchant' shipping and fishing vessels, who are faced with the dilemma of being directed to rescue migrants in distress at sea and then return them to Libya, engaging in what has been called '**privatised pushbacks**'.<sup>550</sup>

It is worth reiterating the scale of humanitarian tragedy to which private actors have been compelled to respond, complementing the discussion in Chapter 4. **Between 1993 and mid-2018, over 27,000 migrants were registered as having drowned at sea in Europe,** often hundreds at a time when large ships capsized.<sup>551</sup> **Many more are missing.** In part as a response to deterrence measures introduced by the EU Home Affairs agencies and MS governments,<sup>552</sup> coupled with externalisation agreements (the EU-Turkey Statement and MoUs with Libya, discussed in Chapters 4 and 6), **arrivals decreased dramatically since 2015** (to 373,652 in 2016; 185,139 in 2017; 141,472 in 2018; and 123,663 in 2019).<sup>553</sup> By contrast, during the same period, the **risk of death increased exponentially.**<sup>554</sup> This can be read as evidence of a successful **deterrence strategy**, or as a **policy of abandonment at sea.**<sup>555</sup>

**Criminal smuggling related investigations and charges against NGOs, volunteers and individuals** (e.g. those helping family members) **have also considerably increased since 2015.**<sup>556</sup> **As of December 2019, there had been at least 60 cases, involving at least 171 individuals in 13 MS.**<sup>557</sup>

The majority of cases were in Italy and Greece. 44 cases were based on crimes of facilitation of entry or transit, 10 on crimes of facilitation of residence, and six on multiple grounds in which smuggling charges were accompanied by accusations of **money laundering, membership of a criminal organisation, and espionage.**<sup>558</sup> There is evidence of **widespread police harassment of volunteers, activists and humanitarian aid workers occurring in France, Greece, Italy, Malta, and Croatia.**<sup>559</sup> While SAR NGOs have faced many accusations and charges related to human smuggling, **bureaucratic and administrative sanctions** have been as successful in hindering their work, for example, the *Sea Watch 3* SAR ship has been held in a Sicilian port since 3 June 2020 because of alleged irregularities found after an inspection by the Italian Coastguard.<sup>560</sup> Table 1 in the Annex documents the various

<sup>549</sup> Moreno-Lax, Ghezelbash and Klein, 'Between life, security and rights: framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia' (2019) 32 *Leiden Journal of International Law* 715; Carrera, Allsopp and Vosyliūtė, 'The Effects of Anti-Migrant Smuggling Policies' (n 545), p. 276.

<sup>550</sup> 'Privatized Pushbacks: How Merchant Ships Guard Europe,' *New York Times*, [20.3.2020](#). See also, Ghezelbash, Moreno-Lax, Klein, and Opeskin, 'Securitization of Search and Rescue at Sea: The Response to "Boat Migration" in the Mediterranean and Offshore Australia' (2018) 67 *International and Comparative Law Quarterly* 315.

<sup>551</sup> 'It's 34,361 and Rising: How the List Tallies Europe's Migrant Bodycount,' *The Guardian*, [20.6.2018](#).

<sup>552</sup> Carrera, Allsopp and Vosyliūtė, 'The Effects of Anti-Migrant Smuggling Policies' (n 545), p. 276.

<sup>553</sup> UNHCR, Mediterranean Situation Data, [1.3.2021](#).

<sup>554</sup> Vosyliūtė, 'Is 'Saving Lives at Sea' still a Priority for the EU?', Heinrich-Böll-Stiftung, [19.4.2018](#).

<sup>555</sup> Ibid; Heller and Pezzani, 'Death by Rescue: The Lethal Effects of Non-Assistance at Sea', *Forensic Oceanography* ([April, 2016](#)).

<sup>556</sup> Vosyliūtė and Conte, 'Final Synthetic report' (n 545).

<sup>557</sup> ReSOMA, 'The Criminalisation of Solidarity in Europe' ([2019](#)).

<sup>558</sup> Ibid.

<sup>559</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights. The Widening Gap in Migrant Protection in the Mediterranean: Follow Up Report to the 2019 Recommendation' ([March 2021](#)).

<sup>560</sup> 'Italy grounds Moonbird plane used to search for migrants at sea,' *InfoMigrants*, [9.9.2020](#).



obstacles that have faced no fewer than **28 independent SAR vessels that have been operational in the Mediterranean and the Aegean between January 2015 and January 2021**.<sup>561</sup>

**The pandemic has made matters worse and provided new justifications for pre-existing rights obstructions.** Anecdotal evidence suggests Covid-19 is being used as a 'catch all' to further **disincentivise humanitarian operations**, including humanitarian aid and judicial access to individuals held in detention centres.<sup>562</sup> The Covid-19 pandemic saw the imposition of various restrictions, including the **closure of Italian and Maltese ports declared 'unsafe' for the disembarkation of migrants rescued by the authorities**. As a result, Germany also called on private rescue ships to suspend their activities and to recall their boats.<sup>563</sup> When NGOs were able to carry out rescues, port restrictions and new safety requirements prevented them from setting sail, which led to the gradual disappearance of NGOs from the Mediterranean. **In March and May 2020, no NGO rescue vessels were reported to be at sea.** In April 2020, just two NGO-operated vessels were at sea, for a total of five days. Since June 2020, a few vessels have resumed rescue activities. However, **more than half of all NGO vessels have been confined to ports for specific periods, and some continue to be held at the time of writing** (see Table 1 in Annex).<sup>564</sup>

MS and the EU in cooperation with the LYCG have taken control of interceptions. And most of those intercepted have subsequently been returned to Libya. **In 2020, more than 10,000 migrants were intercepted and returned to Libya in 'pullback' operations.**<sup>565</sup>

The activist network Alarm Phone continues to operate its emergency hotline for refugees in distress at sea. But they report that the Maltese and Italian Coastguards have ignored their calls on multiple occasions.<sup>566</sup> They have also documented 'mass human rights violations', 'attacks on migrant boats by those formally there to rescue', and 'pushbacks by secret fleets or merchant vessels',<sup>567</sup> drawing attention to the **important but fragile position of NGOs as human rights watchdogs in the Mediterranean**. Access for migrants to this assistance is key, but is currently denied in many cases, against the relevant standards and in disconformity with the 'holistic approach' advocated by the European Parliament.<sup>568</sup>

### 5.3 The Facilitators Package

In 2018, the Commission acknowledged that the criminalisation of humanitarian assistance, as documented in this chapter, stems from the potentially **far-reaching scope of criminalisation of the EU legal instruments on the facilitation of irregular migration**,<sup>569</sup> including Directive 2002/90/EC

<sup>561</sup> Further on legal cases, FRA, 'Table 2: Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea', [15.12.2020](#).

<sup>562</sup> 'The COVID-19 excuse? How migration policies are hardening around the globe', *The New Humanitarian*, [17.4.2020](#).

<sup>563</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights' (n 559).

<sup>564</sup> FRA, 'December 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them', [18.12.2020](#).

<sup>565</sup> 'Migrants and refugees returned to Libya exceeds 10,000', OCHA Updates, [20.12.2020](#).

<sup>566</sup> For a recent incident, see 'Italy, Malta and Libya slow to react to deadly shipwreck, analysis finds', *Euronews*, [4.5.2021](#).

<sup>567</sup> European Parliament, 2016 Mediterranean Resolution (n 24).

<sup>568</sup> 'The COVID-19 excuse? How migration policies are hardening around the globe', *The New Humanitarian* [17.4.2020](#). See also 'The Black Book of Pushbacks – Border Violence Monitoring Network', Border Violence, launch event, [18.12.2020](#).

<sup>569</sup> European Parliament, motion for Resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised, 2018/2769(RSP), B8-0034/2018, 29.6.2018.

**and Framework Decision 2002/946/JHA, collectively known as the 'Facilitators Package'.<sup>570</sup> The decision to criminally sanction people and organisations facilitating access to humanitarian assistance at the point of entry, transit or stay remains at the discretion of each MS.** Article 1(2) of Directive 2002/90 provides an **optional clause for MS to explicitly exclude humanitarian actors from criminal sanctions.** This option has been used, for example, by Greece and France in their transposition of the Directive in national legislation.<sup>571</sup> However, **facilitation of entry is a criminal offence in most MS, punishable by imprisonment or a fine even where the 'smuggler' does not profit, including in countries like Greece and Italy** — which have transposed the humanitarian exemption clause, but fail to apply it adequately to SAR NGOs. A 2018 study for the LIBE Committee found that 13 MS, including France and Italy, did not require a profit motive to establish the crime of facilitating transit and residence.<sup>572</sup>

The optional nature of the humanitarian exception has been questioned for both its inability to safeguard the humanitarian principles, which supposedly inspire it, and for its lack of added value in approximating national criminal laws. Only a few MS (BE, EL, FR, ES, FI, HR, IT, MT) have expressly implemented the exception in their national legal frameworks, but with significant differences as to its scope of applicability,<sup>573</sup> while the European Parliament has repeatedly called for 'efforts to counter the criminal smuggling of migrants [to] not affect those providing humanitarian assistance', specifying that 'private shipmasters or [SAR] NGOs who genuinely assist persons in distress at sea should not risk punishment for providing such assistance'.<sup>574</sup>

**Two related reports by the LIBE Committee, in 2016 and 2018, found the Facilitators Directive 'unfit for purpose'.<sup>575</sup> They showed it to be ill-aligned with the UN anti-smuggling architecture, creating space for ambiguity and inconsistency in the law in a way that undermines social trust and transparency vis-à-vis the rule of law and respect for human rights.** The issue of migrant smuggling is addressed by the UN as primarily one of law and order. The main international instrument that defines smuggling of migrants is the **UN Protocol against Migrant Smuggling by Land, Sea and Air (SOM),<sup>576</sup> which supplements the 2000 UN Convention against Transnational Organised Crime (UNTOC).**<sup>577</sup> This instrument requires its parties to criminalise the procurement of irregular entry and the enablement of irregular residence, when committed intentionally and 'in order to obtain, directly or indirectly, a financial or other material benefit'.<sup>578</sup> It is not an offence under the SOM to act for purposes other than financial or other material benefit. As a result, the Protocol **does not seek to**

<sup>570</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/17 ('Facilitation Directive'); Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, [2002] OJ L 328/1.

<sup>571</sup> Allsopp, 'Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France', Refugee Studies Centre, Working Paper No 82 ([July 2012](#)).

<sup>572</sup> Carrera et al., *Updated Study: Fit for purpose?* (n 488).

<sup>573</sup> Ibid; FRA, 'Challenges facing civil society organisations working on human rights in the EU', [18.1.2018](#).

<sup>574</sup> See, e.g., European Parliament, 2016 Mediterranean Resolution, Rec K and para. 6.

<sup>575</sup> Carrera et al., *Fit for Purpose?* (n 546); and Carrera et al., *Updated Study: Fit for purpose?* (n 488).

<sup>576</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime ('SOM'), 2241 UNTS 507.

<sup>577</sup> UN Convention against Transnational Organized Crime ('UNTOC'), 2225 UNTS 209.

<sup>578</sup> SOM, Arts 6(1)(a) and 3(a).

**criminalise the actions of those acting out of humanitarian concern for migrants.** The *Interpretative Notes of the Protocol against the Smuggling of Migrants* are clear on this.<sup>579</sup>

The **European Commission** showed awareness of this ambiguity when, in the context of the **EU Action Plan Against Smuggling (2015-20)**,<sup>580</sup> it **announced a revision of the 'Facilitators Package' in 2016**. However, this **did not come to pass**. In 2017, the Commission, in its **'REFIT Evaluation' of the Package**,<sup>581</sup> **concluded that there was insufficient evidence of actual criminal cases to support a legislative revision**. Following an NGO-led campaign, the Parliament adopted a Resolution to end the criminalisation of humanitarian assistance in July 2018.<sup>582</sup> It called for MS to implement the humanitarian exemption and for the Commission to provide clearer guidelines for MS.<sup>583</sup> In response, the Commission reiterated that there was not enough evidence showing that the Facilitation Directive causes criminalisation to justify legislative change. The cases that did exist (which recent evidence suggests were significantly underestimated<sup>584</sup>) were considered an 'unintended consequence' to be addressed through a 'reinforced exchange of knowledge and good practice'.<sup>585</sup> **In September 2020, the Commission published new Guidance as part of its New Pact on Migration and Asylum.**<sup>586</sup>

#### 5.4 Guidance on Facilitation in the Commission's New Pact on Migration and Asylum

The **New Pact on Migration and Asylum**, as detailed in previous chapters, sets out the **Commission's new approach to migration management, addresses border control, and seeks more coherence to integrate the internal and external dimensions of JHA policies**. When released, the New Pact came with a package of nine instruments. Two dealt directly with the policing and criminalisation of humanitarian assistance: (i) A new Recommendation on SAR operations by private vessels, aiming at ensuring safety of navigation and coordination between MS and private vessels,<sup>587</sup> discussed in Chapter 4; and (ii) new Guidance on the Facilitators Directive, with clarifications on non-penalisation of humanitarian activities.<sup>588</sup>

The Criminalisation Guidance is an interpretive tool intended to transform the clear statement by **Commission President von der Leyen** in her **2020 State of the Union address** that **'saving lives at sea is not optional'**<sup>589</sup> into soft law, and to follow up on the **2018 Resolution of the European Parliament calling for guidelines to prevent humanitarian assistance being criminalised**.<sup>590</sup> The New Pact references the need to put in place 'a much more effective and comprehensive governance system that ensures that solidarity is effective in practice and that the challenges of migration are

<sup>579</sup> Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1, 3.11.2000; and UNODC, 'The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol', [Issue Paper \(2017\)](#).

<sup>580</sup> European Commission, EU Action Plan against migrant smuggling (2015 – 2020), COM(2015) 285 final, 27.5.2015.

<sup>581</sup> European Commission, REFIT evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence, SWD (2017) 117 final, 22.3.2017.

<sup>582</sup> European Parliament, motion for Resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised, 2018/2769(RSP), B8-0034/2018, 29.6.2018.

<sup>583</sup> Ibid.

<sup>584</sup> Conte and Binder, 'Strategic litigation: the role of EU and international law in criminalising humanitarianism', ReSOMA Discussion Brief, [\(July 2019\)](#).

<sup>585</sup> Marletta, 'The Commission "Guidance" on facilitation and humanitarian assistance to migrants', *EU Law Analysis*, [29.9.2020](#).

<sup>586</sup> New Pact on Migration and Asylum (n 2).

<sup>587</sup> SAR Recommendation (n 324).

<sup>588</sup> Criminalisation Guidance (n 472).

<sup>589</sup> Von der Leyen, 'State of the Union Address' [\(2020\)](#).

<sup>590</sup> European Parliament, Resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP)).

addressed comprehensively — be it outside or inside our Union’.<sup>591</sup> Yet, solidarity, as established in Chapter 3, is primarily understood in terms of responsibility sharing between MS, rather than vis-à-vis non-State humanitarian actors.<sup>592</sup>

### Guidance on the Implementation of EU Rules on Definition and Prevention of the Facilitation of Unauthorised Entry, Transit and Residence<sup>593</sup>

While the Criminalisation Guidance states that Article 1 of the Facilitation Directive must be interpreted so that **‘humanitarian assistance that is mandated by law** [presumably including rescue at sea] **cannot and must not be criminalised’**,<sup>594</sup> it **fails to provide examples of what should be understood as ‘humanitarian assistance’**. The Guidance then states, ‘the criminalisation of NGOs ... that carry out [SAR] operations at sea ... amounts to a breach of international law and therefore is not permitted by EU law’, but the provision covers only rescue operations conducted ‘while complying with the relevant legal framework’,<sup>595</sup> which leaves a **margin of appreciation which could disincentivise certain life-saving acts**. Controversially, the Guidance claims that ‘[e]veryone involved in search and rescue activities *must* observe the instructions received from the coordinating authority when intervening in search and rescue events’.<sup>596</sup> This **disregards recent incidents involving controversial orders to stand by or to collaborate with the LYCG that could lead to *refoulement***, as examined in Chapter 4.<sup>597</sup>

The Guidance, in addition, **fails to clarify the specific conduct to be punished and the conditions under which it should be prosecuted** — something that cannot be authoritatively defined in a non-binding Commission recommendation. The final assessment rests with the judicial authorities of each MS. It is them who will **‘have to strike the right balance between the different interests and values at play’**<sup>598</sup> — creating the false impression that the customary international legal duty to rescue or the absolute principle of *non-refoulement* is merely a value rather than a legal obligation, and one that permits such a balancing against the migration management interests of the Union and the MS, which does not tally with the relevant standards.

The Guidance also explains the discrepancy in the ‘for profit’ motive between EU law and the UN Protocol by the **dual purpose of the EU Facilitators Package**, which is not just **to combat organised crime** — the primary object of the UN instrument — but also to **combat irregular migration as such**. By this logic, ‘the non-inclusion of the purpose of gain in the basic definition of the offence of facilitation of entry and transit would not be in contrast with the definition of the UN Protocol, but rather [would constitute] an expression of the **additional (and broader) objective of fighting against irregular migration**’ in the EU context.<sup>599</sup> **The risk of over-criminalisation, illustrated by the multiple cases faced by SAR NGOs in the Mediterranean, is thereby left unaddressed, leaving the Facilitators’ Package still ‘unfit for purpose’.**

<sup>591</sup> European Commission, New Pact on Migration and Asylum: Questions and Answers, [23.9.2020](#).

<sup>592</sup> Peers, ‘First analysis of the EU’s new asylum proposals’, *EU Law Analysis*, [25.9.19](#).

<sup>593</sup> This section is based on Moreno-Lax, ‘A New Common European Approach to Search and Rescue?’ (n 323).

<sup>594</sup> Criminalisation Guidance, para. 4(i).

<sup>595</sup> *Ibid.*, para. 4(ii).

<sup>596</sup> *Ibid.*, p. 7 (italics added).

<sup>597</sup> Heller and Pezzani, ‘Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean’, *Forensic Oceanography* ([May 2018](#)).

<sup>598</sup> Criminalisation Guidance, p. 6.

<sup>599</sup> Marletta, ‘The Commission “Guidance”’ (n 585).

The only concrete recommendation the Guidance contains in this regard is to **'invite' MS 'to use the possibility provided for in Article 1(2) of the Facilitation Directive' to exempt humanitarian assistance from the scope of criminalisation.**<sup>600</sup> But, as already noted, there **remains a high degree of inconsistency among MS** in how they have transposed anti-smuggling obligations under the UN Protocol and the Facilitation Directive, leading to **confusion among migrants and civil society groups as to what constitutes a violation**, especially among those working across multiple jurisdictions. This **ambiguity has a chilling effect**. Where the law is unclear, rescuers may be tempted to err on the side of caution in a way that put lives at risk.<sup>601</sup>

On the whole, the Commission's Guidance means that a **matter of EU legality (and its compatibility with international norms) has been left unresolved** and relegated to domestic implementation and national policy preferences that may ultimately have to be **resolved by MS courts 'on a case-by-case basis'**.<sup>602</sup> As a result, the policing and criminalisation of SAR NGOs may continue, as it will only be *ex post*, in the courts, that their activities may eventually be exempted from punishment. This case-by-case approach **undermines the uniformity of EU law and the legal certainty** required for individuals to be able to adjust their behaviour. It is, however, a requirement of criminal law to clearly define the conduct that constitutes an offence, under the terms of **Article 49 CFR**. This is why **only a legislative revision of the Facilitators' Package would be appropriate, as advocated by the European Parliament.**<sup>603</sup>

## 5.5 The Response of International Organisations

### 5.5.1 The UN

Many of the European Commission's New Pact's objectives are reflected in the UN Global Compact for Safe, Orderly and Regular Migration (GCM),<sup>604</sup> the UN Global Compact for Refugees (GCR),<sup>605</sup> and related initiatives, which collectively nuance the EU's stance.

**The GCM is one of two non-legally binding documents that countries committed to create in the 2016 New York Declaration seeking to resolve the Syrian refugee situation.**<sup>606</sup> The Migration Compact's objectives include the need to strengthen transnational responses to migrant smuggling and trafficking in persons, through implementation of the UN Protocols. **The Compact acts as re-enforcement of the Smuggling Protocol.** It sets out 22 core objectives with a single aim: making migration work for all. Regarding irregular migration, **Objective 9 pursues three goals: preventing smuggling, ensuring smuggled migrants are not criminalised, and ending impunity for smuggling networks.** The methods suggested to achieve these goals range from traditional methods, e.g. **encouraging States to ratify UNTOC**, to innovative initiatives, e.g. **institutionalising transnational intelligence sharing**. Like the New Pact, the GCM emphasises the need to **strengthen transnational cooperation against migrant smuggling**. However, **definitions of transnational organised crime are unclear, as are thresholds for measures to combat it.**

<sup>600</sup> Criminalisation Guidance, p. 8.

<sup>601</sup> Carrera et al., *Policing Humanitarianism* (n 5).

<sup>602</sup> Criminalisation Guidance, para. 4(iii).

<sup>603</sup> See, among others, European Parliament, 2016 Mediterranean Resolution, Rec K and paras 86-90.

<sup>604</sup> UN Global Compact for Safe, Orderly and Regular Migration ('GCM') (n 3).

<sup>605</sup> UN Global Compact on Refugees ('GCR') (n 3).

<sup>606</sup> UNGA, President Draft outcome document of the Conference: Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration: note by the President of the General Assembly, A/CONF.231/3, [30.7.2018](#).



The SOM, and its restatement in Objective 9 GCM, has also been criticised for **lacking nuance in relation to the goal of ending the impunity of smuggling networks**. The Global Initiative Against Transnational Organized Crime (GI) suggests that law enforcement bodies should target those groups that: (1) have the infrastructure and capacity to move people *en masse*; (2) use the profits from smuggling in harmful ways (e.g. to perpetrate violence, conflict, or terrorism); and (3) enact the greatest levels of abuse or exploitation against the persons they move. GI adds that Objective 9 ‘fails to acknowledge that **refugees and migrants do not simply ‘feel compelled to resort to smugglers’ but are ‘forced to rely upon smugglers in the absence of any viable alternative’** to reach safety and access international protection.<sup>607</sup>

While the Compact reiterates the necessity to clearly distinguish migrants from smugglers, and to protect against criminalisation for having been smuggled, in reality the distinction is more blurred. For example, if a refugee with fishing experience offers to pilot a boat in return for a reduced fee, are they a smuggler or a smuggled migrant? This highlights the **grey area when migrants have a role in facilitating their own irregular entry. Beyond reiterating the profit motive contained within the SOM, the GCM is thus not particularly helpful in clarifying the purpose and scope of the Facilitation Directive.**

In turn, the **GCR** is salient, reaffirming the **absolute prohibition of *refoulement***. This prohibition is included in Article 33 of the 1951 Refugee Convention, Article 3 of the Convention against Torture, Article 3 ECHR, and Articles 4 and 19 CFR. As discussed in Chapter 4, this raises questions as to the legality of interventions, where SAR groups claim to be protecting migrants from *refoulement* and suggests certain interventions by NGOs are not breaches of the law, but rather legitimate attempts to uphold human rights.

In this regard, several **Special Rapporteurs and UN agencies** have criticised developments in the EU. The UN Special Rapporteur on the Independence of Judges and Lawyers expressed particular **concern regarding political accusations directed at judges who have ruled in favour of volunteers facing charges of humanitarian smuggling**.<sup>608</sup> Regarding Italy, the UN Special Rapporteur on the Situation of Human Rights Defenders has **condemned the criminalisation of these human rights defenders and called on Italian authorities to** publicly recognise the important role they play in protecting the right to life of refugees and migrants at risk in the Mediterranean and **end their criminalisation**.<sup>609</sup>

Both **UNHCR and IOM** have called for a halt to returns to Libya and for EU MS to expand SAR in the Mediterranean.<sup>610</sup> In May 2020,<sup>611</sup> UNHCR called for greater coordination, solidarity, and responsibility sharing, in response to increased movements of refugees and migrants in the region, stressing that despite the pressures of Covid-19, rescue at sea is a humanitarian imperative and an obligation under international law. IOM has joined UNHCR in calling for greater coordinated and predetermined disembarkation to avoid migrants being stranded for long periods at sea, and also in **criticising the penalisation of civil society** and merchant vessels, especially in a context where there is no State-led

<sup>607</sup> UNGA, New York Declaration for Refugees and Migrants, A/RES/71/1, [19.9.2016](#).

<sup>608</sup> OHCHR, ‘Italy: UN experts condemn criminalisation of migrant rescues and threats to the independence of judiciary’, [18.7.2019](#).

<sup>609</sup> OHCHR, ‘Legal changes and climate of hatred threaten migrants’ rights in Italy, say UN experts’, [21.11.2018](#); OHCHR, ‘Italy: UN experts condemn bill to fine migrant rescuers’, [20.5.2019](#); OHCHR, ‘Italy: UN experts condemn criminalisation of migrant rescues and threats to the independence of judiciary’, [18.7.2019](#).

<sup>610</sup> UNHCR, ‘News comment on search and rescue in the Central Mediterranean by Gillian Triggs, Assistant High Commissioner for Protection at UNHCR, the UN Refugee Agency’, [1.5.2020](#).

<sup>611</sup> Ibid.



alternative. In August 2020,<sup>612</sup> for example, IOM and UNHCR called for the immediate disembarkation of more than 400 rescued migrants and refugees on board three vessels in the Central Mediterranean, **dismissing the argument that Covid-19 could justify refusing entry to Europe.**<sup>613</sup> Another joint UNHCR-IOM statement warned that not having prompt disembarkation may dissuade commercial shipmasters from attending to distress calls.<sup>614</sup> In January 2021, following a shipwreck off the coast of Libya that claimed 43 lives, IOM and UNHCR renewed calls for countries to re-activate SAR operations.<sup>615</sup> So far, **European authorities have, however, failed to respond.**

### 5.5.2 The Council of Europe

In June 2019, the Council of Europe (CoE) Commissioner for Human Rights **called on CoE MS to co-operate constructively with NGOs conducting SAR operations** to secure effective protection of human rights, recognising their crucial work.<sup>616</sup> She urged States to refrain from engaging in any action or change, at the policy, judicial, or administrative levels, which would contravene their obligation to guarantee a safe and enabling environment for NGO ships and crew to act as human rights defenders. This included a call to facilitate access to territorial waters and ports for disembarkation and respond to any other needs related to their work or technical requirements. The Commissioner has also echoed requests by UNHCR and IOM for greater coordination in SAR and a halt in returns to Libya.<sup>617</sup> A recent report takes stock of MS' implementation of the **Commissioner's 2019 Recommendation on rescuing migrants at sea**<sup>618</sup> and provides a set of actionable measures to be urgently adopted by European countries to ensure that human rights are protected.<sup>619</sup> It reiterates **calls to: (i) guarantee the presence of adequate and sufficient State-led SAR capacity at sea; (ii) ensure safe and prompt disembarkation of those rescued; (iii) allow NGOs involved in SAR activities or human rights monitoring to carry out their work; (iv) end pushbacks and other actions that expose migrants to return to serious human rights violations; and (v) expand safe and legal routes.**

## 5.6 Recent Developments in the Policing and Criminalisation of Humanitarian Assistance

The crackdown on NGOs conducting SAR in the Mediterranean began in a context of **increasing hostility towards migrants and related disbelief of the humanitarian intentions behind lifesaving activities.**<sup>620</sup> MS and EU JHA agencies started to criticise the work of civil society actors in the Central Mediterranean and Aegean in 2016. Among the **accusations were that civil society may be assisting or collaborating with smugglers.**<sup>621</sup> Frontex was reported to have 'knowledge of some

<sup>612</sup> 'UNHCR and IOM call for urgent disembarkation of rescued migrants and refugees in Central Mediterranean Sea', IOM and UNHCR Joint Statement, [29.8.2020](#).

<sup>613</sup> Ibid.

<sup>614</sup> 'UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change, IOM and UNHCR Joint Statement, [11.7.2019](#).

<sup>615</sup> 'UN calls for resumption of Mediterranean rescues, after 43 die in Libya shipwreck,' *UN News*, [20.1.2021](#).

<sup>616</sup> CoE Commissioner for Human Rights, 'Council of Europe member states must assume more responsibility for rescuing migrants at sea and protecting their rights', [18.6.2019](#).

<sup>617</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights' (n 559); CoE Commissioner on Human Rights, 'European countries must urgently change migration policies which are endangering refugees and migrants crossing the Mediterranean', News Room, [9.3.2021](#).

<sup>618</sup> CoE Commissioner on Human Rights, 'Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean', Recommendation ([June 2019](#)).

<sup>619</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights' (n 559).

<sup>620</sup> We thank Lina Vosyliūtė for her contribution to this section, which draws also on Allsopp, Vosyliūtė and Smialowski, 'Picking 'Low-Hanging Fruit'' (n 545); Vosyliūtė and Conte, ReSOMA Briefs and Final Synthetic Report (n 545).

<sup>621</sup> Allsopp, Vosyliūtė and Smialowski, 'Picking 'Low-Hanging Fruit'' (n 545).

volunteers' having an 'unclear past'.<sup>622</sup> In December 2016, **a leaked risk assessment was among the first elements of suspicion cast on SAR NGOs.**<sup>623</sup> There, the agency collated separate statistics on how many people had been rescued by SAR NGOs. The analysis implied that **civil society rescued 'too many, too quickly', creating a 'pull factor'.**<sup>624</sup> The data were then reported by some media as 'civil society colluding with migrant smugglers'.<sup>625</sup>

Today, the **situation has worsened** and there is still **limited consistency in regional or national practices.** Several NGOs are appealing against the detention of their ships (e.g. *Mare Liberum* in Germany),<sup>626</sup> while collating evidence of human rights abuses occurring in their absence, and shifting from rescue to monitoring activities.<sup>627</sup> As detailed in Annex, Table I, alongside criminal prosecutions, administrative, health and safety, and other sanctions are also levelled against NGOs.<sup>628</sup> These include **allegations of safety deficiencies and accusations that NGO vessels have been carrying more passengers than they were authorised for** (counting rescued persons as 'passengers'), and allegations of negligent **pollution of the environment.**<sup>629</sup> The CoE Human Rights Commissioner's report on the Italian maritime authorities' refusal to allow two members of the Mediterraneana rescue team (a rescue paramedic and a SAR expert) to embark on the *Mare Jonio* NGO vessel is only one of the recent examples of apparent **administrative obstruction** (see Table 1 in the Annex for a report on the status of 28 SAR NGO boats).<sup>630</sup>

### 5.6.1 Merchant Vessels and SAR NGOs: The case of Mare Jonio

The *Mare Jonio* case illustrates the **difficult position of merchant vessels operating in the Mediterranean stuck between NGOs and State instructions, particularly in the post-pandemic environment.** The charge facing staff of the *Mare Jonio* (run by Mediterraneana) stems from events of 11 September 2020. At the beginning of August 2020, the oil tanker *Maersk Etienne* rescued 27 migrants in the Maltese SAR zone. Although the Maltese authorities coordinated the rescue operation, they never assigned a 'place of safety' and the **27 migrants were forced to spend 39 days on a ship in the Central Mediterranean without medical facilities or proper accommodation.** The migrants were in a critical condition due to their arduous journey, including prolonged detention in Libya. The *Mare Jonio* answered a request of the captain of the *Maersk Etienne* and the medical staff of Mediterraneana went on board, immediately realising the poor health of the migrants. A transshipment was organised and the *Mare Jonio* immediately set sail toward Sicily, where the migrants were eventually authorised to disembark.<sup>631</sup>

The Public Prosecutor alleges there was a 'financial agreement' between the ship owners of the *Mare Jonio* and *Maersk Tankers*. Maersk denies this.<sup>632</sup> This difficult situation and unusual collaboration between an oil tanker owned by a leading global shipper and the small tugboat *Mare Jonio*

<sup>622</sup> Ibid.

<sup>623</sup> Carrera, Allsopp and Vosyliūtė, 'The Effects of Anti-Migrant Smuggling Policies' (n 545), p. 276

<sup>624</sup> Ibid.

<sup>625</sup> 'Italy migrant crisis: Charities 'colluding' with smugglers,' *BBC*, [23.4.2017](#).

<sup>626</sup> *Mare Liberum*, 'Germany detains ships of human rights organization', [19.10.2020](#).

<sup>627</sup> See The Civil Fleet [blog](#) for updated reporting on these cases.

<sup>628</sup> ReSOMA, 'The criminalisation of solidarity in Europe' (n 557); Allsopp, Vosyliūtė and Smialowski, 'Picking 'Low-Hanging Fruit'' (n 545).

<sup>629</sup> Sea Watch, 'People drowning in the Mediterranean – civilian rescue ships systematically detained', [4.8.2020](#).

<sup>630</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights' (n 559).

<sup>631</sup> 'Migrants on Cargo Ship Maersk Etienne Disembark in Italy After 39 Days at Sea', *InfoMigrants*, [14.9.2020](#).

<sup>632</sup> Mediterraneana, 'International Solidarity Call for Mediterraneana Saving Humans', [17.3.2021](#).

**demonstrates the practical need for cooperation between private and civil society actors in the absence of a coordinated EU response and the uncertain terrain non-State actors are forced to navigate in such a vacuum.** Many shipping companies remain very concerned about this issue, as evidenced by the fact that members of *Mediterranea* have been invited to participate in meetings with European Shipowners' associations.<sup>633</sup>

The dilemma faced by merchant vessels is well documented.<sup>634</sup> In recent years, it has led to new stand-offs with ships carrying the flags of multiple MS and countries outside the EU, including Panama. For example, on 11 January 2020, the LYCG made three requests for merchant ships to rescue migrants. This included *The Panther*, a German owned merchant ship that was ordered by the LYCG to change course, rescue 68 migrants in distress, and return them to Libya. After *The Panther* arrived in Tripoli, it is reported that Libyan soldiers boarded, forced the migrants ashore at gunpoint, and drove them to a detention camp in the besieged Libyan capital. This was **despite the presence of NGO vessels in the vicinity willing and able to assist.**<sup>635</sup> Meanwhile, in November 2018, 93 migrants were forcefully returned to Libya in violation of their rights after having been intercepted by the *Nivin*, a merchant ship flying the Panamanian flag.<sup>636</sup>

**Reliance on merchant boats over NGO vessels** by State authorities has been explained as due to NGOs' reluctance to return migrants to Libya, which would breach international law.<sup>637</sup> Merchant vessels are more likely to 'toe the line', following instructions of European and Libyan coastguards. **Shipping companies have begun raising awareness of them being 'caught in the middle'.**<sup>638</sup> On 25 May 2020, the *Anne*, a Portuguese boat, rescued some 100 migrants on instruction by the Maltese RCC. At Malta's request, it transferred the survivors to the custody of the Libyan Navy. They were then taken to detention in Libya. The incident highlights the **discord among EU MS about the legality of returning migrants to Libya.** The Portuguese Minister of Foreign Affairs voiced concern that a Portuguese flagged ship may have been 'involuntarily involved in an operation that would not be in conformity with international law'.<sup>639</sup> The example highlights the high-stakes situation of MS themselves contesting action by other MS' at sea.

### 5.6.2 Italy

**Italy has been at the forefront of the SAR criminalisation debate in Europe.** This is partly due to Italy's geographical location as a gateway to Europe, and also partly as a result of its **extensive legislation on international organised crime (most significantly in the form of the anti-mafia directorate)** which grants particularly wide powers to investigators and prosecutors regarding human trafficking and migrant smuggling.<sup>640</sup>

A number of important developments have taken place in the Italian rules between 2017 and 2020 that bear directly on the provision of humanitarian assistance and criminalisation of NGOs. **While 2020 saw**

<sup>633</sup> Ibid.

<sup>634</sup> Gauci, *When Private Vessels Rescue Migrants and Refugees* (n 492).

<sup>635</sup> 'Privatized Pushbacks: How Merchant Ships Guard Europe,' *New York Times*, [20.3.2020](#).

<sup>636</sup> Heller, 'Privatised Push-back of the Nivin', *Forensic Oceanography*, [18.12.2019](#). See also, Global Legal Action Network, 'Privatised Migrant Abuse Against Libya', [19.12.2019](#) and related legal suit filed by GLAN members Moreno-Lax, Mann, and Magugliani on behalf of the applicants: *Communication to the UN Human Rights Committee in the case of S.D.G. v. Italy* ([pending](#)).

<sup>637</sup> The Civil Fleet, 'Why did Frontex help an NGO ship rescue refugees in the Mediterranean?', [7.12.2020](#).

<sup>638</sup> 'Merchant Vessels Caught in the Middle With Mediterranean Migrant,' *Maritime Executive*, [28.5.2020](#).

<sup>639</sup> Ibid.

<sup>640</sup> 'Friends of the Traffickers', *The Intercept*, [30.4.2021](#).

**the amendment of some particularly punitive rules introduced in the preceding years, a number of human rights concerns remain.**

Previous reports for the LIBE committee have documented how **health and safety concerns have been used to implement administrative sanctions against human rights defenders in land**, leading, for example, to the closure of soup kitchens and NGO camps in Rome and Ventimiglia, on the grounds that they entail a public health risk.<sup>641</sup> **The pandemic has served to turn administrative sanctions into criminal ones and to spread in-land tactics outwards to the sea.** Covid-19 has provided new grounds to justify additional restrictions, such as refusing boats permission to disembark and holding rescuees in detention. An April 2020 Decree closed Italian ports to SAR boats stating that '[f]or the entire duration of the national health emergency caused by the spread of the Covid-19 virus, Italian ports cannot guarantee the requisites needed to be classified and defined as a place of safety'.<sup>642</sup> But it is worth noting that **the bulk of these practices pre-date the pandemic.**

*- A Timeline of Restrictions: 'Closed Ports' Policy and Security Decrees*

**From 2018 onwards**, Italy's populist government repeatedly declared Italian waters closed to NGO rescue vessels, which were **blocked from disembarking people rescued in the Mediterranean and impounded with increasing regularity**. During his 14 months in office, Interior Minister Matteo Salvini effectively closed ports to migrant rescue ships and threatened them with substantial fines if they tried to dock, while clamping down on asylum rights to curb arrivals. This **'closed ports' policy was formalised in 2018 and 2019, when Salvini pushed through two government decrees, later converted into laws by the Italian Parliament.**

**Decree No 113/2018 on urgent measures on international protection, immigration and public security** was converted into Law 132/2018 in December 2018.<sup>643</sup> Dubbed the **'Salvini Decree' or the 'Security Decree'**, it contained a wide range of measures tightening up the conditions for asylum, reducing the level of protection for the most vulnerable migrants, and making expulsions easier. **It curtailed Italy's asylum procedure and reception system**, by abolishing the humanitarian protection permit and radically reducing capacity for housing asylum seekers. It also doubled the length of time people could be detained pending deportation.

**A second June 2019 decree (or 'Security Decree Bis') on urgent measures concerning public security and public order** was converted into law in August 2019. Decree Law 53/2019, adopted into Law 77/2019, further weakened the rights of migrants and asylum seekers. With the aim to control migration through restrictive policies, **it increased the power of law enforcement and restricted and criminalised rescuing migrants at sea**, despite international obligations under the maritime Conventions. **The law allowed authorities to seize vessels, prosecute and fine captains up to €1m, and impose €5,500 fines for each person rescued.**<sup>644</sup>

<sup>641</sup> For details of events in Italy pre-dating 2017, see previous reports to the LIBE committee: Carrera et al., *Fit for Purpose?* (n 546); and Carrera et al., *Updated Study: Fit for purpose?* (n 488).

<sup>642</sup> 'Italy Closes Ports to Migrant Ships Because of Coronavirus', *Reuters*, [8.4.2020](#).

<sup>643</sup> Decree Law 113/2018 is available [here](#).

<sup>644</sup> Fekete, Webber and Edmond-Pettitt 'Humanitarianism: the unacceptable face of solidarity', Institute of Race Relations ([2017](#)); Fekete, Webber and, Edmond-Pettitt, 'When witnesses won't be silenced: citizens' solidarity and criminalisation', Briefing Paper No 13, Institute of Race Relations ([2019](#)); 'Italy government wins confidence vote on decree targeting migrant rescue ships', *Reuters*, [5.8.2019](#).

The legislation was strongly **criticised by UNHCR**, who expressed its concern on imposing financial or other penalties on shipmasters as 'it could deter or impede sea rescue activities',<sup>645</sup> potentially leaving the Mediterranean without any rescue capacity or safe port for disembarkation. The provisions sought to legalise the practice of delaying or refusing disembarkation of rescued migrants. Citing law of the sea and human rights norms, including the right to life, six **UN Special Rapporteurs concluded that 'search and rescue operations aiming at saving lives at sea cannot represent a violation of national legislation on border control or irregular migration'**.<sup>646</sup> The experts stressed that Italy has obligations to not engage in acts that would jeopardise the right to life, and to 'seek and facilitate humanitarian action'.<sup>647</sup>

At the time of writing, Salvini is standing trial. He has been charged by Palermo prosecutors of dereliction of duty to protect life and false imprisonment, for keeping a group of 147 migrants at sea on board the *Open Arms* rescue ship off the coast of Lampedusa for almost three weeks in August 2019, something for which he declared he was only 'doing his duty'.<sup>648</sup>

#### *- Impacts of Code of Conduct, Closed Ports Policy and Security Decrees*

**Since 2018, NGO boats were impounded by the Italian authorities with increasing regularity.** Some have seen these measures as targeted against NGOs who refused to sign up to Italy's Code of Conduct,<sup>649</sup> which pre-dated the 'closed ports' policy, although the 'closed ports' policy and security decrees also had an important role in enforcing these impoundments, alongside other stalling and intimidating tactics that affected SAR operations.

**As discussed in a previous report to the LIBE Committee,<sup>650</sup> in 2017, a dispute arose when the Italian government sought to impose a Code of Conduct on NGOs running SAR operations in the Mediterranean. Several NGOs refused to sign up to the Code,** which included provisions such as a **ban on sending light signals** that may help migrants locate rescue vessels and a **ban on transferring migrants to other ships**. Other provisions related to financial transparency or collaboration with police authorities, including through the deployment of State officials onboard SAR NGO rescue ships. MSF was among NGOs that deemed the new code would compromise their mandate and lead to a decrease in the efficiency of the SAR response in the Mediterranean, ultimately leading to more deaths.<sup>651</sup> Jugend Rettet similarly refused to sign and the impoundment of their *Iuventa* vessel has been seen as a form of retaliation.<sup>652</sup>

There appears to be a **direct correlation between the adoption of the Closed Ports Policy and Security Decrees and legal proceedings against civil society rescue organisations**, with some **15 cases closed or ongoing in Italy**.<sup>653</sup> Indeed, since the summer of 2017, attempts to obstruct SAR NGOs' activities in Italy through intimidation, harassment, and disciplinary acts were increasingly coupled with formal criminalisation. All investigations were triggered by suspicion of abetting irregular migration or colluding with smugglers, with only one accusation of facilitation of irregular entry with aggravation on grounds of criminal organisation. Some cases also included charges for **disobedience**

<sup>645</sup> UNHCR, 'UNHCR Urges Italy to Reconsider Proposed Decree Affecting Search and Rescue', [12.6.2019](#).

<sup>646</sup> OHCHR, Joint Communication from Special Procedures, AL ITA 4/2019, [15.5.2019](#).

<sup>647</sup> HRW, 'Italy: Revoke Abusive Anti-Asylum Decrees', [31.1.2021](#).

<sup>648</sup> 'Matteo Salvini to face trial over standoff with migrant rescue ship', *The Guardian*, [17.4.2021](#).

<sup>649</sup> 'An Italian Court Decision Could Keep Rescue Boats From Saving Refugees in the Mediterranean', *The Intercept*, [10.4.2018](#).

<sup>650</sup> Carrera et al., *Updated Study: Fit for purpose?* (n 488).

<sup>651</sup> 'NGOs divided by Italy new rescue code', *EU Observer*, [1.8.2017](#).

<sup>652</sup> Jugend Rettet, 'Free Iuventa: Sea Rescue is No Crime' ([undated](#)).

<sup>653</sup> Villa, 'Migrazioni nel Mediterraneo: Tutti i numeri', Istituto per gli Studi di Politica Internazionale (ISPI), [22.2.2021](#).



**to the Interior Minister or to warships, illegal waste management, violation of environmental law, or violation of the Code of Conduct or the Decrees.**<sup>654</sup>

*- On the Edges of the Law: Judicial Harassment and Predictive Policing*

A further component to be examined is **judicial harassment**.<sup>655</sup> **Scrutiny by prosecutors** has been a key point of public debate regarding cases of rescue and humanitarian assistance at sea since 2017, when Catania prosecutor Carmelo Zuccaro first claimed to have intercepted communications between SAR NGOs and Libyan smugglers.<sup>656</sup> A hearing at the Italian Senate subsequently revealed that he had no such evidence.<sup>657</sup> However, rumours about SAR NGOs colluding with smugglers spiralled quickly and served to legitimise the **intimidation and harassment** of civil society assisting refugees and migrants in Italy. Salvini was the main proponent of smear campaigns against SAR NGOs,<sup>658</sup> which **have been put in a position of having to justify their activities** to the public and media **to demonstrate they are not smugglers**, with UN human rights experts expressing concern on numerous occasions.<sup>659</sup>

In addition, **NGOs have continued to experience attacks and hindrances from the LYCG**, with some incidents making the object of pending litigations. For instance, in their submission of the S.S. case to the ECtHR,<sup>660</sup> Global Legal Action Network (GLAN) argued that Italy should be held responsible for the conduct of the LYCG during the events of 6 November 2017, regarding a violent confrontation between Sea Watch and the LYCG, where survivors were attacked and rescue volunteers physically blocked from rescuing.<sup>661</sup> There is evidence that the LYCG vessel *Ras Jadir* threw objects aiming to hit a Sea Watch motorboat with rescued persons on board.<sup>662</sup>

Such instances of strategic litigation show **that authorities may be held accountable for breaching international human rights standards, including when acting 'by proxy'**. The reality of these cases, nevertheless, contributes to a climate of mistrust between law enforcement and civil society, and impacts public faith in the Italian government's ability to uphold human rights more broadly. This has been called '**a crisis of legitimacy**'.<sup>663</sup>

Another worrying development concerns the use of **predictive policing methods by tracking the locations of SAR NGOs and the use of undercover agents**. For example, the Save the Children ship *Vos Hestia* was host to an Italian agent who posed as a security guard.<sup>664</sup> Former Interior Minister Salvini had questionable plans to entrench this practice, calling for €3m for undercover agents to supervise

<sup>654</sup> Ibid.

<sup>655</sup> 'Friends of the Traffickers', *The Intercept*, [30.4.2021](#).

<sup>656</sup> 'Italy softens claim of NGOs colluding with smugglers', *EU Observer*, [8.6.2017](#).

<sup>657</sup> 'Migranti, sulle Ong Zuccaro insiste: "Notizie date da Frontex, non ho nuove prove"'. Orlando: "Nessun illecito disciplinare", *La Repubblica*, [3.5.2017](#); On the interaction between criminalisation of humanitarian assistance and Italy's Anti-Mafia law, see Minetti, 'The Facilitators Package, Penal Populism and the Rule of Law: Lessons from Italy' (2020) 11 *New Journal of European Criminal Law* 335.

<sup>658</sup> 'Migrants: la capitaine du Sea-Watch libérée, Salvini évoque une décision politique', *Les Echos*, [3.7.2019](#).

<sup>659</sup> 'Legal changes and climate of hatred threaten migrants' rights in Italy, say UN experts', OHCHR, [21.11.2018](#); 'Italy: UN experts condemn bill to fine migrant rescuers', OHCHR, [20.5.2019](#).

<sup>660</sup> *S.S. and Others v. Italy* (n 427).

<sup>661</sup> See further Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21 *German Law Journal* 385.

<sup>662</sup> See video op-ed by Heller, Pezzani, Mann, Moreno-Lax, and Weizman, "'It's an Act of Murder': How Europe Outsources Suffering as Migrants Drown", *New York Times*, [26.12.2018](#).

<sup>663</sup> Castelli Gattinara, 'The 'refugee crisis' in Italy as a crisis of legitimacy', (2017) 9 *Contemporary Italian Politics* 318, p. 331.

<sup>664</sup> 'Inside Italy's plot to infiltrate migrant rescue boats in the Mediterranean', *PRI*, [26.6.2018](#).



SAR NGOs' activities.<sup>665</sup> But the compatibility of this tactic with SAR NGO rights as human rights defenders is doubtful.<sup>666</sup>

#### - 2020 Amendment and Current State of Play

**The Security Decrees of 2018 and 2019 were amended in 2020.**<sup>667</sup> Decree-Law No. 130 of 21 October 2020, converted into Law 173/2020, **reduced applicable fines to an amount between €10,000 and €50,000**. The **confiscation of rescue vessels and their assignment to the State or their sale or destruction is no longer provided for**. Rescue boats disobeying official orders now face **lighter fines** compared to the up to €1 million penalties previously contemplated. The fines for unauthorised entry into Italian territorial waters upon rescue are also no longer applicable, if charity vessels liaise with their flag State and maritime authorities coordinating SAR operations and follow their instructions;<sup>668</sup> and **rescuees will no longer be expelled, if they 'risk being subjected to torture or inhumane treatment'**. The new rules also make it easier for those holding special residence permits to **obtain a regular working visa**.

While the recent changes to the Italian law are welcome, **it is yet to be seen the extent to which they will serve to decriminalise humanitarianism**. Despite the changes, the Italian charity *Mediterranea's Mare Jonio*, SMH's *Aita Mari*, European organisation SOS Mediterranean's *Ocean Viking*, and the Banksy-funded rescue ship *Louise Michel* (see Annex I) are **still prevented from sailing due to administrative measures**.<sup>669</sup> Sea Watch currently has two ships detained in Sicily. *Sea Watch 3* has been held since 9 July 2020, following the rescue of 211 refugees. *Sea Watch 4*, jointly operated with MSF, has been stuck in port for over 50 days, after saving 353 lives during its first mission in September 2020.<sup>670</sup> **An International Solidarity Call was launched in March 2021**, as several members of *Mediterranea* stand accused of facilitating illegal immigration.<sup>671</sup>

Ongoing hostility to SAR NGOs' activities **ultimately affects migrants' rights and wellbeing**, as a recent example involving the *Ocean Viking* illustrates. During the ship's last mission in June 2020, it was **left without instructions**, despite contacting Italian and Maltese authorities for days, to the point it **had to declare an emergency on board** when the uncertainty pushed survivors to jump overboard and attempt suicide.<sup>672</sup> These developments show the **costs of policing humanitarianism as a strategy of deterring smuggling on the protection of human rights**, curtailing life-saving work at a time of acute need.

The pandemic, and justifications of closed ports on the grounds of public health, appears to have exacerbated matters. For instance, ***The Eleonore* and *Mare Jonio* vessels, operated respectively by Mission Lifeline and Mediterranean, were seized in the summer 2020**, after being allowed to disembark survivors using *ad hoc* arrangements. Moreover, the **captains and heads of mission received a fine of €300,000** for violation of the prohibition of entry, transit or stopover of ships in the

<sup>665</sup> 'Europe puts its good Samaritans on trial,' *Politico*, [11.7.2019](#).

<sup>666</sup> UNGA, Declaration on Human Rights Defenders, A/RES/53/144, 8.3.1999; and EEAS, [European Union Guidelines on Human Rights Defenders](#).

<sup>667</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights' (n 559).

<sup>668</sup> 'Italy Softens Harsh Migration Rules Championed by Salvini', *Al Jazeera*, [6.10.2020](#).

<sup>669</sup> Ibid.

<sup>670</sup> Note the referral to the CJEU (Case C-15/21 lodged on 8.1.2021) by the Sicilian Administrative Court of a preliminary ruling in relation to the case of [Watch 3 and Sea Watch 4](#).

<sup>671</sup> *Mediterranea*, 'International Solidarity Call for Mediterranean Saving Humans', [17.3.2021](#).

<sup>672</sup> 'Suicide attempts, fights engulf rescue boat carrying 180 migrants', *Al Jazeera*, [21.6.2020](#).

territorial sea, as introduced by the second Security Decree, and **prosecutors in Ragusa opened an investigation against Mission Lifeline.**<sup>673</sup>

Another standoff sparked on Sardinia on 9 October 2020. Following the disembarkation of 133 refugees, after a two-week offshore quarantine, the **Alan Kurdi became the sixth rescue ship in five months to be subjected to inspection by coastguard officials** and handed a long list of supposed safety irregularities that barred the ship from leaving port. Sea Eye, the German charity that operates the ship, refutes the Italian authorities' accusations, pointing out that its flag State, Germany, had already approved the ship's safety. The organisation has a pending lawsuit against the *Alan Kurdi's* detention (see Annex I).<sup>674</sup>

All these prosecutions are presumably in line with domestic law, which allows the **criminalisation of facilitation of irregular entry, even if there is no financial gain or intent to profit.** However, Italian judges have so far upheld the humanitarian exemption under Article 54 of the Criminal Code and Article 12(2) of the Italian Migration Act. Volunteers and captains have, therefore, been cleared of accusations or cases have been discontinued for lack of evidence.<sup>675</sup> Nonetheless, **the consequences for volunteers have been harsh**, including **online threats**,<sup>676</sup> **financial pressure**, and the **risk of a minimum 10 years of imprisonment**, even if most cases have resulted in acquittals. The immediate impact of the prosecution process is illustrated by the reduction of NGO boats operating in the area. While in 2016 fifteen NGOs conducted SAR operations, as of December 2020, only five organisations remained, operating three vessels.<sup>677</sup>

### 5.6.3. Greece

Formally, Greece has declared a humanitarian exemption from crimes of facilitation. There have, nevertheless, been **repeated prosecutions and escalations targeted at certain civil society actors**; Greece is second to Italy in terms of SAR intimidations and prosecutions.<sup>678</sup> Most at risk of prosecution are those who have been the most visible actors monitoring Greek and EU border surveillance activities and challenging policies related to the treatment of asylum seekers in Greek hotspots. This raises concerns over the **shrinking space for civil society** and its watchdog function. The cases of Team Humanity and Emergency Response Centre International (ERCI) illustrate this trend. The use of **Greece's National List of Undesirable Aliens (EKANA)** to list and ban volunteers from Greek territory **is identified as a particularly worrying development.**

#### *- Harassment at Sea and in-Land: Team Humanity*

The first SAR policing case, targeting the Danish NGO Team Humanity and the Spanish NGO Proem-Aid, happened on Lesbos. Although it finished with acquittal,<sup>679</sup> it produced **chilling effects among**

<sup>673</sup> FRA, 'Table 2: Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea', [15.6.2020](#), pp. 1-2.

<sup>674</sup> The Civil Fleet, 'At least 150 dead and over 1,000 refugees intercepted in one month, yet Europe continues to blockade the NGO rescuers', [9.11.2020](#).

<sup>675</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights' (n 559); Vosyliūtė and Conte, 'Final Synthetic report' (n 545).

<sup>676</sup> Mardini and Aldeen, presentation at the Immigration Initiative Conference, Harvard University, [31.3.2021](#).

<sup>677</sup> FRA, 'December 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them', [18.12.2020](#).

<sup>678</sup> ReSOMA, 'The criminalisation of solidarity in Europe' (n 557).

<sup>679</sup> 'Volunteers Who Rescued Migrants Are Cleared of Criminal Charges in Greece', *New York Times*, [7.5.2018](#).

**other volunteers operating on the island. Violations of fair trial guarantees** during the arrest of volunteers constitute an indication of the politicised nature of the issue.

The case relates to facts occurred on 14 January 2016, where two volunteers from Team Humanity, Salam Kamal-Aldeen and Mohammad Abbassi, and three Proem-Aid volunteers, Enrique Rodríguez, Manuel Blanco and Julio Latorre, were taken into custody by the Greek coastguard.<sup>680</sup> The rescuers were **charged with attempted migrant smuggling from Turkey to Greece**, despite that they were arrested in the Greek SRR, without ever having crossed into Turkish waters, and had no rescued person on board. Moreover, they had informed Greek authorities beforehand that they were embarking on their rescue mission. The prosecutor added a **charge for carrying knives, which he characterised as 'illegal weapons'**. The volunteers explained 'the knives were the minimum blade length required to cut through ropes, nets or other material when rescuing people from the sea'.<sup>681</sup> The volunteers were arrested for 68 hours and released on a €5,000 bail. Salam-Kamal Aldeen, as the captain, had a higher bail, of €10,000.<sup>682</sup> He also was not permitted to leave Greece for 1 year and 8 months and his boat was confiscated. In May 2018, after a two-and-a-half-year prosecution, all volunteers were cleared of all charges and acquitted. Although the Greek courts were independent from political pressures, the circumstances surrounding the arrest and violations of fair trial guarantees indicate law enforcement authorities were not. For example, Aldeen, in his testimony at the LIBE Committee on 27 September 2018,<sup>683</sup> described how they were **not provided an independent interpreter and that the declaration given for them to sign was a guilty plea written in Greek**.<sup>684</sup> Acquittal does not necessarily mean effective justice and **prosecution can in itself be a form of punishment**. The experience entailed **high personal costs for the volunteers**. Their lives were put on hold while awaiting trial, facing long prison sentences. They underwent depression and anxiety. The Spanish volunteers have not come back to volunteer on Lesbos after acquittal. Only Aldeen returned. But even after acquittal his boat remains confiscated, forcing Team Humanity to re-orient from rescue operations to establishing a day centre for women and children on land.

Despite clearance of all charges, the **Greek authorities have continued to harass Aldeen** and have retaliated against his activities on land. In August 2019, the Team Humanity Day Centre was attacked by men living in the camp. Salam called the police, who were unresponsive. He therefore tried to disperse the mob using fireworks.<sup>685</sup> **The Greek police arrested him, arguing that the fireworks were illegal, and threatened with deportation on grounds of public security**.<sup>686</sup> Upon arrest, he discovered he figured on the **National List of Undesirable Aliens (EKANA)**.<sup>687</sup> He was not notified, nor provided with any information as to why he had been listed. Those in the database cannot enter Greece and are obliged to leave Greek territory as soon as possible, which shows the important ramifications

<sup>680</sup> 'NGOs decry charges against volunteers in Greece', *Al Jazeera*, [16.1.2016](#).

<sup>681</sup> Allsopp, Vosyliūtė and Smialowski, 'Picking 'Low-Hanging Fruit'' (n 545).

<sup>682</sup> Ibid.

<sup>683</sup> European Parliament, LIBE Committee, Public hearing on the implementation of the Facilitation Directive and humanitarian assistance to irregular migrants, LIBE\_OJ(2018)0927, [27.9.2018](#).

<sup>684</sup> Ibid.

<sup>685</sup> 'Saving Lives is Not a Crime: When Ordinary People Sacrifice Everything in the Name of Humanity', *The Conversationist* [23.8.2019](#).

<sup>686</sup> Ibid.

<sup>687</sup> The following categories are added to the list: (i) aliens that have been deported under administrative or legal decision; (ii) aliens whose presence is considered a threat to national cohesion or security; (iii) aliens considered a threat for health reasons. The administrative bodies that can add individuals to the list are: (i) the head of deportation of Greek police, in the case of aliens whose presence is a threat to social order, security and public health; (ii) head of police, when it is a matter of national security; (iii) the local directors of police station of Athens and Thessaloniki, for aliens that have been deported on the basis of court or administrative decision.

of being recorded. Aldeen's case demonstrates the range of routes that exist for **formal and informal criminalisation outside the Facilitators Package and demonstrates elements of consistency in policing humanitarianism practices at sea and on land**, raising concerns about the shrinking space for civil society.

*- On Trial en Masse: Emergency Response Centre International*

Another prominent case of criminalisation in Greece is that of Sean Binder and Sarah Mardini. The two volunteers of ERCI were arrested by police on Lesbos, in 2018, after participating in several SAR operations. Mardini's first SAR mission took place in 2015 as she travelled herself as a refugee by boat to Greece from Turkey. When the engine broke down, Mardini and her sister helped save others onboard by swimming and pulling the boat to safety. As their rescue efforts become more organised, so too did the harassment and intimidation.<sup>688</sup> Mardini, who was held in a high security prison for several months, including for periods of solitary confinement, has spoken of the immense personal cost of the ordeal. In light of her high profile, she continues to receive death threats from members of the public.<sup>689</sup> Meanwhile, other members of ECRI face ongoing harassment and formal criminalisation. The case is currently the **largest case of criminalisation of solidarity in Europe**, involving 37 persons of interest, with 24 humanitarians prosecuted, five of whom placed in pre-trial detention. They have been **charged with felonies including espionage, assisting smuggling networks, membership of a criminal organisation, and money laundering, facing 25 years in prison if found guilty.**<sup>690</sup>

As with the case against Team Humanity, criminal charges against ERCI as an organisation and its individual volunteers have been considered unfounded,<sup>691</sup> however the **systematic intimidation and harassment** they have faced has **proven as damaging as formal criminalisation**. It causes serious financial pressure, reputational harm, exposes volunteers to danger, forces temporary suspension of activity, and ultimately the termination of rescue work.

**The pandemic** appears to have changed little, if not **provided justifications for further restrictive measures**. Since the outbreak of Covid-19, Greece has introduced a **registry of NGOs**, interpreted by some as an act of intimidation and surveillance. In several cases, NGOs have been forced to suspend their humanitarian activity for failure to meet registration requirements.<sup>692</sup>

#### 5.6.4 Malta

The impact of **port closures in Italy and Greece has had a knock-on effect on Malta** which has also **faced criticism for pushbacks, detaining vessels, and failure to attend to distress calls and allow the disembarkation of refugees and migrants**. On 30 March 2021, for instance, Sea Watch reported a pushback in a Maltese SAR zone.<sup>693</sup> The NGO Alarm Phone has also accused the Armed Forces of Malta of ignoring distress calls.<sup>694</sup> In 2020, similar events led to a magisterial inquiry on a criminal complaint filed by Maltese civil society organisation *Repubblika*. The inquiry cleared Prime Minister Robert Abela, the armed forces commander, and the crew of a patrol boat of **illegal pushback charges that had caused the deaths of migrants.**<sup>695</sup>

<sup>688</sup> Mardini and Aldeen, Harvard presentation (n 676).

<sup>689</sup> Ibid.

<sup>690</sup> Conte and Binder, 'Strategic litigation' (n 584).

<sup>691</sup> HRW, 'Greece: Rescuers at Sea Face Baseless Accusations', [5.11.2018](#); and AI, 'Greece: Facing Jail for Saving Lives', [14.10.2019](#).

<sup>692</sup> 'NGOs in Greece told to register or cease operation', *Info Migrants*, [18.6.2020](#).

<sup>693</sup> 'Malta accused of coordinating illegal pushbacks at sea', *Newsbook*, [30.3.2021](#).

<sup>694</sup> 'Malta ignores distress calls from migrants at sea: NGO', *Deutsche Welle*, [14.3.2020](#).

<sup>695</sup> 'Malta accused of coordinating illegal pushbacks at sea', *Newsbook*, [20.3.2021](#).

Malta has also been **involved in boat impounding**. In 2018, for example, the *Lifeline*, operated by Mission Lifeline and Mare Liberum, was held, while Maltese authorities launched investigations regarding the registration of the ship. In January 2020, the Maltese Appeal Court overturned the decision and cleared the captain of all charges. In July 2018, the same boat faced an accusation by the Public Prosecutor's Service against the captain for not following orders by the Italian MRCC and entering Maltese territorial waters illegally. In May 2019, the Court of Valletta fined the captain EUR 10,000 for operating a ship not properly registered for rescue operations.<sup>696</sup> **This trend has consolidated during the pandemic, which has given Malta, like Italy and Greece, greater grounds for continuing pre-existing practices, using public health as justification.**<sup>697</sup>

#### 5.6.5 The Netherlands

**The Dutch authorities have been involved in ongoing obstructions of the Sea Watch and MSF operated boat Sea Watch 3.** The *Sea Watch 3*, registered in The Netherlands and flying the Dutch flag, is a larger and better equipped ship for maritime rescue than the *Sea Watch*, involved in rescuing approximately 1,500 people from November 2017 to January 2018.<sup>698</sup> Its case constitutes an illustration of the immobilising impact of **changing technical requirements**, which **in practice diminish SAR capacity at sea**. In January 2019, the ship was blocked in Italy for extensive inspections mandated by the Dutch authorities. In April 2019, the Dutch government imposed stringent new technical safety requirements for the boat, without a sufficient transition period. The ship was thus blocked. In May 2019, the court in The Hague ruled on appeal that the new requirements were legal, but the length of the transition period had not been enough. The judges removed the ban to leave port and suspended the applicability of the requirements until December 2019, allowing the *Sea Watch 3* to set sail.<sup>699</sup> But, as in other MS, the **pandemic** appears to be serving to provide a **smokescreen for ongoing restrictions on the ground**.<sup>700</sup>

#### 5.6.6 Germany

Germany has also introduced **legislative amendments imposing stricter security and maintenance requirements for boats engaging in rescue at sea**,<sup>701</sup> further restricting the possibility for NGO vessels registered in Germany or flying the German flag to comply with such criteria. **Failure to comply with the regulations can result in large fines.** The case of the *Sebastian K*, a vessel acquired by Mare Liberum in 2020 to expand human rights monitoring in the Aegean Sea, offers a good example of the ramifications of these legal changes. It has been detained by the German Federal Ministry of Transport since October 2020 under this change in regulation.<sup>702</sup> This has prevented it from resuming monitoring of the Greek and Turkish coastguard's treatment of refugees and migrants. In October 2020, the Hamburg Administrative Court found these stricter requirements inapplicable due to the absence of notification to the European Commission in accordance with EU law.<sup>703</sup> However, upon notification, the

<sup>696</sup> FRA, 'Table 2: Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea', [15.12.2020](#).

<sup>697</sup> Ibid.

<sup>698</sup> SAROBMED, 'Sea Watch 3', [undated](#).

<sup>699</sup> 'Germany's Sea Watch Rescue Boat to Resume Migrant Missions', *Deutsche Welle*, [19.12.2019](#).

<sup>700</sup> FRA, 'Table 2: Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea', [15.12.2020](#).

<sup>701</sup> CoE Commissioner on Human Rights, 'A Distress Call for Human Rights' (n 559).

<sup>702</sup> FRA, 'Table 2: Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea', [15.12.2020](#).

<sup>703</sup> Hamburg Administrative Court, 'Eilantrag des Vereins Mare Liberum gegen Festhalteverfügungen für zwei im Mittelmeer eingesetzte Schiffe erfolgreich', [2.10.2020](#).



changes will become operational and will likely **limit the scope of action of German-registered SAR NGOs.**

### 5.7 Exporting Criminalisation of Humanitarianism?

As Chapter 6 further elaborates, **EU and MS efforts to support transit countries** with migration governance **have led to an increase in policing at and beyond national borders** to combat irregular migration, smuggling and trafficking, and safeguard territorial integrity. **This has had an impact on the rights of migrants and civil society organisations assisting them.**

Recent studies have documented the vulnerabilities of people moving through irregular pathways in the regions bordering the Mediterranean.<sup>704</sup> They highlight the strain on States and local governments that host large populations of irregular migrants and point to the critical role of civil society and humanitarian actors in ensuring that basic needs are met — sometimes in ways that puts them at odds with EU border externalisation arrangements.<sup>705</sup> **As within the territory of EU MS and at sea, it has been shown that in transit countries, humanitarian and other civil society actors facilitate access to essential services like shelter, healthcare, legal assistance, and education.** They fill critical protection gaps, as involuntarily **immobile populations swell, where migration governance can be weak, corrupt or decaying.**<sup>706</sup>

There remains, however, a considerable gap in the literature concerning civil society in this context. While it is widely acknowledged that civil society adds capabilities to the global governance system and plays a crucial role in service provision in local communities in countries including Turkey, Libya, and Niger,<sup>707</sup> it is **unclear how civil society organisations have engaged, and can engage, with the migrant journey without falling victim to legislation and security forces that aim to fight migrant smuggling. Additional research is required to understand their role and how they are responding to these evolving policy frameworks.**

### 5.8 The EU Response

EU institutions have adopted a **Janus-faced approach to SAR NGOs** and other organisations assisting TCNs. For instance, in 2016, the same year dozens of volunteers were arrested for facilitating irregular migration, the European Economic and Social Committee (EESC) awarded its Civil Society Prize to those ‘who have demonstrated outstanding examples of solidarity towards refugees and migrants’.<sup>708</sup> The same organisations can thus be criminalised and lauded at the same time, which reveals the deep tensions underpinning discussions on their role.

**EU actors have adopted divergent, if not opposite, stances to the main demands of SAR NGOs.** The European Commission has, for many years, dismissed calls to halt returns to Libya and to respond to the criminalisation and policing of SAR interventions and other forms of humanitarian assistance through legislative change, as discussed above. The **European Parliament** has generally been more

<sup>704</sup> Reques et al. ‘Episodes of violence suffered by migrants transiting through Libya: A cross-sectional study in “Médecins du Monde’s” reception and healthcare centre in Seine-Saint-Denis, France’ (2020) 14 Conflict and Health 1, p. 6; Cuttitta, ‘Non-governmental/civil society organisations and the European Union-externalisation of migration management in Tunisia and Egypt’ (2020) 26 Population, Space and Place 23, p. 29.

<sup>705</sup> Cuttitta, ‘Non-governmental/civil society organisations’ (n 704), p. 29.

<sup>706</sup> Janssen et al., ‘From abuse to cohabitation: A way forward for positive migration governance in Libya’, Clingendael Institute (October 2019).

<sup>707</sup> UN75, ‘Roadmap for the Future We Want and UN We Need’, (Global Governance Forum, 2020).

<sup>708</sup> European Economic and Social Committee (EESC), ‘EESC 2016 Civil Society Migration Prize to reward inspiring and successful examples of human solidarity’, 29.11.2016.



sympathetic. However, on **24 October 2019, it voted against a resolution in support of more SAR operations in the Mediterranean**,<sup>709</sup> at a time when it was argued EUNAVFORMED Operation IRINI was deliberately avoiding areas where it might encounter boats in distress.<sup>710</sup> European Parliament committees have been more outspoken. In a debate in April 2020, in the LIBE Committee, with representatives of the Commission, Frontex, UNHCR, the Council of Europe, and NGOs, a majority of MEPs insisted Libya is not a 'safe country' for disembarkation of persons rescued at sea and demanded that cooperation with the LYCG discontinue.<sup>711</sup> Several MEPs on the Committee have been especially critical of the policing and criminalisation of human rights defenders within their MS.<sup>712</sup>

**In April 2016, the European Parliament passed its Resolution on the 'holistic approach' to migration in the Mediterranean which speaks directly to the situation of SAR NGOs.**<sup>713</sup> It notes, in particular, that 'efforts to counter the criminal smuggling of migrants should not affect those providing humanitarian assistance to irregular migrants.' It also 'takes the view that anyone who provides different forms of humanitarian assistance to those in need should not be criminalised and that Union law should reflect that principle'. Among its recommendations, the Resolution states that 'saving lives must be a first priority and that proper funding, at Union and Member State level, for search and rescue operations is essential'.<sup>714</sup>

This Resolution, read alongside the previous reports on the criminalisation of humanitarian assistance to the LIBE Committee and recent Commission guidance, suggest that **the Union has the knowledge and wherewithal to act to counter the harmful impacts of this phenomenon.**<sup>715</sup> The evidence points to the need for MS to come together to support the **urgent deployment of pan-European or State-run SAR capacities in the Mediterranean.** In a context where knowledge of the life-threatening effects of policing humanitarianism are so well documented, a failure to act is not only inexcusable, but also constitutes a flouting of the human rights standards on which the Union is founded and on which its credibility depends. Working together with civil society actors will be key to ensuring a functional and lasting solution in this policy area.

## 5.9 Civil Society Response

Civil society has not remained passive in the face of criminalisation of their SAR activities and their support of migrant and refugee rights. In July 2019, **a Joint Statement calling for the EU to 'stop the criminalisation of solidarity with migrants and refugees'** was signed by **over 100 European civil society organisations.**<sup>716</sup> It suggested a range of policy recommendations, some of which are echoed in a thoroughly evidence-based report by ReSOMA.<sup>717</sup> As well as **welcoming** the adoption of guidelines (in the form of **the Criminalisation Guidance** discussed above), it **called for independent monitoring** of acts carried out against humanitarian actors and migrant and refugee human rights defenders. The mechanism should monitor not only criminal convictions, but also all criminal

<sup>709</sup> European Parliament, Resolution on Search and Rescue in the Mediterranean (2019/2755(RSP)), [24.10.2019](#).

<sup>710</sup> HRW, 'How Europe Can Help End Death and Despair in the Mediterranean Sea', [3.3.2021](#).

<sup>711</sup> 'Stop cooperation with and funding to the Libyan coastguard, MEPs ask', European Parliament News, [27.4.2020](#).

<sup>712</sup> LIBE Committee Meeting, [27.4.2020](#), Hearing video (from 16:13).

<sup>713</sup> European Parliament, 2016 Mediterranean Resolution (n 24).

<sup>714</sup> European Parliament, 2016 Mediterranean Resolution, Rec K and paras 88 and 2.

<sup>715</sup> European Parliament, 2016 Mediterranean Resolution, paras 3 and 6.

<sup>716</sup> International Federation for Human Rights, 'Joint Statement: The EU must stop the criminalisation of solidarity with migrants and refugees', [26.7.2019](#).

<sup>717</sup> ReSOMA, 'The criminalisation of solidarity in Europe' (n 557); Vosyliūtė and Conte, ReSOMA Policy Options Brief (n 545).

investigations, as well as ongoing harassment and targeting of migrants' rights defenders, as recommended by the European Parliament in its 2018 Resolution.<sup>718</sup> The Statement also called for EU institutions to **revise the Facilitation Directive in line with the definition of migrant smuggling in the UN instruments** by making the humanitarian exemption clause mandatory and defining what counts as humanitarian assistance. Yet, as discussed above, **the Facilitators Package has remained the same and thus legal uncertainty and the possibility of criminalisation continues.**

### 5.10 Conclusion

This chapter has identified that the criminalisation of humanitarian assistance in the EU remains a salient political issue for individual MS and for the Union as a whole which the Commission has been unable or unwilling to resolve. This topic has been shown to be especially difficult when it comes to saving lives at sea. Absent a hard law approach, **the Commission Guidance may be seen as a strategy of appeasement.** While it can be read as a welcome 'effort to gradually approach a complex issue in a difficult political scenario', it cannot 'be regarded as the "final word" of the EU on the matter'.<sup>719</sup> There remains **scope for the Commission to introduce legislative change to align the EU legal framework with international law.** Its hesitancy to engage at the level of hard law suggests that **humanitarian action in this realm is still seen by some MS and parts of European public opinion as deserving punishment.** Yet, without the introduction of a common EU SAR mechanism, humanitarian assistance remains the only lifeline for TCNs in distress at sea. Alongside this humanitarian service, NGOs also play a key role in monitoring the implementation of human rights. There is thus a **need to foster coordination between independent human rights monitoring bodies in the MS and third countries to ensure effective detection and tracing of the human rights abuses of intercepted or returned migrants as well as of organisations and volunteers who assist them.**

As shown in Chapter 4, an adequate mechanism to manage sea arrivals is yet to be devised, with many incidents of migrants stranded for long periods on overcrowded boats awaiting assistance. **Covid-19 is serving as a smokescreen for these delays.** The widespread targeting of volunteers and organisations helping migrants and refugees in Europe is a serious concern. It limits the already scarce resources available to TCNs and is also an **attack on the freedom of civil society**, a foundation of liberal democracy (Article 2 TEU). While the policing and prosecution of humanitarians for migrant smuggling is only part of a bigger picture, a reform of the Facilitation Directive to prevent this method of criminalisation would send a clear message that saving lives and protecting fundamental rights cannot be criminalised.<sup>720</sup>

There is evidence that the Commission's failure to resolve the issue has fostered **social mistrust and led to a reduction in democratic accountability and reputational harm to MS' and the EU as a whole**,<sup>721</sup> a situation labelled by one observer as '**organised hypocrisy**'.<sup>722</sup> A number of prominent

<sup>718</sup> European Parliament, Resolution of 5 July 2018 on Guidelines for Member States to Prevent Humanitarian Assistance from Being Criminalised (2018/2769(RSP)).

<sup>719</sup> Marletta, 'The Commission "Guidance"' (n 585).

<sup>720</sup> Schack, 'Humanitarian Smugglers? The EU Facilitation Directive and the Criminalisation of Civil Society', *Border Criminologies*, [6.6.2020](#).

<sup>721</sup> Carrera et al., *Policing Humanitarianism* (n 5).

<sup>722</sup> Cusumano, 'Migrant Rescue as Organized Hypocrisy' (n 390), pp. 10-11.

human rights organisations have condemned practices in Europe and expressed concern that **these trends set a bad example** and are being **reproduced elsewhere**.<sup>723</sup>

A final issue regards the fact that the **Commission Guidance is focused on humanitarian assistance 'mandated by law' (i.e. rescue at sea) and has little to say about a significant number of prosecutions within MS for activities undertaken on land**. Although these cases may seem separate to SAR, in reality they are a linked by-product of the lack of humanitarianism safeguards in Europe's migration and asylum system. The conditions of entry to Europe can also impact and shape migrants' trajectories and foster specific vulnerabilities which cause them to rely on humanitarian actors post-arrival. Without further clarification of which humanitarian acts are decriminalised, **legal uncertainty will foster national discrepancies rather than harmonisation and undermine the unity of EU law**.

### Recommendations:

*Regarding the current legislative acquis and ongoing practice*

29. The **work and status of SAR NGOs as human rights defenders**, whose activity is protected under international law, should be **formally and unambiguously recognised in all EU legal and policy instruments** affecting their position;
30. The Parliament should call for and directly support the **introduction of independent monitoring of the acts carried out against humanitarian actors and human rights defenders working with migrants** on land and in the Mediterranean Sea and also **launch a formal, independent investigation into** human rights breaches that have occurred in this context in the last six years. This should not only include criminal convictions, but also all cases of criminal investigations as well as ongoing harassment and targeting of migrants' rights defenders, as recommended in the Parliament's 2018 Resolution;
31. The European Parliament should call for the **urgent deployment of EU/MS SAR capacities in the Mediterranean**, either in the form of dedicated MS missions or an EU-wide SAR operation. In parallel, it should request **the European Commission, Frontex, EUNAVFORMED and the MS to decriminalise and facilitate cooperation between merchant ships and civil society rescuers**;
32. The European Parliament should call on the MS to **release NGO vessels from impoundment** so that they can return quickly to sea. They should, in addition, help them to meet any other needs related to their work or technical requirements introduced in legal provisions, including during the Covid-19 health crisis;
33. The European Parliament should call on the MS to **refrain from misusing criminal and administrative proceedings and technical requirements to obstruct NGOs' life-saving work**;

*Regarding amendments to existing instruments*

34. The EU co-legislators should **amend the Facilitation Directive** to bring it in line with the definition of migrant smuggling contained in the UN instruments. This requires the EU to **make the humanitarian exemption clause mandatory** alongside a clear definition of what humanitarian assistance is;

<sup>723</sup> Akkerman, 'Expanding the Fortress: The Policies, the Profiteers and the People Shaped by EU's Border Externalisation Programme', *Transnational Institute* ([May 2018](#)), p. 51.

*Regarding new guidance and provisions*

35. The European Parliament should call for the adoption of EU-wide **Covid-19 safety procedures that comply with the human rights and protection needs of rescuees, NGO workers, and reception staff**, where SAR boats disembark in EU ports as 'places of safety';
36. The European Parliament should call on the European Commission and the MS to draw a plan that **enables safe, quick and predictable disembarkation of SAR boats** in line with international standards, thus discontinuing cooperation with the LYCG and the facilitation of 'pullbacks' that lead to the delivery of survivors to unsafe ports in Libya and elsewhere.

## 6. COOPERATION WITH THIRD COUNTRIES: THE EXTERNAL DIMENSION OF MIGRATION AND ASYLUM POLICY

### KEY FINDINGS

- The main instruments and tools shaping the external dimension of EU migration and asylum policy are characterised by an overall focus on the fight against irregular migration and limited consideration for fundamental rights.
- Cooperation with third countries is increasingly based on informal arrangements (EU-Turkey Statement, MoUs with Libya, etc.) negotiated without the involvement of the European or national parliaments. They escape democratic accountability and judicial oversight, and are incapable of ensuring compliance with fundamental rights.
- The implementation of the EU-Turkey Statement and the development of the 'hotspot approach' in the Greek islands has resulted in a serious deterioration of reception standards. It has also subjected asylum seekers to human rights abuses, including violent pushbacks, in the Aegean and in Turkey. The situation worsened with the advent of the Covid-19 pandemic, the threat of suspension of the Statement by Turkey in February 2020, and the following suspension of the right to asylum by the Greek authorities.
- Cooperation with Libya largely consists in the provision of training and operational capacity to the Libyan authorities, which has led to a significant increase of migrants intercepted at sea and forcibly returned to Libya, where they face violence and abuse.
- Cooperation with Niger is essentially focused on the development of an EU-sponsored national strategy against migrant smuggling and human trafficking, which disregards local dynamics and the positive economic effects of regional mobility, and has led to the creation of dangerous alternative migration routes.
- The EU sustains its cooperation with third countries, including Turkey, Libya and Niger, with financial tools (Facility for Refugees in Turkey, EU Trust Fund for Africa) based on EU development cooperation and humanitarian aid policy.
- EU-funded projects in Turkey, Libya, and Niger are primarily aimed at reducing migration flows to Europe and do not comply with the objectives at the basis of development cooperation and humanitarian aid policy, i.e. combating poverty and providing relief to populations hit by man-made or natural disasters. Furthermore, they are implemented without consideration of the local context and of their impact on fundamental rights. This falls short of the applicable legal requirements, and risks undermining the EU's reputation as a foreign policy actor, while damaging its relations with external partners.

## 6.1 Introduction

The **external dimension has attained pre-eminence** in the management of EU migration and asylum policy.<sup>724</sup> Three key documents have shaped the EU's approach in this domain since the Lisbon Treaty entered into force: The **2011 Global Approach to Migration and Mobility (GAMM)**,<sup>725</sup> the **2015 EU Agenda on Migration**,<sup>726</sup> and the **2016 Migration Partnership Framework (MPF)**,<sup>727</sup> adopted in the aftermath of the Arab Spring and the refugee crisis respectively. Cooperation with third countries constitutes the most important element of the external dimension and appears to play a **very significant role** in the Commission's **New Pact on Migration and Asylum**. This chapter will recapitulate and update previous assessments of this overarching framework, mapping the EU's priorities and main strategies and identifying their **implications for human rights** as well as for migrants, asylum seekers, and civil society organisations, paying particular **attention to the financial aspect**. The main rules and principles governing EU external action will guide the assessment, taking account of the European Parliament's proposed 'holistic approach' to migration in the Mediterranean.<sup>728</sup>

Following Article 205 TFEU, EU external action must be carried out in line with Articles 3(5) and 21 TEU, which jointly establish a legally binding **obligation** on the EU **to comply with international law**, including international human rights law and to contribute to the **protection and promotion of democracy, the rule of law, and the universality and the indivisibility of human rights, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter**. The EU is further bound to comply with its Charter of Fundamental Rights in all spheres governed by EU law.<sup>729</sup> And there is no jurisdictional clause within the Charter, akin to Article 1 ECHR or Article 2 ICCPR, acting as a threshold criterion on which its applicability may be dependent. As Article 51(1) CFR makes clear, the **Charter applies whenever EU organs exercise their competences and whenever MS implement EU law**. This is the standard against which EU external action must be assessed.<sup>730</sup>

Three case studies will illustrate the failings of the current approach: (1) the **EU-Turkey Statement**,<sup>731</sup> which ushered in the 'hotspot' scheme, transforming EU asylum policy and serving as a blueprint for other informal, soft-law arrangements pursued with other countries for the management of migration; (2) the **multi-factor cooperation with Libya**, defining the EU's approach in the Mediterranean regarding border control, search and rescue (SAR) and the fight against migrant smuggling and trafficking by sea; and (3) the **cooperation with Niger**, which is one of the MPF's short-term priority countries, hosting the European Union Capacity Building Mission in Niger (EUCAP) Sahel mission.<sup>732</sup> EUCAP coordinates the EU external action on defence, security, borders, migration and asylum in a key region of transit, and it covers different actors, policies, and actions that require attention.

<sup>724</sup> This chapter draws and expands upon Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights* (n 167), pp. 21-31 and Annex I, case studies 1, 2 and 4.

<sup>725</sup> Global Approach to Migration and Mobility ('GAMM') (n 58).

<sup>726</sup> European Agenda on Migration (n 62).

<sup>727</sup> Establishing a new Partnership Framework ('MPF'), COM(2016) 385 final, 7.6.2016.

<sup>728</sup> European Parliament, 2016 Mediterranean Resolution (n 24).

<sup>729</sup> TEU, Arts 2 and 6; CFR, Art 51.

<sup>730</sup> Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights* (n 167), pp. 20-21.

<sup>731</sup> EU-Turkey Statement (n 4).

<sup>732</sup> [EUCAP Sahel Niger](#).



## 6.2 External Cooperation with Third Countries: An Overview

The three main instruments shaping the EU's approach to external migration management seek above all to **pre-empt unauthorised flows in cooperation with third countries**. The **GAMM** aims to develop a 'coherent and comprehensive migration policy' by fostering: (1) legal migration and mobility; (2) the fight against irregular migration; (3) asylum; and (4) the migration-development nexus, but with an **overall focus on the fight against irregular migration**. The premise is that 'without well-functioning border controls, lower levels of irregular migration and an effective return policy, it will not be possible for the EU to offer more opportunities for legal migration'.<sup>733</sup> The Agenda on Migration and the MPF have similar objectives.

The **Agenda on Migration** addresses the short- and medium-term measures required to handle the 2015 'refugee crisis' and its aftermath. It thus focuses on 'immediate action', targeting: deaths at sea; smuggling networks; the relocation and resettlement of refugees; assistance to MS at the external frontiers of the EU; and cooperation with third countries 'to tackle migration upstream'. Like the GAMM, the Agenda also identifies 'four pillars to manage migration better', concentrating on **containing unauthorised movement**, reinforcing return and readmission, enhancing border controls and 'support[ing] third countries developing their own solutions to better manage their borders'.<sup>734</sup> The **MPF** serves as the **implementation mechanism of the Agenda's external dimension**, placing migration 'at the top of the EU's external relations priorities'.<sup>735</sup> It is **based on intensified cooperation with third countries**, in the form of rapid result-oriented 'partnerships', pursuing migration management through 'all means available'. This entails a multi-dimensional engagement, going beyond the 'migration toolkit alone' through the coordination of EU action and MS bilateral efforts; the mainstreaming of MPF goals in all EU policies; and increased financial assistance and targeted support to 16 priority countries.<sup>736</sup> The MPF also introduces **migration management conditionality** entailing the mobilisation of 'all ... tools' available and the use of a 'mix of positive and negative incentives', 'bringing maximum leverage' and guided 'by the ability and willingness of the [third] countries to cooperate on migration management, [with the main aim of] effectively preventing irregular migration and readmitting irregular migrants'.<sup>737</sup>

The **MPF** pursues **three short-term priorities**: (1) '[I]ncrease the rate of return', presumably within 'a context which fully respects international law and fundamental rights', in particular 'the dignity of the persons concerned as well as the principle of *non-refoulement*'.<sup>738</sup> However, this is to be achieved 'not necessarily [through] formal readmission agreements',<sup>739</sup> but also with the aid of informal arrangements, which, by definition, **heighten the risk of *refoulement***,<sup>740</sup> as **soft-law tools cannot produce legally enforceable guarantees**. (2) '[E]nable migrants ... to stay close to home', by '[w]ork[ing] with key partners to improve the [ir] legislative and institutional framework for migration', providing them with '[c]oncrete assistance for capacity building on border and migration management', without paying sufficient attention to the need to guarantee the effectiveness of the right to leave any country, including one's own, and the right to seek asylum recognised in the EU

<sup>733</sup> GAMM, pp. 2, 5-6.

<sup>734</sup> European Agenda on Migration, pp. 3, 5-6, and 11.

<sup>735</sup> MPF, pp. 3, 5-6, and 11.

<sup>736</sup> MPF, pp. 2-3. The priority countries are: Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

<sup>737</sup> MPF, pp. 6 and 9. See also EC Conclusions, 28.6.2016, Council doc. EUCO 26/16, paras 1-8.

<sup>738</sup> MPF, pp. 6 and 2.

<sup>739</sup> MPF, p. 7.

<sup>740</sup> Giuffr , *The Readmission of Asylum Seekers under International Law* (Hart Publishing, 2020).

Charter. (3) '[S]ave lives in the Mediterranean', which has yet to materialise in the launch of an EU-wide mission with a specific SAR mandate, and is, instead, intended to be achieved through Frontex-coordinated border control deployments and the EUNAVFORMED operations fighting smuggling by sea, as discussed in Chapter 4.<sup>741</sup>

**In the long term**, actions should **tackle the root causes of migration**. Enhanced **conditionality** is to be employed in this context, 'to ensure that **development assistance** helps partner countries manage migration more effectively, and also **incentivises** them to effectively **cooperate on readmission of irregular migrants**'.<sup>742</sup> However, as will be further expounded in the next sections, this **contravenes Article 208 TFEU**, which stipulates that development assistance 'shall have as its primary objective the reduction and, in the long term, the **eradication of poverty**'. The use of development aid as an incentive for migration control may undermine meaningful action on root causes in practice.<sup>743</sup> Democratisation and development efforts may not necessarily be assisted by enhancing the control capacities of regimes with dubious human rights records. 'Restoring order', bringing 'robustness' to external border systems and 'stemming the irregular flows' can have **detrimental effects on human rights**.<sup>744</sup> Yet, MPF progress reports do not assess compliance with the relevant obligations, stating simply that '[i]n all cases [without specification], the humanitarian and human rights imperatives of EU policy need to stay at the core of the approach'.<sup>745</sup> There is **no elaboration as to whether and how action in this realm is 'guided by the principles which have inspired [the EU's] own creation'**.<sup>746</sup>

Against this background, the **New Pact on Migration and Asylum** does not represent a 'fresh start', as posited by the European Commission, but rather **inherits the orientation and core content of the MPF** and preceding instruments.<sup>747</sup> While declaring that '[t]he task facing the EU and its MS ... is to build a system that manages and normalises migration for the long term and which is fully grounded in European values and international law', even suggesting the development of legal pathways, both for protection and legal migration purposes, through 'Talent Partnerships' and enhancing resettlement, **the main focus remains on containment and deterrence of irregular movements**.<sup>748</sup> The text repeats the **emphasis on return, readmission, and the 'fight against migrant smuggling'**, pushing for a 'common EU system for returns' based on 'more effective cooperation with third countries' taking the form of 'tailor-made **Counter Migrant Smuggling Partnerships**' that 'prevent dangerous journeys and irregular crossings'.<sup>749</sup> This approach will be further developed in a **new EU Action Plan against migrant smuggling (2021-25)** aiming to 'boost cooperation and support the work of law enforcement' in countries of origin and transit, 'encouraging effective action by police and judicial authorities'.<sup>750</sup> The idea is to 'mobilise relevant policies and tools', including information

<sup>741</sup> MPF, p. 6.

<sup>742</sup> MPF, p. 9.

<sup>743</sup> Landau, 'A Chronotope of Containment Development: Europe's Migrant Crisis and Africa's Reterritorialisation' (2019) 51 *Antipode* 169.

<sup>744</sup> MPF, pp. 5-6 and 13.

<sup>745</sup> First Progress Report on the Partnership Framework, COM(2016) 700 final, 18.10.2016, p. 2.

<sup>746</sup> TEU, Art 21(1), first indent. See also TEU, Art 3(5).

<sup>747</sup> New Pact on Migration and Asylum (n 2), p. 1. See also García Andrade, 'EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?', *EU Migration Law*, [8.12.2020](#).

<sup>748</sup> New Pact on Migration and Asylum, p. 1 and section 6.6.

<sup>749</sup> *Ibid.*, pp. 7 (heading), 8 and 14-15.

<sup>750</sup> New Pact on Migration and Asylum, pp. 15-16 and Answer by Ms Johansson on behalf of the European Commission, Question E-005942/2020.

exchange, direct intervention on the ground through ESDP missions, joint investigative teams (JITs) and common operations, as well as targeted funding, in a bid to **advance EU priorities**.<sup>751</sup>

Corruption, instability, human rights, and rule of law concerns have yet to be effectively addressed. Instead, the accent is on 'support' and 'capacity building' to 'help partner countries manage irregular migration', strengthening migration governance and border control structures and fostering cooperation on readmission through the activation of existing '**agreements and arrangements**',<sup>752</sup> thus embracing the informalisation of EU instruments in this field. This is **despite the drawbacks of soft law** in terms of democratic accountability and judicial oversight, EU competences and institutional balance, and the non-enforceability of commitments and individual guarantees.<sup>753</sup> Insofar as informal arrangements exclude the European Parliament's input and the CJEU's jurisdiction, they become **structurally incapable of ensuring compliance with EU fundamental rights**, if only because, pursuant to the principle of legality, all measures that interfere with individual rights need to be provided for 'by law',<sup>754</sup> which renders soft-law instruments unsuitable by definition.

As the case studies on Turkey, Libya and Niger below illustrate, **actions based on the GAMM, the Agenda on Migration, and the MPF**, including financial assistance, reflecting the overwhelming preoccupation with halting irregular migration, raise **compatibility issues with the principles governing EU external action**.<sup>755</sup> Besides the **substantive concerns**, there are implications for the **partnership principle**, which requires the EU to 'build [genuine] partnerships with third countries' and 'promote multilateral solutions to common problems'.<sup>756</sup> As the New Pact's stance echoes that of its predecessors, evaluating the current relationship and resulting situation in Turkey, Libya, and Niger will provide insights into what can be expected under the forthcoming Counter Migrant Smuggling Partnerships, barring meaningful amendments and a **change of approach** that **incorporates the needs and interests of partner countries and their populations** into policy design and implementation.

### 6.3 The EU-Turkey Statement

In the aftermath of the 'refugee crisis', the EU and Turkey reached an **informal agreement delineating a joint strategy to reduce migration flows via Turkey to Europe**.<sup>757</sup> The agreement was publicised on the Council's website on 16 March 2016 in the form of a non-legally binding press 'statement'.<sup>758</sup> It provides for the rapid return to Turkey of all irregular migrants intercepted in Turkish waters, as well as of those not in need of international protection crossing into Greece from Turkey. The arrangement entails that, before being returned, all migrants should be registered and allowed to apply for asylum on the Greek islands in accordance with the Asylum Procedures Directive (APD). It also establishes that for every Syrian readmitted or returned to Turkey, another one should be resettled in the EU and that **Turkey should take measures to prevent irregular arrivals** on the Greek islands. In exchange, the

<sup>751</sup> New Pact on Migration and Asylum, pp. 20 and 22. See generally ss 6.1-6.5.

<sup>752</sup> Ibid., p. 21.

<sup>753</sup> Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) Yearbook of European Law 1.

<sup>754</sup> CFR, Art 52(1).

<sup>755</sup> See further Akkerman, *Outsourcing oppression: How Europe externalises migrant detention beyond its shores*, Transnational Institute Policy Brief, [14.4.2021](#).

<sup>756</sup> TEU, Art 21(1), second indent.

<sup>757</sup> The authorship of the agreement, whether attributable to the EU or its MS, has been considered by the General Court in Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council* ECLI:EU:C:2018:705. We address this issue in Chapter 2. For analysis, see Ineli-Ciger, 'Why the EU-Turkey Statement should never serve as a blueprint', ASILE Forum, [7.10.2020](#).

<sup>758</sup> EU-Turkey Statement (n 4).

EU committed to disbursing a €6bn Facility for Refugees in Turkey (FRT), to invigorate the visa liberalisation process, and to advance EU accession negotiations.

According to the latest data available, Turkey has officially readmitted a total of 2,054 persons from Greece, including citizens of Pakistan, Syria, Algeria, Afghanistan, Iraq and Bangladesh, between 4 April 2016 and 31 January 2020,<sup>759</sup> while it intercepted circa 200,000 irregular migrants (including Syrians) prior to their arrival on EU soil.<sup>760</sup> Irregular arrivals to the EU fell accordingly to 150,000 in 2018, the lowest in five years, representing a 90% reduction compared to 2015.<sup>761</sup> The downward trend continued and, as of March 2020, **irregular arrivals** on the Greek islands **dropped by 94%**, although **only 27,000 Syrian refugees have been resettled** to EU MS.<sup>762</sup> The remaining 3.6 million Syrian refugees continue to be hosted in Turkey — the highest number of any host country in the world.<sup>763</sup>

An **EU Special Coordinator** has been charged with the **effective implementation of the Statement** through a Joint Action Plan adopted to coordinate efforts to tackle irregular flows: addressing root causes, supporting Syrians in Turkey under temporary protection, and preventing irregular flows to the EU.<sup>764</sup> With a view to accelerating removals to and containment within Turkey, the main objectives are shortening asylum claims' processing times, 'limiting appeal steps', increasing 'detention capacities', accelerating relocation and returns from Greece, and sealing off external borders to prevent irregular crossings and subsequent secondary movements.<sup>765</sup> Yet, the inherent **risk of fundamental rights violations** has been **ignored**.<sup>766</sup>

Dedicated **reports** were issued on the progress in implementing the Joint Action Plan until September 2017. Since then, coverage has been confined to generic implementation reports on the Agenda on Migration, which have reduced the total pages dealing with the matter from 15 to 2-3 and omitted any assessment of effects on human rights.<sup>767</sup> The **focus** has remained **on the Statement objectives** of 'speeding up ... the processing of asylum applications' in Greece, 'ensuring ... pre-removal capacity', and 'prevent[ing] new sea or land routes for irregular migration', whilst 'the situation of human rights of refugees' is never mentioned, except regarding projects funded by the FRT,<sup>768</sup> considered part of the 'EU support for protection abroad'. Having 'led to a substantial reduction of irregular arrivals,' the **Statement is praised as having 'paid off in tackling migrant smuggling'**.<sup>769</sup> No independent monitoring or other follow up action has been envisaged to ensure compliance with the EU *acquis*,

<sup>759</sup> UNHCR, 'Returns from Greece to Turkey', [31.1.2020](#). Cf. Turkish government statistics increase the number to 2,139 as of [17.3.2021](#).

<sup>760</sup> HRW, 'Greece: Violence Against Asylum Seekers at Border', 17.3.2020, reporting that '[b]etween January 2015 and March 12, 2020, Turkey's coastguard reportedly intercepted 186,766 asylum seekers and migrants in the Aegean Sea'. Cf. [Turkish government statistics](#) increase the number to 258,530 (20,380 (2020); 60,802 (2019); 26,678 (218); 21,937 (2017); 37,130 (2016); 91,611 (2015).

<sup>761</sup> Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019, pp. 1 and 6.

<sup>762</sup> EU-Turkey Statement Four years on ([March 2020](#)). Cf. Turkish government statistics increase the number to 28,335 Syrians as of [17.3.2021](#).

<sup>763</sup> EASO, Asylum Report 2020: Annual Report on the Situation of Asylum in the European Union, p. 16.

<sup>764</sup> European Commission Fact Sheet, Implementing the EU-Turkey Statement – Questions and Answers, [28.9.2016](#); and EU-Turkey Joint Action Plan, [15.10.2015](#).

<sup>765</sup> Fourth report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792 final, 8.12.2016, Annex I.

<sup>766</sup> Alpes et al., 'Human rights violations by design: EU-Turkey statement prioritises returns from Greece over access to asylum', Migration Policy Centre Policy Brief [2017/29](#).

<sup>767</sup> Delegation of the EU to Turkey, [Previous Reports](#).

<sup>768</sup> Seventh Report on the Progress made in the implementation of the EU-Turkey Statement, COM(2017) 470 final, 6.9.2017, pp. 9-11.

<sup>769</sup> Progress report on the Implementation of the EU Agenda on Migration, COM(2019) 126 final, 6.3.2019, p. 15 and 2.

prompting complaints about Greece's infringement of its legal obligations,<sup>770</sup> criticism of the EU's approach to the human rights situation in Turkey,<sup>771</sup> and ongoing proceedings against Frontex' involvement in illegal pushbacks, as discussed in Chapter 4.

### 6.3.1 The post-Statement situation in Greece

The Statement's implementation through the **hotspots system**, rather than improving protection in Greece, has **exacerbated pre-existing shortcomings**.<sup>772</sup> As of October 2019, there were 'more than 31,000 people present in hotspots designed for a maximum of around 8,000 — in spite of 'over 20,000 transfers to the mainland [that] year'.<sup>773</sup> The result has been a return-oriented system involving prolonged detention in inadequate facilities, where 'serious fundamental rights gaps persist [and] where reception conditions remain sub-standard'.<sup>774</sup> The **Statement has actually altered the nature of the hotspots over time**. Rather than serving as temporary reception and registration centres as originally envisaged, they accommodate applicants for the entire duration of the asylum procedure. Instead of facilitating fast and reliable processing, **despite the introduction of a dedicated fast-track border procedure, implementation has been erratic**, which has undermined fairness and rendered access to asylum uncertain.<sup>775</sup> Due to the conditions on the islands, procedures have been slow, even within the fast-track border variant. In 2019, its total duration has been calculated to be over seven months on average from registration to a first-instance decision,<sup>776</sup> with subsequent appeals taking an extra five to six months,<sup>777</sup> but there are no comprehensive statistics on the length of stay in the hotspots or on the total duration of procedures. FRA, using UNHCR data, has estimated that at the beginning of 2019 there were asylum seekers on the islands who had arrived in 2016 (224 people) or 2017 (628 people).<sup>778</sup> The shortage of medical and other professionals to undertake vulnerability assessments, with waiting times going up to eight months,<sup>779</sup> has had a **knock-on effect on the asylum system overall**. Oftentimes, vulnerabilities are only identified *during* the asylum procedure, which causes delays, as applicants are then diverted to the regular procedure from the fast-track border procedure.<sup>780</sup> The end result has been an accumulated backlog of almost 100,000 asylum applications, with thousands stranded in overcrowded camps.<sup>781</sup> If adopted, the **new border procedures envisaged in the New Pact will embed rather than resolve these shortcomings**. The Commission

<sup>770</sup> Oxfam et al., Complaint to the European Commission Concerning Infringements of EU Law by Greece, [22.9.2020](#).

<sup>771</sup> Cortinovis, 'Pushbacks and lack of accountability at the Greek-Turkish borders', CEPS Paper in Liberty & Security No 2021-01 ([February 2021](#)).

<sup>772</sup> *MSS v. Belgium and Greece* (n 95); *NS & ME* (n 96).

<sup>773</sup> Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019, p. 3.

<sup>774</sup> Popp, "'No more Morias'? Origins, challenges and prospects of the hotspots on the Greek islands', SVR Policy Brief 2021-1, The Expert Council on Integration and Migration ([Berlin, 2021](#)), pp. 4 and 9.

<sup>775</sup> FRA, Update of the 2016 Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy ([February 2019](#)), p. 7.

<sup>776</sup> AIDA – Asylum Information Database 2020: Country Report: Greece, [2019](#) Update, p. 93.

<sup>777</sup> ECA, *Asylum, Re-location and Return of Migrants: Time to Step up Action to Address Disparities between Objectives and Results*, Special Report No [24/2019](#), p. 48.

<sup>778</sup> FRA, Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on Fundamental Rights in the 'Hot-spots' Set up in Greece and Italy. FRA Opinion [3/2019](#), p. 24.

<sup>779</sup> See, e.g., Leivaditi et al., Refugee Protection: Greece Country Report, RESPOND Working Papers Global Migration: Consequences and Responses, Paper [31/2020](#), p. 35.

<sup>780</sup> Popp, "'No more Morias'? (n 774), p. 17.

<sup>781</sup> 'Close to 100,000 asylum applications still pending in Greece', *Info Migrants*, [11.8.2020](#).



proposals mirror the hotspot approach, which risks yielding similar outcomes, normalising substandard conditions EU-wide.<sup>782</sup>

In January 2020, **Commissioner Johansson acknowledged** these ‘**terrible conditions**’ plaguing the hotspot system in her opening statement at the European Parliament plenary debate about the humanitarian situation on the Greek islands.<sup>783</sup> There have also been several **condemnations by the European Court of Human Rights** (ECtHR) regarding the ineffectiveness of remedies and procedural guarantees against arbitrary detention and the treatment of vulnerable applicants in reception camps.<sup>784</sup> **MEPs have repeatedly asked questions** about the ‘shortage of sanitary facilities and of adequate accommodation’, the absence of adequate ‘provision of basic necessities, such as food and medicines’, and the ‘extremely poor’ overall standards, particularly for children.<sup>785</sup> The resulting despair led the camp in Moria to be set on fire in September 2020, leaving 13,000 residents destitute.<sup>786</sup> A temporary closed site has been set up in a former military camp in Mavrovouni, previously used as a firing range. Human Rights Watch has expressed concerns over the potential for lead exposure.<sup>787</sup> Very poor sanitary conditions have been reported,<sup>788</sup> and journalists have been denied access to the premises.<sup>789</sup> MEPs have questioned the compliance of the site with the Reception Conditions Directive.<sup>790</sup> Meanwhile, a new Multi-Purpose Reception and Identification Centre (MPRIC) is currently being built on Lesbos with EU financial and operational support.<sup>791</sup>

Since the advent of **Covid-19, circumstances have rapidly worsened**.<sup>792</sup> **Throughout the pandemic**, Greek authorities have imposed **mass quarantines** in hotspots and **mass detentions** of new arrivals in light of Turkey’s refusal to accept returnees.<sup>793</sup> The restrictions, which include limiting residents’ movement within camps and prohibiting entry or exit, have severely affected the provision of legal, medical and social services.<sup>794</sup> And, as pointed out by Médecins sans Frontières (MSF) and others, the ‘cramped conditions make **infection prevention impossible**’.<sup>795</sup>

LIBE Committee Chair, López Aguilar, noted that, in such conditions, there is simply ‘no chance of isolation or social distancing’, **making it imperative to preventatively evacuate 42,000 people from**

<sup>782</sup> See also Rasche and Walter-Franke, ‘Clear, Fair and Fast? Border Procedures in the Pact on Asylum and Migration’, Hertie School – Jacques Delors Centre Policy Paper ([December 2020](#)).

<sup>783</sup> Opening statement at European Parliament plenary debate about the humanitarian situation Greek islands, [29.1.2020](#).

<sup>784</sup> ECtHR, *Kaak and Others v. Greece*, App No 34215/16, 3.10.2019 (insufficient protection against arbitrary detention); *HA and Others v. Greece*, App No 19951/16, 28.2.2019 (substandard detention conditions and lack of effective remedies); *Applicant v. Greece*, [8.10.2019](#) (interim measures to ensure treatment of vulnerable applicant in line with state of health).

<sup>785</sup> [Parliamentary Question E-000435-19](#); [Parliamentary Question E-001853-19](#); [Parliamentary Question E-003808-19](#); [Parliamentary Question E-002345-19](#).

<sup>786</sup> HRW, ‘Greece’s Moria Camp Fire: What’s Next?’, [12.9.2020](#).

<sup>787</sup> HRW, ‘Q&A: Lesbos Lead Contamination’, [17.2.2021](#). See also ‘Athens accused of ‘downplaying’ risks of lead contamination at Lesbos camp’, *The Guardian*, [17.2.2021](#).

<sup>788</sup> Oxfam, ‘European asylum pact: a repetition of the same mistakes’, [15.2.2021](#).

<sup>789</sup> ‘We are suffocating’: Migrants in Lesbos camp appeal for help’, *France 24*, [3.30.2021](#).

<sup>790</sup> Parliamentary Question [E-000603/2021](#).

<sup>791</sup> Memorandum of Understanding between the European Commission, the European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of the Hellenic Republic, of the other part, on a Joint Pilot for the establishment and operation of a new Multi-Purpose Reception and Identification Centre on Lesbos, C(2020) 8657 final, 2.12.2020.

<sup>792</sup> FRA, Coronavirus Pandemic in the EU – Fundamental Rights Implications, Bulletin No 1, [20.3.2020](#), p. 19.

<sup>793</sup> HRW, ‘Greece: Nearly 2,000 New Arrivals Detained in Overcrowded, Mainland Camps’, [31.3.2020](#). For a more detailed description of Covid-related measures, see Refugees International, ‘Blocked at Every Pass: How Greece’s Policy of Exclusion Harms Asylum Seekers and Refugees’, [24.11.2020](#).

<sup>794</sup> FRA, Coronavirus Pandemic in the EU – Fundamental Rights Implications, Bulletin No 6, [31.10.2020](#), p. 31.

<sup>795</sup> MSF, COVID-19: BBC Panorama investigates the squalid Greek refugee camps risking virus outbreak, [27.10.2020](#).



**the camps.**<sup>796</sup> However, **relocations have been scarce**, with a scheme by the government, UNHCR and IOM, targeting just 2,000 vulnerable individuals for transfers to hotel accommodation on the islands or to the mainland, and a plan to 'create facilities to house [an extra] 5,000 asylum seekers'.<sup>797</sup> Other MS have been slow to lend support.<sup>798</sup> According to UNHCR, while the programme started in September 2020, '[t]he first direct relocation from Lesbos to another EU Member State without transfers via [Greece's] mainland took place as part of the EU relocation programme, with 116 refugees arriving in Germany [only] on 17 February 2021'. So far, '[a]s of 3 March [2021], 2,968 refugees and vulnerable asylum-seekers had been relocated from Greece, including 634 unaccompanied children'.<sup>799</sup>

The situation sharply deteriorated in February 2020 when Turkey threatened to suspend the Statement,<sup>800</sup> supposedly due to the lack of European support for its military operations in Syria.<sup>801</sup> In response, **Greece suspended the right to asylum and blocked large numbers at the border**,<sup>802</sup> leaving them in severe hardship.<sup>803</sup> Reports of **violent pushbacks in the Aegean** emerged, as mentioned in Chapter 4.<sup>804</sup> The Commission's reaction has been equivocal, with its President initially congratulating Greece for acting as 'Europe's shield',<sup>805</sup> and failing to launch infringement proceedings. Pushback incidents continue to be reported,<sup>806</sup> both at sea and across the Evros river, with Greece accusing Turkey of strategically pushing migrants towards its territory.<sup>807</sup> A complaint to the UN Human Rights Committee has proposed reframing them as **instances of 'enforced disappearance'**.<sup>808</sup> Another report, which constitutes the basis of a request for the ICC Prosecutor to open an investigation, argues that the conditions on the islands and at sea constitute **crimes against humanity**, on account of their systematic and widespread nature, of which the EU is considered complicit.<sup>809</sup>

### 6.3.2 The post-Statement situation in Turkey

The Statement is based on the **presumption that Turkey represents a safe third country** (STC) within the meaning of the Asylum Procedures Directive (APD). Article 38 APD defines a STC as a country where (a) the life and liberty of asylum seekers are not threatened on account of their race, religion, nationality, membership in a particular social group or political opinion; (b) there is no risk of serious harm as defined in the Qualification Directive; (c) the principle of *non-refoulement* is upheld; (d) removals that violate the right to freedom from torture and cruel, inhuman or degrading treatment are

<sup>796</sup> 'EU urged to evacuate asylum seekers from cramped Greek island camps', *The Guardian*, [24.3.2020](#).

<sup>797</sup> 'More than 2,000 asylum applicants will be moved from Greek islands due to pandemic fears', *Greek City Times*, [14.4.2020](#).

<sup>798</sup> See, e.g., 'Greece refugee crisis: First 12 children evacuated from camps', *Deutsche Welle*, [15.4.2020](#).

<sup>799</sup> UNHCR, Regional Bureau for Europe - GREECE UPDATE No [16.7.3.2021, pp. 1-2](#).

<sup>800</sup> Erdogan says border will stay open until EU meets his demands', *New Europe*, [11.3.2020](#).

<sup>801</sup> Rayes, 'Amid an Unfolding Humanitarian Crisis in Syria, the EU Faces the Perils of Devolving Migration Management to Turkey', Migration Policy Institute Feature, [20.3.2020](#).

<sup>802</sup> 'Refugees told "Europe is closed" as tensions rise at Greece-Turkey border', *The Guardian*, [6.3.2020](#).

<sup>803</sup> UNHCR, 'Statement on the situation at the Turkey-EU border', [2.3.2020](#).

<sup>804</sup> See, e.g., 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations', *Just Security*, [22.5.2020](#).

<sup>805</sup> 'Greece is "Europe's shield" in migrant crisis, says EU chief von der Leyen on visit to Turkey border', *Euronews*, [4.3.2020](#). Cf. 'Commissioner Johansson in "Greece warned by EU it must uphold the right to asylum"', *The Guardian*, [12.3.2020](#).

<sup>806</sup> For a summary of allegations and sources, see 'Greece minister: Smugglers spread false rumors about pushbacks', *Info Migrants*, [1.9.2020](#).

<sup>807</sup> 'Greece accuses Turkey of trying to provoke it with migrant boats', *Al Jazeera*, [3.4.2021](#).

<sup>808</sup> 'A Syrian Asylum-Seeker's Case Reframes Migrant Abuses as Enforced Disappearances', *The Intercept*, [28.2.2021](#).

<sup>809</sup> Legal Centre Lesbos, *Crimes Against Humanity in the Aegean*, [1.2.2021](#). See also Syria Justice and Accountability Centre, Communication to the Office of the Prosecutor of the International Criminal Court under Article 15 of the Rome Statute: The Situation in Greece - Systematic human rights abuses against refugees on Greek territory and at reception and identification centres on the Aegean islands ([January 2021](#)).

not carried out; and (e) asylum seekers can request refugee status and be protected under the 1951 Geneva Convention.

**Although Turkey has ratified the Convention, it maintains a geographical limitation**, whereby it only grants refugee status to people originating from Europe. Furthermore, while the 2014 Turkish Law on Foreigners allows for '**conditional refugee status**' to those from a non-European country, the status is temporary and confers a limited set of basic rights, which explicitly excludes long-term integration and family reunification in Turkey.<sup>810</sup> The Turkish Law on Foreigners offers also the possibility of **subsidiary protection** for those who can be neither classified as refugees nor conditional refugees, on grounds similar to those applicable under the EU QD. This form of protection entails basic social and economic rights, as well as family reunification in Turkey. Finally, the **Temporary Protection Regulation**,<sup>811</sup> which came into force in October 2014, introduced a separate legal regime **for Syrian nationals in the country**, who can obtain free access to basic rights, including health, education, and social assistance and have a limited right to work. However, despite the legal guarantees, **refugees**, including Syrians, **still face severe challenges in accessing basic rights in practice**, and poverty remains high.<sup>812</sup> This is why, from the outset, the Parliamentary Assembly of the Council of Europe,<sup>813</sup> various scholars,<sup>814</sup> and NGOs have **challenged the definition of Turkey as a STC**.<sup>815</sup>

**The STC presumption** has also been **rebutted by courts**. Greek Appeals Committees have ruled multiple times that Turkey does not fulfil STC requirements, particularly given the risk of *refoulement* and the lack of protection equivalent to that provided by the Refugee Convention,<sup>816</sup> which has made implementing the Statement difficult.<sup>817</sup> Likewise, the Munich Administrative Court impeded the return of an asylum seeker to Greece on the basis that return would risk chain *refoulement* to Turkey. It found that Turkey's temporary protection status does not comply with the 1951 Geneva Convention and therefore fails to fulfil the ADP's requirements.<sup>818</sup>

Despite recent reforms, asylum seekers in Turkey still face arbitrary detention, ill treatment, insufficient procedural guarantees, and ineffective remedies.<sup>819</sup> Several observers report other **grave human rights violations**, including **violent pushbacks and mass deportations**,<sup>820</sup> exposing the serious risks involved in applying the Statement. The Syrian Observatory for Human Rights estimates that over 400 Syrian civilians have been **killed by Turkish border guards** since 2011, including women and

<sup>810</sup> [Turkish Law on Foreigners and International Protection](#).

<sup>811</sup> [Turkish Temporary Protection Regulation](#). See also, Ineli-Ciger and Yigit, ASILE Country Fiche: Turkey ([October 2020](#)).

<sup>812</sup> See further Ineli-Ciger, 'How have the European Union and the EU Asylum Acquis Affected protection of Forced Migrants in Turkey? An Examination in View of the Turkish Law on Foreigners and International Protection and the EU-Turkey Statement of March 2016', in Stoyanova and Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) 118.

<sup>813</sup> PACE, Resolution 2109 (2016) on 'The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016', 20.4.2016.

<sup>814</sup> Labayle and De Bruycker, 'The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain?', *EU Migration Law*, [1.4.2016](#).

<sup>815</sup> NGO concerns persist. See, e.g., HRW, Letter to EU Ministers: Address Rights Concerns in Turkey at Ministerial Meeting, [9.7.2020](#).

<sup>816</sup> For an overview of the case law, see Gkliati, 'The application of the EU-Turkey agreement: A critical analysis of the decisions of the Greek appeals committees' (2017) 10 *European Journal of Legal Studies* 122.

<sup>817</sup> AI, 'Greek Decision Highlights Fundamental Flaws in EU Turkey Refugee Deal', [20.5.2016](#).

<sup>818</sup> Equal Rights Beyond Borders, 'Court of Munich again: Turkey is not a safe third country - Is the EU Turkey Deal dead?', [16.8.2019](#).

<sup>819</sup> AIDA, 'Country Report: Turkey', [31.12.2019](#).

<sup>820</sup> AI, Turkey: Syrians Still Risk Deportation from Turkey, [20.11.2019](#); and AI, Turkey: Halt Illegal Deportation of People to Syria and Ensure Their Safety', [29.5.2020](#).

children.<sup>821</sup> Human Rights Watch points at **indiscriminate shootings and abuse** of Syrian asylum seekers, who were blocked when attempting to cross into Turkey.<sup>822</sup> The ECtHR has condemned the illegality of decisions to deport and detain asylum applicants in pre-removal centres in **unsuitable conditions**, especially for children, which reach the inhuman treatment threshold.<sup>823</sup> The 2019 EU pre-accession report additionally notes that 'international protection applicants face serious difficulties in accessing registration', especially Afghan nationals.<sup>824</sup> It also mentions that '[r]eports ... of deportations of Syrian nationals, in **violation of the principle of non-refoulement**, continued in 2018', but, because 'the EU does not have access to the Turkish-Syrian border', the Commission is explicitly '*not* monitoring returns to Syria',<sup>825</sup> which is concerning, especially since Turkish's removal centres **received EU funding** through the FRT, as part of the implementation of the EU-Turkey Statement.<sup>826</sup>

These **violations have continued throughout the pandemic**,<sup>827</sup> which has negatively impacted forced migrants in Turkey, 'especially children and vulnerable individuals ... who were already living in dire economic conditions'. Due to the Covid-19 crisis, '[t]he majority of refugees in Turkey [have] lost the jobs that they used to hold in the informal sectors of the economy'. Cases of **mass detention and deportation**, which raise concerns regarding access to asylum, have increased. This tallies with general developments regarding '[t]he deterioration of human and fundamental rights' in the country, which remains a grave concern: 'The legal framework includes general guarantees of respect for human and fundamental rights but the **legislation and practice still need to be brought into line with the [ECHR] and with the [ECtHR] case-law**'.<sup>828</sup>

Efforts to seal the Turkey-Greece Aegean route have also led to the emergence of a **new, much longer and more dangerous**,<sup>829</sup> **route via North Cyprus**.<sup>830</sup> Representatives of the Cypriot government have recently accused Turkey of the creation of this new route,<sup>831</sup> and allegations of pushbacks and ill treatment of asylum seekers by Cypriot coastguards have proliferated.<sup>832</sup> The **CoE Commissioner for Human Rights has expressed concern** at these developments and called on Cyprus to accept the disembarkation of migrants, stop summary and violent removals, and allow access to asylum procedures. The Commissioner warns that these practices amount to *refoulement* and collective expulsion in breach of the ECHR provisions.<sup>833</sup>

A future **Counter Migrant Smuggling Partnership modelled on the existing arrangements**, as envisaged by the New Pact,<sup>834</sup> will **entrench the current dynamics** within the common asylum and migration policy, leaving the serious fundamental rights challenges brought about by the Statement,

<sup>821</sup> Syrian Observatory for Human Rights, 'Turkish Jandarma kill Syrian civilians again and raise to 422, the number of civilian victims killed during their escape towards the Turkish territory', [6.4.2019](#).

<sup>822</sup> HRW, 'Turkey/Syria: Border Guards Shoot, Block Fleeing Syrians', [3.2.2018](#).

<sup>823</sup> ECtHR, *GB and Others v. Turkey*, App No 4633/15, 17.10.2019.

<sup>824</sup> AIDA, 'Country Report: Turkey', [31.12.2019](#), p. 15.

<sup>825</sup> Turkey Pre-accession Report 2019, SWD(2019) 220 final, 29.5.2019, pp. 47-49 (italics added).

<sup>826</sup> Fourth Annual Report on the Facility for Refugees in Turkey, COM(2020) 162 final, 30.4.2020, p. 13.

<sup>827</sup> HRW, World Report 2021: Turkey - Events of 2020 ([undated](#)).

<sup>828</sup> Turkey Pre-accession Report 2020, SWD(2020) 355 final, 6.10.2020, pp. 17-18 and 6.

<sup>829</sup> 'Cyprus new route for migrants prepared to "die at sea"', *France 24*, [18.7.2019](#).

<sup>830</sup> 'Asylum Seekers Find a New Route to Europe, Flowing Into a Divided Cyprus', *New York Times*, [19.4.2021](#).

<sup>831</sup> 'Cyprus blames Turkey for 'sending migrants'', *Financial Mirror*, [19.2.2021](#).

<sup>832</sup> HRW, 'Cyprus: Asylum Seekers Summarily Returned: Pushbacks Against Surge of Arrivals by Boat From Lebanon', [20.9.2020](#).

<sup>833</sup> Letter of Ms Dunja Mijatović, CoE Commissioner for Human Rights, to Mr Nicos Nouris, Minister of Interior of Cyprus, Ref. CommHR/DM/sf 014-2021, [10.3.2021](#).

<sup>834</sup> New Pact on Migration and Asylum, p. 16.

and exacerbated by the pandemic, unresolved. The Statement and New Pact's containment **strategy should instead be replaced with a sustainable human rights-compliant system.**

#### 6.4 Cooperation with Libya

The EU and Libya's cooperation on migration and border management started in **2013** with the establishment of the **EU Border Assistance Mission to Libya** (EUBAM), designed to develop a border management framework in Libya.<sup>835</sup> In June **2016**, the **EUNAVFORMED *Sophia* mandate was modified to provide training to the Libyan coastguard** (LYCG) to this effect.<sup>836</sup> And, in January **2017**, the Commission and the High Representative for Foreign Affairs adopted a **Joint Communication** which, building on the MPF, underlined the EU's intention to **step up support to the LYCG and strengthen Libya's borders**, with funding coming from the EU budget.<sup>837</sup>

On 2 February **2017**, **Italy and Libya signed a MoU** to reinforce border security and fight illegal immigration, human trafficking and contraband.<sup>838</sup> Despite the dangerous situation in Libya since Gaddafi's overthrow in 2011, as per the EU's own account,<sup>839</sup> **Italy committed to deliver support and funding** to development programmes in the regions affected by irregular immigration, provide technical and technological support to the LYCG and to the Ministry of Home Affairs (Articles 1b and 1c), fund detention centres, train their personnel, and support international organisations facilitating return and readmission from Libya (Article 2).

The **MoU** has been **endorsed in the Malta Declaration**, which 'welcomes and ... support[s] Italy in its implementation', pledging funds and capacity building, with the explicit aim of 'preventing departures and managing returns'.<sup>840</sup> Despite the wealth of sources denouncing the situation facing TCNs in Libya,<sup>841</sup> which has prompted an investigation into atrocity crimes against migrants by the International Criminal Court (ICC),<sup>842</sup> human rights violations have not impeded the EU's backing of the MoU.

The MoU specifies that joint activities are to be financed through the Italian State's budget and EU funding (Article 4). The **EU has correspondingly allocated substantial funds towards its commitments**. By September 2019, it had awarded over **€455m for migration management** in Libya, trebling grants to support good governance, health, civil society, youth and education, mediation and stability activities.<sup>843</sup> An EU project, 'Support to Integrated border and migration management in Libya' (SIBML), further analysed in Section 6.6, was awarded to the Italian Ministry of Interior in July 2017, allocating €46.3m to '[s]trengthen ... the operational capacities of the Libyan coastguards' for 'maritime surveillance and rescuing at sea',<sup>844</sup> with about **€42m** of the total **stemming from the EU**

<sup>835</sup> EUBAM Libya European Union Border Assistance Mission in Libya Civilian Mission, EEAS Press Release, [30.11.2020](#).

<sup>836</sup> Council Decision (CFSP) 2016/993 of 20 June 2016 Amending Decision (CFSP) 2015/778, [2016] OJ L 162/18.

<sup>837</sup> Migration on the Central Mediterranean route: Managing flows, saving lives, JOIN(2017) 4 final, 25.1.2017, p. 7.

<sup>838</sup> Unofficial translation of the [Italy-Libya MoU](#). Regardless of criticism, the MoU has been tacitly renewed on [2.2.2020](#).

<sup>839</sup> EEAS, EUBAM Libya Initial Mapping Report Executive Summary, EEAS(2017) 0109, [24.1.2017](#).

<sup>840</sup> Malta Declaration, [3.2.2017](#), para. 6(j).

<sup>841</sup> AI, 'Libya's Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants', [11.12.2017](#), counting over 20 reports from reliable monitors, including UN and EU sources. See further list of nearly 50 reports by AI and HRW spanning the period 2013 to 2019 appended to their joint 'Submissions to the European Court of Human Rights', Annex, [12.11.2019](#).

<sup>842</sup> ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), [8.5.2019](#), paras 21–22.

<sup>843</sup> 'EU-Libya relations', EEAS Factsheet, [2.3.2021](#).

<sup>844</sup> 'EU Trust Fund for Africa Adopts EUR 46 Million Programme to Support Integrated Migration and Border Management in Libya', Commission Press Release, [28.7.2017](#).

**Trust Fund for Africa (EUTFA).**<sup>845</sup> A second tranche of **€15m** was allocated in December 2018, entirely covered by the EUTFA.<sup>846</sup>

The EU's **direct involvement** in these initiatives is also facilitated by the **EUBAM**,<sup>847</sup> whose **mandate** has been **extended** to cover 'border management' as well as 'advice and capacity-building in the area of ... migration [and] border security'.<sup>848</sup> **EUNAVFORMED Sophia's** mission has also been expanded. The operation started training the LYCG in October 2016, launching a second package in January 2017, following the signature of a **dedicated MoU with the LYCG**.<sup>849</sup> **Frontex** has also played a crucial role in the achievement of the MoU's objectives through the deployment of a **targeted technical assistance project**, covering several African countries, including Libya and Niger. The three-year project **SAFIC** ('Strengthening the Africa-Frontex Intelligence Community') was launched in December 2018. It aims to 'consolidate and enhance inter-agency and inter-regional information-sharing, with a view to establishing more direct cooperation channels, thus contributing to more effective border management'; 'to improve the operational capabilities of the partner countries, through promoting information exchange that can lead to investigations to dismantle organised crime networks'; and 'to increase the capacities of beneficiary countries to draft and share strategic and operational risk analyses/assessments on regular/irregular migration flows, border security, and cross-border criminality'.<sup>850</sup> Despite the project's focus on border and migration control, its **€4m allocation** derives from the **Instrument contributing to Stability and Peace/DG DEVCO**.

**Malta** has also reached an agreement for cooperation to intercept migrants and return them to **Libya** 'follow[ing] a similar understanding reached between the Libyan and Italian governments'.<sup>851</sup> In the first quarter of 2020, the LYCG prevented 2,000 migrants from reaching Maltese shores in pursuance of this arrangement,<sup>852</sup> which was subsequently drafted as a **MoU** on 28 May 2020,<sup>853</sup> committing the parties to launching coordination centres in Tripoli and Valetta to better organise operations.<sup>854</sup> Drawing on the Italian model, Malta pledged to 'finance in full both these centres' (Article 3) and to seek the EU's financial support 'to help the [Government of National Accord (GNA)] in securing the ... borders of Libya' (Article 5).

The extent to which **the EU** has funded the implementation of the Malta-Libya MoU is unclear. It **appears to have rejected sponsoring Malta's 'floating' detention centres**,<sup>855</sup> with the Commission, instead, 'encouraging MS to participate in voluntary relocations [after disembarkation in Malta]'.<sup>856</sup> This call, however, has largely been ignored, especially since the outbreak of the pandemic.<sup>857</sup>

<sup>845</sup> Support to Integrated border and migration management in Libya - First phase, [T05-EUTF-NOA-LY-04](#).

<sup>846</sup> Support to Integrated border and migration management in Libya - Second phase, [T05-EUTF-NOA-LY-07](#).

<sup>847</sup> [EUBAM](#).

<sup>848</sup> 'EUBAM Libya: mission extended, budget approved', EC Press Release, [4.8.2016](#).

<sup>849</sup> 'Operation SOPHIA: package 2 of the Libyan Navy Coast Guard and Libyan Navy training launched today', EEAS Press Release, [30.1.2017](#).

<sup>850</sup> 'Strengthening the Africa-Frontex Intelligence Community: Technical assistance projects in non-EU countries', Frontex Website ([undated](#)).

<sup>851</sup> 'Exposed: Malta's secret migrant deal with Libya', *Times of Malta*, [10.11.2019](#).

<sup>852</sup> 'Libyan coastguard stopped 2000 migrants from reaching Malta', *Times of Malta*, [23.6.2020](#).

<sup>853</sup> Malta-Libya MoU, [28.5.2020](#).

<sup>854</sup> 'Malta-Libya deal sets up centres "against illegal migration"', *Times of Malta*, [28.5.2020](#).

<sup>855</sup> Parliamentary Question [E-003555/2020](#).

<sup>856</sup> Answer by Ms Johansson on behalf of the European Commission, Question: E-003555/2020, [17.8.2020](#).

<sup>857</sup> 'Group of migrants relocated to Germany', *Malta Independent*, [26.2.2021](#).



## Human Rights Implications

The **Malta-Libya MoU does not mention human rights**, limiting itself to stating that ‘the implementation of this Memorandum should not contravene with [sic] rights and obligations under other international conventions signed by either party’ (Article 6). Yet, the **€1m a month ‘floating’ detention centres scheme** imprisons seaborne migrants and refugees heading for Malta aboard disused, repurposed passenger ships offshore, at the rim of territorial waters.<sup>858</sup> The programme started on 28 April 2020 and has affected at least 400 individuals, employing private security personnel to guard detainees on government chartered private vessels that should only be allowed to sail within three nautical miles off land and in favourable weather conditions; this precludes all contact with the outside world, including asylum authorities, monitoring bodies, and lawyers.<sup>859</sup> This ‘incommunicado’ detention, which lacks a legal basis, safeguards or judicial oversight, and may be imposed for an indefinite period of time, constitutes a grave breach of the right to liberty and amounts to inhuman treatment.<sup>860</sup>

In contrast to the Maltese MoU, the **Italy-Libya MoU** stipulates that ‘[t]he Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements ... the two Countries are part of’ (Article 5). It also establishes a ‘Joint Commission’ to oversee its correct application (Article 3), but with no specific human rights mandate. Since its decisions are not public, it is impossible to determine whether human rights concerns are taken into account. Otherwise, no safeguards or remedies to contest pullbacks and other actions undertaken under the MoU are envisaged, and its legality has, in fact, been challenged in national courts. The **Trapani Tribunal has declared the MoU unconstitutional and incompatible with human rights**, refugee law and maritime law obligations, explicitly rejecting the idea that Libya may be considered a ‘place of safety’ for disembarkation.<sup>861</sup> The related practice of *refoulement* by proxy (performed by either commercial vessels or LYCG assets at the behest of the authorities of the country of intended destination) has been **denounced in a string of international cases** pending at the ECtHR, the UN Human Rights Committee, and the UN Committee Against Torture, and it forms the basis of a request for an ICC investigation.<sup>862</sup>

**SAR and interdiction practices** at sea by Italy and Malta, **in cooperation with Libya** under their respective MoUs, have, indeed, been **highly problematic**. Strategies including *refoulement* by proxy, relying on the LYCG to perform pullbacks, engaging private shipping vessels to avoid direct responsibility, and/or abandoning shipwreck survivors at sea, have been exposed by multiple actors.<sup>863</sup> A recent **condemnation by the UN Human Rights Committee** of these practices has called on Italy to desist from inadequate responses to situations of distress, as they are incompatible with the duty to protect the right to life in the maritime context.<sup>864</sup>

However, there are **no dedicated monitoring or evaluation mechanisms of the EU’s support for the MoUs’ implementation and their compatibility with fundamental rights**, at least in the public

<sup>858</sup> ‘EU money can be used to offshore migrants on boats’, *EU Observer*, [2.9.2020](#).

<sup>859</sup> ‘Illegal floating prisons’, *Malta Today*, [2.6.2020](#).

<sup>860</sup> UN HRC, General Comment No 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, 16.12.2014, para. 56. See also, ECtHR, *Aksoy v. Turkey*, App No 21987/93, 18.12.1996, para. 78.

<sup>861</sup> Tribunale di Trapani, [3.6.2019](#).

<sup>862</sup> *S.S. and Others v. Italy* (n 427); *S.D.G. v. Italy* (n 636); CAT Committee, [submission against Italy; request to the ICC Prosecutor](#) to start proceedings against EU/MS agents for crimes against humanity.

<sup>863</sup> For a reconstruction of practices, see Heller and Pezzani, ‘Mare Clausum’ (n 597); Heller, ‘The Nivin Case’ (n 325).

<sup>864</sup> *A.S. and Others v. Italy* (n 463). The same facts have given rise to *A.S. and Others v. Malta* (n 464) declared inadmissible for non-exhaustion of domestic remedies.



domain. Commission and EEAS press releases provide limited information, making it impossible to reconstruct the relevant decision-making processes and determine the status of human rights considerations.

In one of its latest factsheets on Libya, **the EEAS appears to disregard the impact of EU interventions on the ground**. It limits itself to praising the establishment of a Trilateral Task Force (TTF) between the EU, the African Union (AU) and the UN in November 2017, to accelerate returns and humanitarian evacuations out of Libya. This implicitly recognises Libya's status as an unsafe third country. Yet, the document fails to question the EU's wide-ranging support for its migration containment apparatus. According to the EEAS, the TTF contributed to 51,100 (presumably voluntary) assisted returns and 5,850 evacuations, principally to Niger, up to March 2021.<sup>865</sup> A €44m package has been delivered to UN agencies since 2014, part of which has been used to sponsor this initiative.<sup>866</sup> Yet, the EEAS fails to mention whether any procedural guarantees or legal safeguards are applied, or how individual rights and preferences regarding family unity/reunification, health and vulnerability conditions or specific needs for international protection are taken into consideration in each particular case. The report also omits to mention that about 800,000 migrants and 45,000 registered refugees remain 'trapped' in Libya in appalling conditions, including at least 3,200 in detention centres partly funded through the EUTFA.<sup>867</sup>

**EU support**, in the form of €57m funding, training, and assistance to **'border management authorities'**, including the LYCG, is **meant to cover SAR and interdiction** as well as 'law enforcement' activities **'embedded in a human rights-based approach'**.<sup>868</sup> However, progress in embedding human rights in LYCG undertakings has been deemed 'poor' in an internal EUBAM report leaked to the press in October 2020.<sup>869</sup> The EEAS Factsheets also state that '[w]hile operating off the coast of Libya ... Operation *Sophia* has been involved in rescuing over 44,900 lives', but **no details on disembarkation** are furnished. The reports are equally unforthcoming on the role of EUROSUR data and EUNAVFORMED/Frontex communications in enabling LYCG's interdictions, which affected 9,225 people in 2019, 12,000 in 2020, and 3,600 in the first seven weeks of 2021, including women and children forcibly returned to inhuman detention in Libya in the midst of the pandemic.<sup>870</sup> As related by the Commission in a March 2019 letter to Frontex, **'the increased performance of the Libyan Coastguard ... [is] a direct consequence of the support EU provided** both in terms of training and equipment'. The letter adds that '[m]any of the recent **sightings of migrants** in the Libyan SRR have been provided by aerial assets of EUNAVFORMED and were **notified directly to the Libyan [authorities]**'.<sup>871</sup> There seems to be **a lack of concern that this procedure facilitates refoulement**, impedes access to asylum and exposes migrants to abuse by the LYCG, despite Libya being considered 'unsafe' for both disembarkation and international protection purposes.<sup>872</sup>

<sup>865</sup> 'EU-Libya relations', EEAS Factsheet, [2.3.2021](#).

<sup>866</sup> 'EU-Libya relations', EEAS Factsheet, [25.9.2019](#).

<sup>867</sup> UNHCR, Operational Portal: Libya, [1.3.2021](#); and Global Detention Project, Libya, [14.1.2021](#).

<sup>868</sup> 'EU-Libya relations', EEAS Factsheet, [2.3.2021](#).

<sup>869</sup> 'EU Commission's Libya stance undercut by internal report', *EU Observer*, [21.10.2020](#).

<sup>870</sup> CoE Commissioner for Human Rights, 'A Distress Call for Human Rights' (n 559), p. 13; and 'Eluding Libya's coast guard: Fewer migrants make it to Europe on central Mediterranean', *Info Migrants*, [25.2.2021](#).

<sup>871</sup> Letter of Director-General for Migration and Home Affairs to Frontex Executive Director, Ref. Ares(2019)1755075, [18.3.2019](#) (italics added).

<sup>872</sup> UNHCR, Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation following Rescue at Sea, ([September 2020](#)).

Recently, even the Maltese authorities have recognised Libya to be ‘ill-equipped to deal with shipwrecks’.<sup>873</sup> **Several international actors**, including the UN Secretary-General, **have denounced the LYCG’s violent behaviour**,<sup>874</sup> like firing live shots,<sup>875</sup> intimidating NGO rescue boats,<sup>876</sup> and using lethal force against migrants.<sup>877</sup> These findings have been confirmed by the Panel of Experts on Libya, established by the UN Security Council, which exposed ‘the coastguard [as being] **directly involved in ... grave human rights violations**’, including ‘executions, torture and deprivation of food, water and access to sanitation ... [as well as] enslavement of sub-Saharan migrants’.<sup>878</sup> The **ICC prosecutor has echoed these concerns**, denouncing the ‘serious and widespread crimes against migrants attempting to transit through Libya’. Labelling Libya as a ‘marketplace for the trafficking of human beings’, she states that ‘thousands of vulnerable migrants ... are being held in detention centres ... in inhumane conditions’.<sup>879</sup> In these centres, both official and unofficial, they are exposed to ‘unlawful killings ... kidnappings ... torture ... rape, and other ill-treatment’.<sup>880</sup>

**The situation has worsened since the outbreak of Covid-19.** MSF reported in June 2020 that migrants detained in Libya are held in awful, overcrowded conditions, with poor access to food, water and hygiene, and with no real possibility for physical distancing. Meanwhile, the presence of humanitarian organisations in the centres has been reduced due to Covid-19 restrictions.<sup>881</sup> Amnesty International has reported that **migrants have been blamed for the spread of the virus, exacerbating abuses**.<sup>882</sup> A Nigerian national was burnt to death in October 2020,<sup>883</sup> illustrating the ‘shocking cycle of violence’ facing migrants in the country,<sup>884</sup> and prompting the **UN Human Rights Office to call for a moratorium on all returns to Libya**.<sup>885</sup> IOM has also urged the EU and its MS to **end pushbacks** and for an ‘urgent change in approach to the situation in Libya and the Central Mediterranean’.<sup>886</sup> All this makes **the EU’s continued funding of the LYCG and related infrastructure through the EUTFA highly problematic**.<sup>887</sup> A **complaint** to the Court of Auditors concerning the mismanagement of EU funds is, in fact, **pending**.<sup>888</sup>

<sup>873</sup> ‘Libya ill-equipped to deal with shipwrecks – Evarist Bartolo’, *Times of Malta*, [25.4.2021](#).

<sup>874</sup> Report of the Secretary-General on the United Nations Support Mission in Libya, S/2018/140, 12.2.2018, para. 49.

<sup>875</sup> ‘Migranti. Guardia costiera libica spara contro motovedetta italiana’, *Avvenire*, [26.5.2017](#).

<sup>876</sup> ‘Migrants evade Libyan coast guard to reach Europe’, *Associated Press*, [25.2.2021](#).

<sup>877</sup> ‘Video Shows Libyan Coastguard Whipping Rescued Migrants’, *The Times*, [14.2.2017](#).

<sup>878</sup> Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), S/2017/466, [1.6.2017](#), para. 104 (italics added).

<sup>879</sup> ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), [9.5.2017](#), paras 25–27.

<sup>880</sup> ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), [8.11.2017](#), paras 31 and 41.

<sup>881</sup> MSF, ‘Conflict and COVID-19 adds up to a crisis within a crisis in Libya’, [20.6.2020](#).

<sup>882</sup> AI, ‘Libya: New evidence shows refugees and migrants trapped in horrific cycle of abuses’, [24.9.2020](#).

<sup>883</sup> ‘Officials: Nigerian migrant burned alive in Libya’s Tripoli’, *Associated Press*, [7.10.2020](#).

<sup>884</sup> OHCHR, ‘“Shocking” cycle of violence for migrants departing Libya to seek safety in Europe’, [2.10.2020](#).

<sup>885</sup> OHCHR, ‘Press briefing note on Libya’, [28.4.2020](#).

<sup>886</sup> ‘IOM Calls for End to Pushbacks and Violence Against Migrants at EU External Borders’, [9.2.2021](#). See also ‘Several Europe-bound migrants drown off Libya coast: UN’, *Al Jazeera*, [2.5.2021](#).

<sup>887</sup> Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 16.10.2019, p. 9.

<sup>888</sup> Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa’s ‘Support to Integrated Border and Migration Management in Libya’ (IBM) Programme Submitted by Global Legal Action Network (GLAN), Association for Juridical Studies on Immigration (ASGI), and Italian Recreational and Cultural Association (ARCI), [27.4.2020](#).

## 6.5 Cooperation with Niger

**Niger**, in particular the northern city of Agadez, constitutes the **primary route for Sub-Saharan migrants heading to Europe**, via Libya and across the Mediterranean. The country is the world's poorest and **heavily reliant on external aid**.<sup>889</sup> Its **security situation** has been **unstable** since the 1990s, aggravated by a series of armed uprisings in the 2000s, the emergence of Boko Haram, and ongoing conflict in Mali, northern Cameroon, north-eastern Nigeria, and parts of Burkina Faso.<sup>890</sup> Niger is among the six countries in the Sahel considered to be in urgent need of humanitarian assistance according to the UN. 'Unparalleled' insecurity and growing hunger affect 29 million people in the region, including 5.3 million forcibly displaced.<sup>891</sup> Militarisation, desertification, under-development, and the lack of alternative livelihoods have bred trafficking in arms, drugs, and human beings. The Nigerien central government has no control over several parts of the country, which are in the hands of militias, trafficking rings, and terrorist cells.<sup>892</sup> Out of a total population of 22 million, there are 291,000 Nigerien IDPs displaced by terrorist violence and 58,000 Malian refugees accommodated in UNHCR-run camps across the country.<sup>893</sup> Recent violent spouts in Nigeria's Maradi region have driven 77,000 Nigerians to take refuge in southern Niger, which currently hosts 100,000 displaced persons.<sup>894</sup> Attacks in western Niger in March 2021 have killed 137 people, many of whom already displaced after having fled earlier violence.<sup>895</sup> Although the country has a **formal asylum system**, as a party to the 1951 Refugee Convention,<sup>896</sup> it remains very difficult to find 'detailed information related to the treatment of migrants and asylum seekers in the country ... [and] little effort appears to have been made to systematically track what happens to apprehended migrants in the country'.<sup>897</sup> The US Department of State reports widespread abuse of migrants, refugees, and stateless persons, including by immigration and security service members who routinely '**demand bribes from migrants**'. Refugees and IDPs in some parts of the country are, in addition, '**vulnerable to armed attacks**'. And, in the Diffa Region, in particular, 'Boko Haram and ISIS-WA continued unlawful recruitment of child soldiers among refugees'.<sup>898</sup> As a result, Niger **cannot generally be considered a safe country** in accordance with the EU STC criteria.

Since 2015, Niger has, nonetheless, become **the EU's main strategic partner** in the fight against irregular migration through West Africa.<sup>899</sup> This has led the EU to shift its engagement in the region to prioritise short-term security-sector reform and improved border management (via **EUCAP Sahel Niger**, **Frontex**, and the **EUTFA**) over traditional development assistance and long-term State reforms.<sup>900</sup> Niger is among the main EUTFA beneficiaries, receiving a total of €279m for migration

<sup>889</sup> UNDP, Human Development Report 2020: Niger ([undated](#)).

<sup>890</sup> See, e.g., 'Dozens of civilians killed in Niger gun attacks', *Al Jazeera*, [3.1.2021](#). See also 'Dozens killed in eastern Burkina Faso attack', *Al Jazeera*, [4.5.2021](#).

<sup>891</sup> 'Record 29 million in the Sahel in need of humanitarian assistance', *Al Jazeera*, [27.4.2021](#).

<sup>892</sup> Tinti and Westcott, 'The Niger-Libya Corridor. Smugglers' Perspectives', ISS Papers No. 299, Institute for Security Studies, ([November 2016](#)).

<sup>893</sup> International Rescue Committee, 'Country Profile: Niger', ([June 2020](#)); UNHCR, 'Refugee Situations: Niger', [31.5.2020](#).

<sup>894</sup> UNHCR, 'Surging violence in Nigeria drives displacement to Niger', [2.3.2021](#).

<sup>895</sup> UNHCR, 'UNHCR outraged by deadly attack against displaced population in Western Niger', [23.3.2021](#).

<sup>896</sup> UNHCR, 'Refugees and asylum seekers in Agadez' ([August 2020](#)), p. 3.

<sup>897</sup> Global Detention Project, Country Report: Immigration Detention in Niger, ([March 2019](#)), p. 10.

<sup>898</sup> US Department of State, Niger 2020 Human Rights Report, ([2021](#)), pp. 14-15.

<sup>899</sup> First Progress Report on the Partnership Framework with third countries, 18.10.2016, COM(2016) 700 final.

<sup>900</sup> Bøås, 'EU migration management in the Sahel: unintended consequences on the ground in Niger?' (2021) 42(1) Third World Quarterly 52, 57.

management and border security projects<sup>901</sup> — especially via the **Better Migration Management Programme**, which aims to strengthen ‘national authorities’ capacities to fight against smugglers and traffickers and better control their borders’.<sup>902</sup>

**EUCAP Sahel** is an **EU civil mission operating under the Common Security and Defence Policy** (CSDP) launched in 2012 to support the Nigerien security actors in fighting terrorism and organised crime.<sup>903</sup> It is part of the wider EU Strategy for Security and Development in the Sahel.<sup>904</sup> In 2016, the mission established a permanent office in Agadez<sup>905</sup> and amended its mandate to focus on border and migration management.<sup>906</sup> Its **main task** is now to provide **training, advice and equipment to the Nigerien authorities, to enhance their counter-migrant smuggling capabilities**.<sup>907</sup> Over 13,000 officials have been trained under this mandate, contributing to an increase in seizures by Nigerien authorities.<sup>908</sup>

Cooperation has also been strengthened through other **MPF** initiatives, within which Niger is a **priority country**. The focus has been on designing a **National Migration Strategy**, including a comprehensive Action Plan and **anti-migrant smuggling legislation** adopted in 2015.<sup>909</sup> A Niamey-based **Joint Investigation Team** (JIT), set up in March 2017 to facilitate implementation of a trilateral protocol between **Niger, France and Spain**, has been allocated €11.5m from the EU budget for projects undertaken by the police forces of the three countries.<sup>910</sup>

The JIT is one of **many cooperation mechanisms** deployed in Niger, where other EU missions and agencies also participate, including Europol, EUCAP Mali, and Frontex,<sup>911</sup> including via the EUBAM operation in Libya. In March 2017, **Frontex’s** Executive Director visited Niger to discuss border security cooperation and the deployment of the Agency’s first **liaison officer**.<sup>912</sup> In September 2017, it launched the **AFIC project** to provide technical assistance aimed at developing a joint intelligence analysis of migrant smuggling and other border security threats.<sup>913</sup>

**Regional efforts have complemented bilateral engagement with Niger.** A Joint Declaration of August 2017, signed in Paris by the EU, Germany, Italy, France, Spain, Niger, Chad and the Libyan GNA (the 2017 Paris Declaration), commits the parties to enhance cooperation ‘in conformity with international law’ to counter irregular migration. The key **focus** is on the **fight against smugglers**, ‘to

<sup>901</sup> European Commission, EUTFA: Niger ([undated](#)). This encompasses 3 migration management projects (€47m); 2 governance projects (€101.5m), one on the JIT and another supporting the reinforcement of the justice, security and border control system; and 4 resilience projects (€37.6m), two regarding displaced populations, and another two complementing actions on migration management.

<sup>902</sup> European Commission, EUTFA: A two-fold approach for the Sahel and Lake Chad window ([undated](#)).

<sup>903</sup> Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger)

<sup>904</sup> EEAS, Strategy for Security and Development in the Sahel, ([March 2011](#)) .

<sup>905</sup> EEAS, EUCAP Sahel Niger: Partnership for Security in the Sahel ([undated](#)).

<sup>906</sup> EUCAP Sahel Niger: mission extended, budget agreed, mandate amended, Press Release, [18.7.2020](#).

<sup>907</sup> EEAS, The EUCAP Sahel Niger civilian mission – Update: [April 2016](#).

<sup>908</sup> EUCAP Sahel Niger – Partnership for Security in the Sahel, [Factsheet 2019](#).

<sup>909</sup> EEAS, Niger Action and Progress under the Migration Partnership Framework [June 2016 – June 2017](#).

<sup>910</sup> Création d’une Équipe Conjointe d’Investigation (ECI) pour la lutte contre les réseaux criminels liés à l’immigration irrégulière, la traite des êtres humains et le trafic des migrants, [15.2.2017](#).

<sup>911</sup> Document d’action fonds fiduciaire d’urgence de l’UE en faveur de la stabilité et de la lutte contre les causes profondes de la migration irrégulière et du phénomène des personnes déplacées en Afrique, [undated](#), p. 13 ff.

<sup>912</sup> ‘Frontex Executive Director on official visit to Niger’, *Frontex News*, [1.3.2017](#).

<sup>913</sup> ‘Frontex launches capacity building project for Africa during AFIC meeting’, *Frontex News*, [29.9.17](#).

limit irregular migration to Europe and protect migrants against human rights violations'.<sup>914</sup> A strategy combining direct action against smuggling, including the reinforcement of border controls in Niger and Chad,<sup>915</sup> with the 'prevention of departures' and the 'return of irregular migrants to their countries of origin', is proposed. However, there is no reference to: freedom of movement under the Economic Community of West African States (ECOWAS) rules; the right to leave any country; the right to seek asylum; or the principle of *non-refoulement*.<sup>916</sup> EU countries commit to finance the relevant actions, including work through the EUCAP Sahel Niger, support to assisted returns and reintegration programmes, and the resettlement of refugees evacuated from Libya.<sup>917</sup> An '**operational cooperation team**' (OCT) has been established **for the joint implementation of the actions foreseen**, working in consultation with the European Commission and the CFSP High Representative.<sup>918</sup>

A **follow-up Declaration**, adopted after a meeting of the OCT in Niamey in March 2018, **opens up the cooperation framework to other West African countries**, including the Ivory Coast, Burkina Faso, Guinea, Senegal, and Mauritania, as well as the UN, the AU, the G5 Sahel and the Community of Sahel-Saharan States.<sup>919</sup> The Declaration contains an **Action Plan** (the 2018 Niamey Action Plan) foreseeing: (1) reinforcement of national legislation for the fight against irregular migration; (2) enhancement of operational capacities at national level through the creation of JTs, rapid-action teams, the conclusion of WAs with Frontex, and the improvement of information exchange networks; (3) enhancement of the national defence and security forces capabilities; (4) development of judicial cooperation schemes; (5) improvement of border controls; (6) investment in sustainable development; and (7) protection of migrants and trafficking victims through the return/reintegration and evacuation programmes coordinated by the TTF in Libya. A dedicated mechanism is tasked with overseeing implementation.

Regarding international protection, one such TTF programme is the **Emergency Transfer Mechanism (ETM) to evacuate refugees detained in Libya to Niger** for onwards resettlement. The ETM was established in November 2017, via a MoU between UNHCR and the Nigerien government, and extended in December 2019 for a further two years.<sup>920</sup> €45m has been devoted to fund this initiative via the EUTFA. So far 3,361 refugees have been evacuated from Libya,<sup>921</sup> of an estimated 800,000 refugees and migrants requiring assistance.<sup>922</sup> On arrival in Niger, evacuees undergo a refugee status determination procedure. A resettlement file is completed by UNHCR and submitted to potential host countries, which might agree to resettle evacuees or conduct a resettlement mission for further screening *in situ*. Meanwhile, evacuees are either hosted in a closed centre in Hamdallaye or, if particularly vulnerable, at guesthouses in Niamey. Amongst the EU MS, Belgium, Finland, France, Germany, Italy, Luxembourg, Malta, The Netherlands and Sweden have resettled 2,454 ETM and non-ETM refugees from Niger, alongside Canada, Norway, Switzerland, the UK and the US. However, all resettlement flights were suspended during March-August 2020 due to Covid-19.<sup>923</sup>

<sup>914</sup> Rencontre à Paris sur la migration: Déclaration conjointe 'Relever le défi de la migration et de l'asile', [28.8.2017](#), para. 1 (own translation).

<sup>915</sup> Ibid., para. 2.2(1).

<sup>916</sup> Ibid., para. 2.1(2) (own translation).

<sup>917</sup> Ibid., para. 2.2 and Annex.

<sup>918</sup> Ibid., para. 2.5.

<sup>919</sup> Rencontre à Niamey sur la migration - Déclaration conjointe suivant la réunion de coordination de la lutte contre le trafic illicite de migrants et la traite des êtres humains, [16.3.2018](#).

<sup>920</sup> UNHCR, 'Emergency Transit Mechanism – Factsheet [June 2020](#)'.

<sup>921</sup> UNHCR, 'Emergency Transit Mechanism – Factsheet [January 2021](#)', p. 2.

<sup>922</sup> Global Detention Project, Libya, [14.1.2021](#).

<sup>923</sup> UNHCR, 'Emergency Transit Mechanism – Factsheet January 2021', p. 2



## Human Rights Implications

**Implementation of the JIT protocol** has been reported in a Commission document, detailing the number of operations conducted in 2018 (82 in total).<sup>924</sup> It assesses the activities positively overall, considering them to have **contributed to an 80% reduction in migration flows**, but **does not mention human rights** considerations regarding *non-refoulement*, access to asylum, or the right to leave.<sup>925</sup> Its view is that 'since human trafficking and migrant smuggling constitute grave violations of human rights, the project has a positive impact in this regard',<sup>926</sup> as if the fight against smugglers and traffickers may be considered a human rights protection measure in and of itself. The Commission states that JIT activities are undertaken 'according to the relevant international human rights standards',<sup>927</sup> but does not substantiate this claim. The report also discloses **synergies between the JIT and other elements of the EUCAP Sahel Niger**, which assist the detection and interception of irregular movements, sometimes involving aerial means, again without contemplating the human rights implications.<sup>928</sup>

EUCAP Sahel Niger's latest factsheet states that '[t]he promotion of human rights is imperative to the mission's objectives' and explains that '[t]o better integrate them into the security sector, the mission regularly trains key actors on ... human rights'. However, the only measure specified in this regard is that 3,000 copies of the Nigerien penal code have been provided to the Ministry of Justice.<sup>929</sup> Otherwise, there have been **no reports or evaluations assessing the 'development of a ... human rights-based approach** among the various Nigerien security actors'<sup>930</sup>, either in relation to the JIT protocol, the 2017 Paris Declaration or the 2018 Niamey Action Plan. Both of the latter documents refer to the need to protect migrants' rights, in compliance with the 1951 Refugee Convention and to assist those in danger of losing their lives in the desert.<sup>931</sup> The 2019 general report on the Sahel regional action plan celebrates cooperation with Niger as 'particularly fruitful', resulting in 'a significant decrease in departures from Libya since mid-July 2017'. It contains general statements on human rights and a list of projects financed along with the amounts involved, but **no analysis of compliance** with the relevant standards.<sup>932</sup>

By contrast, independent reports on the **impact of the 2015 legislative reform** are critical of the EU's approach.<sup>933</sup> The new law criminalises all forms of irregular migration, rendering all forms of facilitation of international border crossing without legal authorisation punishable by hefty fines, including transport *within* Niger.<sup>934</sup> This is problematic, considering that many of the targeted persons are

<sup>924</sup> Document d'action fonds fiduciaire d'urgence de l'UE en faveur de la stabilité et de la lutte contre les causes profondes de la migration irrégulière et du phénomène des personnes déplacées en Afrique ([undated](#)).

<sup>925</sup> Ibid., p. 6.

<sup>926</sup> Ibid., p. 17 (own translation).

<sup>927</sup> Ibid. (own translation).

<sup>928</sup> Ibid., p. 12.

<sup>929</sup> EUCAP Sahel Niger Factsheet [2019](#), p. 2.

<sup>930</sup> EUCAP Sahel Niger Decision, Art 2.

<sup>931</sup> 2017 Paris Declaration, paras 1 and 2.2(1); and Niamey Action Plan, para. 2.

<sup>932</sup> Annual Report Sahel Regional Action Plan 2017/2018, SWD(2019) 9 final, 24.1.2019, pp. 1, 17, and addendum II.

<sup>933</sup> Castillejo, 'The Influence of EU Migration Policy on Regional Free Movement in the IGAD and ECOWAS Regions', DIE Discussion Paper 11/2019 ([German Development Institute, 2019](#)).

<sup>934</sup> [Loi No 2015-36 du 26 mai 2015 relative au trafic illicite de migrants](#).



ECOWAS nationals, who are entitled to travel within the territory of States Party under the ECOWAS Free Movement Protocol.<sup>935</sup> This raises **issues concerning the right to freedom of movement** within a country, the limiting of which requires compliance with the principles of legality, proportionality, and non-discrimination.<sup>936</sup> It may also interfere with the **right to asylum** and the **right to leave any country**, including when they intersect with the principle of **non-refoulement**, which does not allow for any restrictions or derogations.<sup>937</sup>

It appears that **the 2015 law was adopted quickly and without much debate**, which suggests that Niger was acting **under pressure from the EU and its donors**.<sup>938</sup> The extreme poverty of many of its citizens makes it particularly reliant on external funding, rendering it willing to accept foreign demands in exchange for financial support.<sup>939</sup> Satisfying the EU's requests has **created significant political and practical challenges**: The **EU-sponsored anti-smuggling strategy overlooks the functioning of the country and the importance of the migration industry** to the region.<sup>940</sup> The lack of a distinction between mobility within and outside the ECOWAS, not only exposes West-Africans, who typically do not possess identity documents, to criminalisation and the dispossession of their rights of entry to and circulation within Niger,<sup>941</sup> but it also **jeopardises Niger's relations with ECOWAS partners**, leading to a reduction of trust in the government,<sup>942</sup> and **deprives** the country of the **positive economic effects linked to migration**.<sup>943</sup> From an economic perspective, migration aids development. The 2015 law has, however, resulted in the unemployment of over 10,000 operators, putting them at risk of joining smuggling networks.<sup>944</sup>

Although the EU has praised the decrease in outgoing flows,<sup>945</sup> observers, including UNHCR,<sup>946</sup> deplore that the broad **criminalisation of mobility has simply pushed irregular routes underground**, increasing smuggling prices and the dangers for migrants.<sup>947</sup> Nigerien reforms have been regarded as **'born out of European policies'** and contributing to 'migrants tak[ing] enormous risks',<sup>948</sup> leading to a substantial **increase in disappearances and loss of life**.<sup>949</sup>

**The implementation of EU migration preferences** also threatens the delicate political balance between Niger's central government and local authorities, which **may spark internal conflicts**.<sup>950</sup>

<sup>935</sup> Protocol relating to Free Movement of Persons, Residence and Establishment, [ECOWAS/979.A/P.1/5/79](#).

<sup>936</sup> Protocol 4 ECHR, Art 2(1); ICCPR, Art 12(1); Protocol 4 ECHR, Art 2(3); and ICCPR, Art 12(3).

<sup>937</sup> Moreno-Lax, *Assessing Asylum in Europe* (n 120) Ch 9.

<sup>938</sup> Bøås, 'EU migration management in the Sahel' (n 900), p. 62.

<sup>939</sup> Akkerman, 'Expanding the Fortress' (n 723), p. 51.

<sup>940</sup> Abebe and Mbiyozo, 'New Pact's focus on migrant returns threatens Africa-EU partnership', ASILE Forum, [11.12.2020](#).

<sup>941</sup> Spijkerboer, 'The New Borders of Empire. European migration policy and domestic passenger transport in Niger' in Minderhoud, Mantu and Zwaan (eds), *Caught in Between Borders: Citizens, migrants and humans* (Wolf, 2019) 49.

<sup>942</sup> Oxfam, 'The EU Trust Fund for Africa - Trapped between aid policy and migration politic' ([January 2020](#)), p. 11.

<sup>943</sup> Uzelac, 'Incoherent Agendas. Do European Union migration policies threaten regional integration in West Africa?', Clingendael Policy Brief ([June 2019](#)).

<sup>944</sup> Hall, 'Selling Sand in the desert: The Economic impact of Migration in Agadez', IOM Niger ([January 2017](#)).

<sup>945</sup> First Progress Report on the Partnership Framework with third countries, 18.10.2016, COM(2016) 700 final.

<sup>946</sup> Deadly trade through Niger snares refugees and migrants, *UNHCR News*, [4.8.2017](#).

<sup>947</sup> 'The dangerous link between migration, development and security for the externalisation of borders in Africa. Case studies on Sudan, Niger and Tunisia', ARCI ([July 2018](#)), pp. 12-15.

<sup>948</sup> 'EU Strategy Stems Migrant Flow from Niger, But at What Cost?', *IRIN News*, [2.2.2017](#). See also 'Why More Migrants Are Dying in the Sahara', *New York Times*, [22.8.2017](#).

<sup>949</sup> Tubiana, Warin, Saeneen, 'Multilateral Damage: The impact of EU migration policies on central Saharan routes', RCU Report, Clingendael ([September 2018](#)), p. 25.

<sup>950</sup> Bøås 'EU migration management in the Sahel' (n 900), p. 64.

Experts suggest that now ‘migrant management is chiefly security-based and repressive’.<sup>951</sup> The overall perception is that EU strategy consists of **shifting migration control’s responsibility to Niger** through funding and capacity building, rather than of fostering peace and sustainable development,<sup>952</sup> which **risks generating local friction**.<sup>953</sup> The Tuareg and Tubu communities in particular, who had been encouraged by the government, after the peace talks in the 1990s-2000s, to transport migrants to Libya for a living rather than getting involved in drug smuggling and other criminal activities, and whose main source of income was migration, have not reacted well to what they call the ‘diktat of Europe’.<sup>954</sup> The predominantly securitarian slant of **EU actions in Niger shows a lack of sensitivity and understanding of migration dynamics in the country and the wider region**. This not only fails to align with the basic objectives of EU development assistance, but also works against the long-term EU interest of ensuring stability in the Sahel.<sup>955</sup>

**As for refugees**, although the 2017 Paris Declaration states the fight against smuggling needs to ‘go hand in hand’ with opening legal pathways to asylum (para. 2.2(3)), the **ETM scheme’s implementation has been unsatisfactory**. The main problem has been the slow ‘turnover’ of refugees, due to the low number of resettlement pledges by EU MS. In the absence of speedy acceptance of potential beneficiaries, new arrivals to the ETM are put on hold, so as to not exceed capacity, which blocks access to safety.<sup>956</sup> In March 2018, the Nigerien government suspended the scheme precisely ‘because of the slow pace of onward resettlements out of Niger’<sup>957</sup> until the backlog is cleared.<sup>958</sup> This **slowness**, combined with the programme’s **limited scale compared to the level of need**, has made the scheme incapable of sparing refugees the dangers they face in Libya, as exemplified by the Tajoura detention centre’s bombardment in July 2019, without detainees having been evacuated.<sup>959</sup> The situation had been denounced by UNHCR months prior to the attack,<sup>960</sup> in response to which it urged the EU to change its approach, making human rights, rather than the containment of irregular migration, the ‘core element’ of its engagement.<sup>961</sup>

Both Libya and Niger constitute countries of destination for some migrant workers, who fill gaps in the Libyan and Nigerien labour markets, despite the many challenges each country is facing.<sup>962</sup> However, there is no systematic data on how many TCNs may desire to travel to Europe and how many attempt

<sup>951</sup> Danda, ‘The Security–Migration–Development Nexus in the Sahel: A view from Niger’, in Venturi (ed.), *The Security–Migration–Development Nexus Revised: A Perspective from the Sahel*, Foundation for European Progressive Studies and Istituto Affari Internazionali ([March 2017](#)) 35, p. 48.

<sup>952</sup> *Ibid.*, p. 54.

<sup>953</sup> Pichon, *The external dimension of the new pact on migration and asylum - A focus on prevention and readmission*, PE 690.535, (European Parliament, 2021), p. 4.

<sup>954</sup> ‘Europe’s “Migrant Hunters” - Letter From Agadez’, *Foreign Affairs*, [31.8.2017](#).

<sup>955</sup> As a high-ranked Nigerien official explained, ‘the minister for foreign affairs has received complaints from his colleagues in neighbouring countries, regarding the push-backs of their own citizens’, in De Guerry and Stocchiero, *Partnership or Conditionality? – Monitoring the Migration Compacts and EU Trust Fund for Africa* ([Concord Europe, 2018](#)), p. 26.

<sup>956</sup> For a detailed analysis, see ASGI, ‘The “Emergency Transit Mechanism” program and the resettlement from the Niger. Legal analysis, current and future concerns’ ([November 2018](#)).

<sup>957</sup> Annual Report Sahel Regional Action Plan 2017/2018, SWD(2019) 9 final, 24.1.2019, p. 12.

<sup>958</sup> Progress report on the Implementation of the EU Agenda on Migration, COM(2019) 481 final, 16.10.2019, pp. 9-10.

<sup>959</sup> ‘Libya: Air raid kills dozens at Tripoli migrant detention centre’, *Al Jazeera*, [3.7.2019](#).

<sup>960</sup> UNHCR, ‘Amid hostilities in Libya, 146 refugees evacuated to Italy’, [29.4.2019](#).

<sup>961</sup> UNHCR, ‘UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change’, Press Release, [11.7.2019](#); UNHCR, ‘UNHCR, IOM condemn attack on Tajoura, call for an immediate investigation of those responsible’, Press Release, [3.7.2019](#).

<sup>962</sup> Borgnäs, Cottone and Teppert, ‘Labour migration dynamics in Libya’, in *Migration in West and North Africa and across the Mediterranean: Trends, Risks, Development and Governance* (IOM, 2020) 298; and IOM, Niger — Migration Trends To, From and Within Niger ([2016—2019](#)).

the Mediterranean crossing or take alternative routes. **Both countries are simultaneously countries of origin, transit, and destination**, whose priorities and local dynamics the EU should take into account. It would be best for the **EU not to attempt to artificially alter their status into countries of containment** through funding and targeted support. The **forced sedentarisation** of mobile populations along the Niger-Libya route against the wishes of those concerned, not only ignores practical realities, but also **fuels disregard for basic human rights**.<sup>963</sup>

## 6.6 Financial Tools: The Facility for Refugees in Turkey (FRT) and the EU Emergency Trust Fund for Africa (EUTF)

The **most important means through which the EU sustains its cooperation with third countries** are funding mechanisms. The EU cooperates with Turkey, on the one hand, and Libya and Niger on the other, through two **financial tools**: the **FRT** and the **EUTF**.

The **FRT** is a coordination mechanism created in 2015 by a Commission Decision<sup>964</sup> to **support the implementation of the EU-Turkey Joint Action Plan**.<sup>965</sup> The Decision is **based on Articles 210(2) and 214(6) TFEU**, allowing the Commission to take 'useful measures to promote coordination' between the actions of the EU and its MS in the field of development cooperation and humanitarian aid respectively. Besides the legally binding Commission Decision, the mechanism's function is further specified in the soft-law Common Understanding between the Commission and the MS, which establishes a governance and conditionality framework for the FRT, linking the disbursement of funds to strict compliance by Turkey with undertakings reflected in the EU-Turkey Joint Action Plan and an EU-Turkey Statement of 29 November 2015.<sup>966</sup> The FRT **aggregates resources from the EU budget (€1bn) and MS contributions (€2bn)**, as specified in the 2016 amending Decision (Recital 13).<sup>967</sup> An innovation of the mechanism is that MS contributions are directly included in the budget, rather than being placed in a separate bank account.<sup>968</sup> **EU resources mainly come from** budgetary instruments for financing EU external action in the field of development (59%) and humanitarian assistance (41%)<sup>969</sup>: the **European Neighbourhood Instrument (ENI)**,<sup>970</sup> the **Development Cooperation Instrument (DCI)**,<sup>971</sup> the **Instrument for Pre-Accession Assistance (IPA II)**,<sup>972</sup> and the **Instrument contributing to Stability and Peace (IcSP)**.<sup>973</sup> They are all based on Article 209(1) TFEU, allowing the European Parliament and the Council (as co-legislators) to adopt measures aimed at implementing EU development cooperation policy (Article 208 TFEU), and Article 212(2) TFEU, allowing them to adopt

<sup>963</sup> Landau, 'A Chronotope of Containment Development' (n 743).

<sup>964</sup> Commission Decision on the coordination of the actions of the Union and of the Member States through a coordination mechanism, C(2015) 9500 final, 24.11.2015.

<sup>965</sup> EU-Turkey Joint Action Plan, [15.10.2015](#).

<sup>966</sup> Common Understanding establishing a governance and conditionality framework for the Refugee Facility for Turkey, Council doc. 5845/16, 5.2.2016 (amended by Council doc. 11329/18, 20.7.2018), para. 24.

<sup>967</sup> Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24.11.2015, C(2016) 855 final.

<sup>968</sup> Carrera et al., *Oversight and Management of the EU Trust Funds - Democratic Accountability Challenges and Promising Practices*, PE 603.821 (European Parliament, 2018), p. 35.

<sup>969</sup> Fourth Annual Report on the Facility for Refugees in Turkey, COM(2020) 162 final, 30.4.2020, p. 8.

<sup>970</sup> Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, [2014] OJ L 77/27.

<sup>971</sup> Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-20, [2014] OJ L 77/44.

<sup>972</sup> Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II), [2014] OJ L 77/11.

<sup>973</sup> Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, [2014] OJ L 77/1.

measures to carry out economic, financial and technical cooperation (including assistance) with third countries that are not considered developing countries (Article 212(1) TFEU). Regulation 1257/96 concerning humanitarian aid is another funding source.<sup>974</sup> The Decision specifies that the FRT's actions should comply with the requirements of its funding instruments (Article 6) and fully respect humanitarian principles (Recital 11). Therefore, **FRT funded measures must comply with the principles underpinning EU cooperation with third countries and humanitarian aid** (Title III TFEU), **as well as the general provisions on EU external action** (Title I TFEU).

The **EUTFA** was set up by a Commission Decision in October 2015,<sup>975</sup> and launched during the **Valletta Summit on Migration** in November 2015, where EU and African leaders committed to 'respond decisively and together manage migration flows in all their aspects', by allocating resources to pursue concrete actions 'using all existing instruments, along with the newly set up EUTFA'.<sup>976</sup> It was created under Article 35 of the Financial Regulation,<sup>977</sup> applicable to the European Development Fund (EDF) Regulation,<sup>978</sup> based on Articles 234 and 235 of the Financial Regulation of the EU Budget,<sup>979</sup> which defines the condition for creating trust funds (TFs) for external action through an agreement with donors, in the form of a Constitutive Agreement. EU TFs **should pursue emergency and post-emergency actions necessary to react to a crisis**, or thematic actions, and their establishment should (1) bring added value to the EU intervention, in line with the principle of subsidiarity; (2) enhance the political visibility of the EU and create managerial advantages; (3) provide additionality, meaning that they should not duplicate existing funding instruments but contain innovative elements; and (4) comply with the objectives of the financial instruments they derive from.

**The EUTFA is an emergency TF** created to address the crisis in the Sahel, Lake Chad, and the North of Africa, by fostering stability and **contributing to better migration management**; addressing the root causes of destabilisation, forced displacement and irregular migration; promoting resilience, economic and equal opportunities, security and development; and addressing human rights abuses (Article 2 Constitutive Agreement<sup>980</sup>). Its strategic objectives are: (1) greater economic and employment opportunities (21% of funding); (2) strengthening resilience of communities (24%); (3) improved migration management (31%); and (4) improved governance and conflict prevention (21%). Unlike the FRT, the EUTFA's **funds mainly come from extra-budget sources**, namely the **European Development Fund** (EDF) (€3,149.3m), an instrument reliant on discretionary contributions from voluntary donors (MS, Norway and Switzerland) (€590.5m). The EU does contribute with **resources from budgetary instruments** (€956.5m) however: the DCI, the ENI, the Asylum, Migration and

<sup>974</sup> Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid, [1996] OJ L 163/1.

<sup>975</sup> Commission Decision of 20.10.2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, C(2015) 7293 final.

<sup>976</sup> Valletta Summit, 'Political Declaration', [11-12.11.2015](#).

<sup>977</sup> Note that the Decision refers to Art 42 of the previous Financial Regulation: Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund, [2015] OJ L 58/17.

<sup>978</sup> Council Regulation (EU) 2018/1877 of 26 November 2018 on the financial regulation applicable to the 11th European Development Fund, and repealing Regulation (EU) 2015/323, [2018] OJ L 307/1.

<sup>979</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, [2018] OJ L 193/1.

<sup>980</sup> Agreement Establishing the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa, between the European Commission and 'the donors' (25 EU Member States, Norway and Switzerland), [12.11.2015](#).

Integration Fund (AMIF),<sup>981</sup> and resources from the Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO).<sup>982</sup> Apart from the AMIF, which is based on EU migration and asylum policy (Articles 78-79 TFEU), the remaining funding instruments pertain to the same policies as the FRT's, i.e. development cooperation, assistance to non-developing countries, and humanitarian aid.

The **legality of actions** funded through both the FRT and the EUTFa thus **depends upon their compliance with the objectives and requirements of the relevant policies**, as implemented in the regulations of the financial instruments from which they originate, **and with the general principles and objectives of the Union's external action**, as examined below.

### 6.6.1 The legal framework

FRT and EUTFa financed actions need to conform with the **principles underpinning EU cooperation with third countries and humanitarian aid** (Title III TFEU), with **the principles and objectives of EU external action**, especially human rights, and with any **specific requirements pertaining to the policies** to which they relate. These are scrutinised in turns.

#### *- Principles Underpinning EU Cooperation with Third countries and Humanitarian Aid (Title III TFEU)*

Article 208(1) TFEU specifies that the **primary objective of EU development cooperation** is the reduction and, in the long term, the **eradication of poverty**; this must inform any policy choice likely to have an impact on developing countries. It further recalls that EU development measures should comply with the principles and objectives of the EU's external action. Article 208(2) requires the Union and its MS to comply with the commitments, and take account of the objectives, they have approved in the context of the UN and other competent international organisations. In this regard, compliance with the **aid effectiveness principles** ('**Busan Principles**'), adopted at the 2011 Busan High-Level Forum on Aid Effectiveness, renewed at the 2016 High-Level Meeting in Nairobi, and adhered to by the EU and its MS, require examination.<sup>983</sup>

The Busan principles consist of: (i) **ownership of development priorities by developing countries**, so that '[c]ountries should define the development model that they want to implement'; (ii) focus on results, meaning that 'having a **sustainable impact** should be the driving force behind investments and efforts in development policy making'; (iii) **inclusive development partnerships**, acknowledging that 'development depends on the participation of all actors, and recognises the diversity and complementarity of their functions'; (iv) **transparency and mutual accountability**, requiring that 'development co-operation ... be transparent and accountable to all citizens'.<sup>984</sup> Accordingly, EU development cooperation actions should **ensure that development countries are not treated as silent recipients of development aid**. On the contrary, they should fully participate in the shaping of development assistance strategies. Development assistance should also be sustainable, and both donors and recipients should be held accountable for meeting reciprocal commitments. The European Parliament has specifically referred to the Busan Principles in its Report on the EUTFa, noting that the fund 'should contribute to development in countries of transit and origin of migrants ... in accordance

<sup>981</sup> Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, [2014] OJ L 150/168.

<sup>982</sup> [2019 Annual Report EU Emergency Trust Fund for Africa](#), p. 11.

<sup>983</sup> The New European Consensus on Development 'Our World, Our Dignity, Our Future', DG C 1, [2.6.2017](#), para 18.

<sup>984</sup> [The Busan Partnership for Effective Development Co-operation](#).



with the principles of aid effectiveness', and that local authorities, civil society organisations, and NGOs should be involved in its design and implementation.<sup>985</sup>

As for the FRT and EUTFAs' funding instruments, the **requirement to comply with the objective of reducing and eradicating poverty is recalled in Recital 11 of Regulation 236/2014**, laying down common rules and procedures for the implementation of the Union's instruments financing external action (ENI, DCI, IPA II, IcSP),<sup>986</sup> and **in the regulations establishing each financial instrument**.<sup>987</sup> The EDF, the legal basis and main funding source of the EUTFAs — not regulated by Regulation 236/2014 due to its extra-budgetary nature — specifies that the primary objective of cooperation should be the reduction and, in the long run, eradication of poverty (Article 2(2)(a)). Furthermore, Article 1(1) provides that its resources can be allocated solely for the attainment of the objectives, principles, and values reflected in the general provisions of the ACP-EU Partnership Agreement (Cotonou Agreement).<sup>988</sup>

The **Cotonou Agreement** is a partnership agreement between the EU and African, Caribbean and Pacific (ACP) countries, providing detailed rules on the role of receiving countries in development finance cooperation. Its fundamental aim is to create an **equal partnership between the EU and developing countries, which should be the owners of developing strategies**. In line with the Busan principles, implementing actions should emphasise the role of civil society and the private sector; fulfilment of mutual obligations and accountability; and continuous dialogue and differentiation depending on regional needs and priorities (Article 2). Although Article 13 addresses migration, it does so by presenting the objective of 'normalising migratory flows' as the long-term result of **'strategies aiming at reducing poverty, improving living and working conditions, creating employment and developing training'**, which **remain the primary aims** (Article 13(4) Cotonou Agreement).

**Assistance to non-developing third countries** is regulated by Article 212 TFEU. The provision sets out that economic, financial, and technical cooperation with these countries should be consistent with the objectives of Article 208 TFEU outlined above and comply with the principles governing the Union's external action.

For its part, Article 214 TFEU clarifies that **EU humanitarian aid** aims to provide **ad hoc assistance, relief and protection** for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these situations. Humanitarian aid policy, and any measures adopted thereunder, must be consistent with the objectives of the Union's external action, comply with the principles of impartiality, neutrality, and non-discrimination, and be conducted in line with international law. Regulation 1257/96 further specifies that humanitarian aid allocation **must not be guided by, or subject to, political considerations** (Recital 7) but be solely based on the victims' needs and interests.

CJEU case law has specified that **EU development measures can pursue additional objectives that do not contribute 'to the economic and social development of the developing country' as long as they are 'incidental' to the measures' main purpose and do not constitute distinct objectives not directly related to it**. A decision allocating EU development aid for a border security project in the

<sup>985</sup> Report on the EU Trust Fund for Africa: the implications for development and humanitarian aid, 2015/2341(INI), RR\1099280EN.doc, 28.6.2016, para. 14.

<sup>986</sup> Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, [2014] OJ L 77/95.

<sup>987</sup> ENI, Art 2(2)(d); DCI, Art 2; DCI, Rec 2 and Art 2(a); IPA II, Annex II, letter (f); IcPS, Rec 12.

<sup>988</sup> Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, [2000] OJ L 317/3 ('Cotonou Agreement'). See text of the agreement [here](#).



Philippines was, indeed, annulled for lack of a 'direct connection' with development objectives.<sup>989</sup> Although migration policy can be part of development cooperation policy, as a 'positive factor for development contributing to poverty reduction',<sup>990</sup> **migration control objectives must be secondary** to the implementation of EU development cooperation and be included only if they **tangibly contribute to poverty reduction**. Projects solely aimed at sustaining border management activities do not comply with the ratio of Article 208 TFEU.

*- The Obligation to Promote Human Rights in the Union's External Action*

**Regulation 236/2014** reflects the Treaties-derived **obligation to promote human rights and democratic principles** in external relations. It provides that EU-financed actions under these instruments should promote, develop and consolidate the principles of democracy, the rule of law and respect for human rights, on the basis (where appropriate) of dialogue and cooperation with partner countries and regions (Article 1(6)). Similarly worded provisions are present **in each instrument's Regulations**.<sup>991</sup>

As for the EDF, Article 36 of its financial regulation provides that **'any decision to provide budget support shall be based on** budget support policies agreed by the Union, a clear set of eligibility criteria and **a careful assessment of the risks and benefits**. One of the key determinants of such a decision shall be an assessment of the commitment, record and progress of ACP States and OCTs **with regard to democracy, human rights and the rule of law** ... When providing budget support, **the Commission shall clearly define and monitor its conditionality** ... Disbursement of **budget support shall be conditional on satisfactory progress**'. These obligations are **reflected in the Cotonou Agreement**, particularly in Article 96's **human rights conditionality clause**. This provides that **in case of serious breaches** of 'essential elements' of the agreement — i.e. human rights obligations, democratic principles and the rule of law (as referred to in Article 9(2)) — by any party, a consultation procedure must be initiated to find a remedy. **Ultimately**, if no solution can be negotiated, **the agreement must be suspended**.

It follows that the **respect of human rights, democratic principles, and the rule of law constitutes an irrevocable condition for any kind of partnership with third countries**, demonstrating the EU legislature's intent to **ensure that EU financial resources are not allocated for aims contrary to its founding values**, which are binding even when the EU acts externally. Therefore, in designing external actions, EU institutions and MS must **act with due diligence and carry out human rights impact assessments** to avoid **negatively impacting human rights in third countries**, in line with the 'do no harm' principle.<sup>992</sup> The obligation to carry out such assessment **before adopting the relevant measures (regardless of their legal nature)** has also been recognised by the EU Ombudsman as forming part of the principle of good administration enshrined in Article 41 CFR.<sup>993</sup>

**To avoid international legal responsibility, the EU should discontinue funding when conformity with human rights cannot be guaranteed.** Failure to do so may amount to complicity in wrongful

<sup>989</sup> CJEU, Case C-403/05 *Parliament v. Commission* [2007] ECLI:EU:C:2007:624, para. 66.

<sup>990</sup> CJEU, Case C-377/12, *European Commission v. Council of the European Union* [2014] ECLI:EU:C:2014:1903, paras 48–49.

<sup>991</sup> ENI, Art 1(4); DCI, Art 2; IPA II, Art 2; IcPS, Art 10.

<sup>992</sup> Carrera et al., *Oversight and Management of the EU Trust Funds* (n 968), p. 11.

<sup>993</sup> Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, Case 1409/2014/MHZ, 26.2.2016, at 8; Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, Case 506/2016/MHZ, 30.7.2016, at 26.

conduct.<sup>994</sup> From an international law perspective, the due diligence requirement derives from Article 14 of the Articles on the Responsibility of International Organisations (ARIO), prohibiting international organisations (IOs) from aiding or abetting a State or another IO in committing an internationally wrongful act. Accordingly, international responsibility could arise if the IO purposely fails to investigate the circumstances of an assisted act, despite clear indications that the assistance may have been or may be employed unlawfully.<sup>995</sup>

#### *- Requirements Originating from the AMIF*

As explained above, the EUTFA also draws resources from the **AMIF**, and thus **should comply with its requirements**. The AMIF Regulation requires that the Commission, MS and the EEAS ensure that AMIF-financed actions: (a) are consistent with both the Union's external policy, and the strategic programming documents for the region or country in question, respecting the principle of policy coherence for development; (b) focus on non-development-oriented measures; and (c) are consistent with the interests of the Union's internal policies and activities (Article 24). The AMIF is based on **Articles 78 and 79 TFEU**, which clarify that EU borders, asylum and migration policy must ensure compliance with *non-refoulement*, the Refugee Convention, and 'other relevant treaties', including the maritime conventions and human rights instruments.

### 6.6.2 Assessment of the FRT's compliance with the relevant requirements

**FRT projects** in Turkey mainly focus on humanitarian assistance, education, health, municipal infrastructure, and socio-economic support,<sup>996</sup> which at a glance seem in line with humanitarian and development actions. However, a number of **shortcomings** can be identified.

#### *- Governance and migration management conditionality*

From the outset, it is apparent that **EU aid** has been **mobilised as a bargaining chip** to obtain Turkish cooperation in preventing irregular crossings to Europe. As recalled in Section 6.6, the Common Understanding establishing a governance and conditionality framework for the FRT specifically provides that 'the execution of assistance actions under the Facility shall be conditional upon strict compliance by the Republic of Turkey with undertakings reflected in the EU Turkey Joint Action Plan and the EU-Turkey Statement from 29 November 2015' (Point 24). It also appears that the FRT played a major role in bringing about the March 2016 Statement, as 'Turkey clearly was going to agree to any mechanism if EU funding was mobilised'.<sup>997</sup> The inclusion of an explicit conditionality clause is a unique feature of the FRT (compared to the EUTFA), and it is **at odds with a humanitarian and development-based approach to migration policy**, which should be solely based on protection considerations.<sup>998</sup> The political nature of the FRT, and its link to the EU's (internal) objective of containing migration flows, has led to a situation whereby 'the FRT has been threatened by political pressure exerted by the Turkish

<sup>994</sup> ILC Articles on the responsibility of international organizations, [2011] Yearbook of the International Law Commission, Vol II, Part Two ('ARIO').

<sup>995</sup> Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459, p. 471.

<sup>996</sup> List of projects committed/decided, contracted, disbursed, [31.12.2020](#).

<sup>997</sup> Carrera et al., *Oversight and Management of the EU Trust Funds* (n 968), p. 36.

<sup>998</sup> Ibid., p. 37.

Government on the European Union in disputes over the EU-Turkey Statement, which ultimately harms the refugees and host communities who depend on this support', as noted by the LIBE Committee.<sup>999</sup>

#### *- Legal basis and objectives pursued*

The other problematic aspect of the FRT is its **'migration management' priority**, under which **two projects** were financed in 2016. The first allocated €60m to the Turkish Directorate General for Migration Management (DGMM) for **'Support to the Implementation of the EU-Turkey Statement of 18 March 2016'**, supporting the management, reception and hosting of migrants,<sup>1000</sup> including the management of returns from the EU and the day-to-day operations in 21 removal centres.<sup>1001</sup> The second allocated €20m to the International Organisation for Migration (IOM) for **'Strengthening the operational capacities of the Turkish Coast Guard in managing migration flows in the Mediterranean Sea'**.<sup>1002</sup> The project's main beneficiary was the Turkish Coast Guard (TCG) Command, which received technical equipment and training to successfully undertake SAR operations 'with full respect to international and national obligations and the human rights of migrants'.<sup>1003</sup> Under the project, six life-boats were delivered and 1,081 TCG staff were trained.<sup>1004</sup> Although the migration management priority received a limited amount of resources (3%),<sup>1005</sup> and the two projects were only funded in the first tranche,<sup>1006</sup> the inclusion of a migration management priority in an **instrument adopted on the basis of development and humanitarian assistance is inherently legally questionable**. As the ECA points out, since the Facility's aim is to provide development and humanitarian aid for refugees and host communities, the inclusion of a migration management objective in the RFT is 'not clearly justified' and not in line with a refugees' needs assessment.<sup>1007</sup> In fact, it is **unclear how either migration management project concretely contributes to poverty reduction**, which may thus constitute a distortion of the principal aim of development cooperation policy in contravention of EU primary law. Furthermore, while EU-Turkey cooperation against irregular migration has led to a drop in the number of arrivals to the EU, related negative outcomes that undermine development objectives, such as the reconfiguration of smuggling routes, cannot be ignored.<sup>1008</sup>

As for the **FRT's needs-oriented projects**, despite development assistance constituting the majority of the FRT's funding, the EU has primarily focused on providing short-term relief to Syrian refugees, with relatively low allocations for integration and long-term well-being. This **contravenes the principles of sustainability**, insofar as it **encourages aid dependency** and **does not enhance long-**

<sup>999</sup> European Parliament, Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs, the Committee on Development and the Committee on Budgets on the implementation report on the EU Trust Funds and the Facility for Refugees in Turkey, 2020/2045(INI), AD\1231264EN.docx, 11.5.2021, p. 8.

<sup>1000</sup> EU Delegation to Turkey, Support to the Implementation of the EU-Turkey Statement of [18 March 2016](#).

<sup>1001</sup> Fourth Annual Report on the Facility for Refugees in Turkey, COM(2020) 162 final, p. 13.

<sup>1002</sup> IOM, Strengthening the Operational Capacities of the Turkish Coast Guard in Managing Migration Flows in the Mediterranean Sea, [24.11.2017](#).

<sup>1003</sup> EU Delegation to Turkey, Strengthening the Operational Capacities of the Turkish Coast Guard in Managing Migration Flows in the Mediterranean Sea ([undated](#)).

<sup>1004</sup> Fourth Annual Report on the Facility for Refugees in Turkey, COM(2020) 162 final, p. 13.

<sup>1005</sup> ECA, The Facility for Refugees in Turkey: helpful support, but improvements needed to deliver more value for money, Special Report No 27 ([2018](#)), para. 25.

<sup>1006</sup> Note that the Turkish Coast Guard currently receives EU funding (outside the FRT) through the IcSP: Strengthening the operational capacities of the Turkish Coast Guard in managing migration flows in the Mediterranean Sea – [Phase II](#).

<sup>1007</sup> ECA, The Facility for Refugees in Turkey: helpful support, but improvements needed to deliver more value for money, Special Report No 27 (2018), para. 65.

<sup>1008</sup> Okay, *EU-Turkey Migration Cooperation: From Saving the Day to Sustainable Mixed Migration Governance*, Global Turkey in Europe Working Paper No 21, Italian Institute of International Affairs ([July 2019](#)), p. 6.

**term social cohesion.**<sup>1009</sup> In this respect, the ECA has highlighted that the FRT is generally well equipped to address the short-term needs of refugees. However, the Facility's socio-economic support window is underdeveloped and should receive more attention so that a transition from emergency-driven humanitarian assistance to durable development assistance can be made.<sup>1010</sup>

*- Lack of a risk assessment and monitoring framework to prevent human rights violations*

Despite the legal framework described above and the European Ombudsman's recommendation to carry out human rights impact assessments on a continuing basis in light of the obligations set out in the EU Charter and international human rights law, with particular attention to 'its impact on the human rights of migrants',<sup>1011</sup> **no pre-allocation appraisal, post-allocation independent monitoring, or other follow up evaluation** has been undertaken **to ensure compliance with human rights and avoid contributing to violations.** While the ECA found that the Commission put an appropriate framework in place for monitoring humanitarian projects,<sup>1012</sup> there is no mention of the existence of a monitoring mechanism to ensure compliance with human rights in the FRT's migration management priority, despite the numerous concerning reports of serious infringements by Turkish authorities discussed in Section 6.3.2. The LIBE Committee has indeed expressed concern over the 'lack of access and monitoring by national and international observers, including to detention sites' funded through FRT allocations and has called on the Commission to ensure compliance with the EU's general principles, policies, and objectives including democracy, the rule of law, and human rights.<sup>1013</sup>

### 6.6.3 Assessment of EUTFA's compliance with the relevant requirements

Before looking at the shortcomings of two EUTFA financed actions in Libya and Niger respectively, it should be noted that, as with the RFT, **the inclusion of a migration management objective** in an instrument adopted under a development policy legal basis (the EDF), and mainly funded through development aid lines (89%),<sup>1014</sup> is **legally questionable.**

*- Legal basis and objectives pursued*

Adopting an instrument allocating the **largest share of funding for migration management** (i.e. 31% of funding)<sup>1015</sup> **under EU development cooperation law does not comply with the requirements** stemming from primary, secondary law and the CJEU case law. Within this framework, migration control is not 'incidental' to the purpose of poverty reduction but becomes the main objective, also without demonstrating how the actions contribute to 'the economic and social development of the [recipient] countr[ies]'.<sup>1016</sup> The European Parliament has, therefore, warned 'against the [EUTFA's] serious risk of misuse of EU development aid' and condemned 'any use of the [EDF] and Official

<sup>1009</sup> Temprano Arroyo, *Using EU aid to address the root causes of migration and refugee flows*, Migration Policy Centre ([EUI, 2019](#)), p. 73.

<sup>1010</sup> ECA, *The Facility for Refugees in Turkey: helpful support, but improvements needed to deliver more value for money*, Special Report No 27 ([2018](#)), paras 24 ff and 65-66.

<sup>1011</sup> Ibid.

<sup>1012</sup> Ibid., para. 49.

<sup>1013</sup> European Parliament, *Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs, the Committee on Development and the Committee on Budgets on the implementation report on the EU Trust Funds and the Facility for Refugees in Turkey*, 2020/2045(INI), AD\1231264EN.docx, 11.5.2021, p. 6.

<sup>1014</sup> ECA, *European Union Emergency Trust Fund for Africa: Flexible but lacking focus*, Special Report No 32 ([2018](#)), para. 7.

<sup>1015</sup> Fourth Annual Report on the Facility for Refugees in Turkey, COM(2020) 162 final, p. 13.

<sup>1016</sup> Cf. CJEU, Case C-377/12, *European Commission v. Council of the European Union* [2014] ECLI:EU:C:2014:1903, paras 48-49; Case C-403/05 *Parliament v. Commission* [2007] ECLI:EU:C:2007:624, para. 66.

Development Assistance funds for migration management ... and any other actions without development objectives'.<sup>1017</sup>

It should be noted, though, that **the EUTFA also draws resources from the AMIF**, which is not governed by development aid rules. However, since development funding constitutes the vast majority of its resources and EU development cooperation law is its legal basis, it cannot disregard development objectives when implementing border and migration management projects. In fact, the EUTFA's **combination of development and migration funding is in itself problematic**, as the AMIF regulation specifically provides that financed actions should not support measures that are directly oriented towards development (Recital 35) but rather focus on non-development-oriented actions (Article 24).

#### *- Governance structure and migration management conditionality*

Given the above, **the very governance structure of the EUTFA raises concerns** regarding compliance with the principles of aid effectiveness and casts doubt about the interests it attempts to pursue. Unlike other development cooperation instruments, such as the Cotonou agreement, the **EUTFA does not include any provision ensuring development countries' ownership of development strategies and equal participation**; partner countries do not have any right to vote, but are merely invited to join meetings at the Operation Committee's discretion.<sup>1018</sup> The European Parliament referred to this when it criticised the EUTFA's lack of policy coherence for development, saying **the fund does not adhere to the 'co-management spirit' of the Cotonou Agreement**, but rather seems to be used as a 'pretext for preventing departure or tightening borders between countries while ignoring the factors that drive people from their homes'.<sup>1019</sup>

In addition, the EUTFA's budget allocation is increasingly being linked to the nationalities of migrants arriving in the EU and the geographical areas from which they transit and depart, and **a number of its actions have been approved alongside negotiations of return and readmission agreements**, in the context of the MPF.<sup>1020</sup> European Commission officials avow that there is a 'more for more' logic within the fund, with countries that are more cooperative on readmission and border control being likely to obtain more funding.<sup>1021</sup> **Linking the EUTFA's budget allocation to the EU's desire to stop arrivals** is inherently based on internal policy considerations and **does not comply with** the legally required objective of bettering the socio-economic conditions of beneficiaries. Furthermore, it risks deprioritising developing countries, which are not countries of transit or departure, but which might be more in need of aid.

#### *- Emergency nature of the fund and democratic accountability*

As an emergency TF, the EUTFA's creation did not require the approval of the European Parliament. Considering the **implications** of the Parliament's exclusion **for democratic accountability**, the fund's qualification should be carefully scrutinised.

The Financial Regulation does not define '**emergency**' but states that emergency TFs are set up for 'actions necessary to react to a crisis' (Article 234(1)). Recital 21 defines a crisis as '(a) a situation of immediate or imminent danger threatening to escalate into an armed conflict or to destabilise a

<sup>1017</sup> European Parliament, Report on the EU Trust Fund for Africa (n 985), para. 18.

<sup>1018</sup> EUTFA Constitutive Agreement, Art 6.1.2.

<sup>1019</sup> European Parliament, Report on the EU Trust Fund for Africa (n 985), paras 18, 23, and 33.

<sup>1020</sup> OXFAM, *The EU Trust Fund for Africa: Trapped between Aid Policy and Migration Politics* (January 2020), p. 3.

<sup>1021</sup> Castillejo, 'The European Union Trust Fund for Africa: a glimpse of the future for EU development cooperation', Discussion Paper No. [22/2016](#), German Development Institute.



country or its neighbourhood; (b) a situation caused by natural disasters, man-made crisis such as wars and other conflicts or extraordinary circumstances having comparable effects related, inter alia, to climate change, environmental degradation, privation of access to energy and natural resources or extreme poverty'. The provision, thus, pertains to **humanitarian crises where a short-term response is urgently needed** and it may be necessary to derogate from standard procedures. In this respect, **it is unclear what emergency the EUTFA seeks to respond to, or why all the 26 countries it covers are deemed to be in a situation of crisis**, as to justify the establishment of an emergency fund.<sup>1022</sup> It seems 'the emergency was perceived to be at the EU's external borders, along the migration routes, and in the Mediterranean more specifically',<sup>1023</sup> rather than in third countries, which flouts the provision's stated aims. Also, **crisis-management goals benefiting EU migration control objectives are at odds with the long-term development cooperation objective** of addressing the 'root causes of irregular migration and displaced persons' and reducing poverty in recipient countries.

**The limited role of the European Parliament** is even more **questionable as**, despite being an extra-budget instrument, **the EUTFA draws some resources from the EU budget**. This leads to the peculiar situation in which the Parliament, which is the competent institution (alongside the Council) for exerting budgetary control, is excluded from exercising any substantial power over an instrument that pulls contributions from it. This 'result[s] in **bypassing the budgetary authority and undermining the unity of the budget**',<sup>1024</sup> in a highly politically sensitive domain, **without a proper justification of its necessity**, which **upsets transparency, good administration, and the principle of institutional balance** within the EU legal order.

#### *- Lack of risk assessment and monitoring framework to prevent human rights violations*

The Commission Decision establishing the EUTFA and its Constitutive Agreement contain **neither a human rights conditionality clause nor** any provision envisaging **human rights impact assessments or monitoring mechanisms before or during the implementation** of its projects. The ECA has expressed concern over the EUTFA's absence of a specific risk assessment framework.<sup>1025</sup> The lack of consideration for human rights obligations in the foundational and policy text of the EUTFA, coupled with the internal policy interest of preventing arrivals to the EU, has led to the funding of projects aimed at curbing migration flows in both Libya and in Niger, despite the foreseeable detrimental effect on human rights. The LIBE Committee has also expressed misgivings in this regard and has invited the Commission, as well as EU agencies, to suspend cooperation with third countries when it endangers the human rights of migrants, to establish a transparent risk-assessment framework, and to create an independent human rights monitoring mechanism with clear protocols for action.<sup>1026</sup>

Additional elements point in the direction that **there is an implicit obligation to carry out human rights impact assessments** not only with regard to EUTFA-funded projects, **but in relation to all EU external actions that may have an effect on fundamental rights**. Although the EUTFA Constitutive Agreement does not contain any explicit wording in this sense, the EDF Financial Regulation (which constitutes the EUTFA's legal basis) does contemplate that 'any decision to provide budget support

<sup>1022</sup> Spijkerboer and Steyger, 'European External Migration Funds and Public Procurement Law' (2019) 4 European Papers 493, p. 503.

<sup>1023</sup> Carrera et al., *Oversight and Management of the EU Trust Funds* (n 968), p. 33.

<sup>1024</sup> European Parliament, Report on the EU Trust Fund for Africa (n 985), p. 14.

<sup>1025</sup> ECA, European Union Emergency Trust Fund for Africa: Flexible but lacking focus, Special Report No 32 (2018), para. 25.

<sup>1026</sup> European Parliament, Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs, the Committee on Development and the Committee on Budgets on the implementation report on the EU Trust Funds and the Facility for Refugees in Turkey, 2020/2045(INI), AD\1231264EN.docx, 11.5.2021, p. 8.



shall be based on budget support policies agreed by the Union, a clear set of eligibility criteria and a careful assessment of the risks and benefits' (Article 36(3)). Regarding the FRT, when the Commission amended the original Decision creating the facility,<sup>1027</sup> it included an obligation to 'permanently monitor and assess the implementation of the actions coordinated under the Facility, including respect of the conditionality requirements, having regard to the assessments carried out by the structures established with the purpose of monitoring progress in the implementation of the commitments reflected in the EU-Turkey Joint Action Plan' (Article 5(1)(ii)). Although neither the EDF Financial Regulation nor the FRT revised Decision specifically mention human rights impact assessments, from a systemic point of view and taking EU primary law into account (particularly Articles 41 and 51 of the Charter, alongside Articles 2, 3(5), 6, and 21 TEU), one may conclude that the European Commission is duty-bound to undertake them.

The **European Ombudsman**, in a case concerning a free trade agreement, **has determined that this interpretation is in the spirit of the right to good administration**, establishing that: 'Although the Ombudsman agreed with the Commission that there appears to be no express and specific legally binding requirement to carry out a human rights impact assessment concerning the relevant free trade agreement, she took the view that it would be in conformity with the spirit of the legal provisions mentioned above to carry out a human rights impact assessment'.<sup>1028</sup> The same reasoning should be applied by analogy to funding decisions regarding the EUTFA and the FRT.

**The General Court has reached a similar conclusion** in the *Front Polisario* case, establishing that when EU (trade) agreements could 'indirectly encourage' fundamental rights violations or the EU could 'profit from them', a careful and impartial examination of 'all the relevant facts' should be carried out, with the aim of ensuring that the implementation of the agreement does not entail infringements of fundamental rights.<sup>1029</sup> Although the CJEU annulled the relevant decision for an erroneous interpretation of the geographical applicability of the agreement at hand, rather than due to the absence of a human rights impact assessment,<sup>1030</sup> the above elements lend sufficient support to establish that the duty to carry one out is implicit in a systemic interpretation of the relevant provisions.

**The European Commission itself has accepted that the duty exists in relation to trade agreements.**<sup>1031</sup> And **there is no good reason to exclude the obligation with regard to other EU external actions which could cause or exacerbate similar harm**. It should, therefore, be construed that there is an implicit obligation to carry out human rights impact assessments in relation to all EU external actions (whatever their form) that may potentially impact human rights **deriving from a systematic reading of the right to good administration in light of EU primary law** (taking together Articles 41 and 51 CFR and Articles 2, 3(5), 6, and 21 TEU).

#### 6.6.4 Assessment of EUTFA funded actions in Libya and Niger

**In both Libya and Niger, EUTFA funded measures** supporting the prevention of departures, without consideration for the complex dynamics of migration flows and the human rights of TCNs, are **hardly**

<sup>1027</sup> European Commission, Decision on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24.11.2015, C(2016) 855 final, 10.2.2016.

<sup>1028</sup> European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, [26.2.2016](#), para 11.

<sup>1029</sup> General Court of the EU, Case T-512/12 *Front Polisario* ECLI:EU:T:2015:953, paras 225 ff and 231 ff.

<sup>1030</sup> CJEU, Case C-104/16 P *Front Polisario* ECLI:EU:C:2016:973.

<sup>1031</sup> European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives ([July 2015](#)).

**compatible with EU development cooperation policy** and the principles of effectiveness, efficiency and transparency, and human rights monitoring and conditionality, as several organisations have submitted to the PETI Committee of the European Parliament.<sup>1032</sup>

#### - EUTFA funding in Libya

As for the **SIBML** (Support to Integrated Border and Migration Management in Libya) **programme**, the Commission has **never fully substantiated what development objective the action is intended to achieve**, and it remains unclear how financing the LYCG contributes to poverty reduction or fighting 'root causes' of displacement.<sup>1033</sup> NGOs on the ground have pointed out that EUTFA funded action in Libya has a predominantly securitarian content and effect and does **not comply with the core principles of aid effectiveness**. The focus on preventing departures has **marginalised the country's real needs and supported poor governance strategies**, which not only fails to better the socio-economic conditions of the population but could exacerbate local discontent, actively increasing instability in Libya.<sup>1034</sup>

The **training and support provided to the LYCG**, coupled with the establishment of a Libyan SRR and the implementation of strategies aimed at restricting NGO SAR activities in the Mediterranean, expounded above, is meant to ensure that migrants are intercepted and returned to Libya,<sup>1035</sup> where they face gross ill treatment. The outsourcing of responsibility for SAR operations to the LYCG and the resulting pullbacks and containment in Libya entails **serious human rights risks, which the European Commission has failed to assess** both prior to and during the implementation of EUTFA funded actions.

**As for the reliability of the Libyan authorities receiving EU funds**,<sup>1036</sup> international observers have reported that **government officials**, including LYCG officials, immigration officers, security and defence personnel, members of armed groups formally integrated within State institutions, and officials from the Ministry of Interior and its Department to Combat Illegal Migration (DCIM), **are complicit in human trafficking and smuggling operations**.<sup>1037</sup> Some members of the LYCG have been individually **sanctioned for being former traffickers**.<sup>1038</sup> **In Zawiya the entire LYCG unit** has been found to be **connected to the al-Nasr Brigade militia**, which controls the official Zawiya migrant detention centre, 'nominally under the ... DCIM', where **migrants** are held in 'critical conditions' and **'sold on the local market as "sex slaves"'**, leading the Council to adopt restrictive measures against its leader in March 2020.<sup>1039</sup>

<sup>1032</sup> [Petition No 0655/2020](#) by Filippo Miraglia (Italian), on behalf of Associazione Ricreativa e Culturale Italiana (ARCI), Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), and Global Legal Action Network (GLAN), on mismanagement and misuse of EU funds by the EUTFA's programme of support to the integrated border management in Libya.

<sup>1033</sup> Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds (n 888).

<sup>1034</sup> De Guerry and Stocchiero, *Partnership or Conditionality?* (n 955), pp. 14-20.

<sup>1035</sup> Alarm Phone, Borderline Europe, Mediterranean, Sea-Watch, 'Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean', [17.6.2020](#).

<sup>1036</sup> Relevant Libyan authorities from Ministry of Interior and Ministry of Defence and Ministry of Communications, according to Action Fiche IBM Libya – Second Phase ([undated](#)).

<sup>1037</sup> US Department of State, *2020 Trafficking in Persons Report: Libya* ([undated](#)).

<sup>1038</sup> 'UN accuses Libyan linked to EU-funded coastguard of people trafficking', *The Guardian*, [8.6.2020](#); and 'Senior Libyan coastguard commander arrested for alleged human trafficking', *The Guardian*, [16.10.2020](#).

<sup>1039</sup> Council Implementing Regulation (EU) 2020/371 of 5 March 2020 implementing Article 21(5) of Regulation (EU) 2016/44 concerning restrictive measures in view of the situation in Libya, [2020] OJ L 71/5.

The **European Commission 'strongly refutes' the submission** that the SIBML programme fails to comply with the relevant legal requirements.<sup>1040</sup> Yet, **it fails at demonstrating detailed compliance with the applicable standards**, in its reply to the PETI Committee. First, it mentions that the amount of funding for border management activities in Libya is 'significantly lower' than assumed from publicly available information. **Quantitative considerations**, however, do not exempt the Commission from compliance with its legal duties and, in particular, have **no bearing on fundamental rights obligations** (Article 51 CFR). The Commission goes on to rely on a soft-law code of conduct issued by the Organisation for Economic Co-operation and Development (OECD), which describes migration management activities as development assistance, which the Commission reads as 'including border management'. However, as explained above, **migration management objectives**, whenever included, must **demonstrably contribute to poverty reduction** in concrete terms.<sup>1041</sup> The Commission's most important argument relates to the **claim that 'the programme is designed to ... save lives at sea'** and that the 'main objective' in funding the LYCG is to 'improve their capacities to execute [rescue] operations'. While these may be the intentions, the Commission **fails to appreciate realities on the ground**. As specified in Chapter 4, **rescue can only be defined as such** under international and EU law **when it leads to** the retrieval of survivors and their **delivery to a 'place of safety'**. Yet, numerous reliable sources refute that Libya may be deemed such a place, meaning that **continued collaboration with the LYCG** constitutes a **violation of the maritime conventions and related human rights requirements**, amounting to the sponsorship of a system of death and abuse at sea and upon disembarkation. Furthermore, financing the LYCG to bring migrants back to Libya and, at the same time, supporting evacuations from the country through the EUTFA-funded ETM programme is in itself contradictory. Finally, the Commission asserts that it goes beyond its legal duty and conducts a 'third party monitoring' system to ensure 'respect of the "do no harm" principle'. But without access to the relevant reports, it is impossible to corroborate this information and the quality of this exercise. The lack of public accessibility itself fails to comply with the demands of transparency and good administration of Article 41 CFR.

#### *- EUTFA funding in Niger*

The **EUTFA-funded projects in Niger engender similar misgivings**. As mentioned above, shortly after the adoption of the 2015 anti-migrant smuggling law,<sup>1042</sup> Niger elaborated a **National Strategy to Counter Irregular Migration**, supported by the EU through the EUTFA's action '**Migrant Resource and Response Mechanism**' (MRRM).<sup>1043</sup> As discussed in the previous sections, the anti-smuggling focus fails to distinguish between intra and extra-regional mobility, thus **infringing on ECOWAS residents' rights** of entrance to and movement within Niger,<sup>1044</sup> and **damages relations between Niger and the other ECOWAS members**, working **against the long-term aim of stability in the region**.<sup>1045</sup>

**Migration conditionality has a particularly insidious effect** in Niger. As a result of EU pressure, 'the Nigerien government might have no choice but to reallocate its already tight budget in order to adequately fund its restrictive security forces, thus **diverting finances that could otherwise be used**

<sup>1040</sup> European Parliament, PETI Committee Notice to Members, 21.1.2021, European Commission reply to Petition No 0655/2020 (on file with the authors), para. 3.

<sup>1041</sup> CJEU, Case C-377/12, *European Commission v. Council of the European Union* [2014] ECLI:EU:C:2014:1903, paras 48-49.

<sup>1042</sup> Loi No. 2015-36 du 26 mai 2015 relative au trafic illicite de migrants.

<sup>1043</sup> Migrant Resource and Response Mechanism (MRRM) Phase II, Document d'action ([undated](#)).

<sup>1044</sup> Spijkerboer, 'The New Borders of Empire' (n 941).

<sup>1045</sup> Uzelac, 'Incoherent Agendas' (n 943).

**for health, education and economic development**,<sup>1046</sup> thus running counter to the basic principles of EU development policy and external action.

As for aid effectiveness compliance, **local civil society and institutions** have complained about **not** being **sufficiently involved or consulted**, with projects being drafted and selected by the EU in line with EU and MS preferences rather than Nigerien policy objectives or the interests of its population. A **lack of transparency and 'of comprehension of the global context** in which migration happens in Niger' has also been identified.<sup>1047</sup>

### 6.6.5 General considerations going forward

In light of the above, the fact that the EU and its MS continue to provide **material and financial support to the Turkish and Libyan authorities, and** continue to fund **projects in Niger** that disregard the specific development needs and interests of the country, **fails to conform with EU and international law**. Both the EU and the MS **could incur international responsibility** for their contributions to human rights violations.<sup>1048</sup>

While the **last FRT contracts** were signed in **December 2020**,<sup>1049</sup> the **EUTFA has been extended** until 31 December 2021,<sup>1050</sup> so **the issues identified** above **will continue**. It appears that actions currently financed through the EUTFA will be funded under the Neighbourhood, Development and International Cooperation Instrument (NDICI), in the context of the new Multiannual Financial Framework (MFF) 2021-27.<sup>1051</sup> The same may happen with FRT funding since the coordination mechanism pulls the majority of its resources from budgetary instruments that will be consolidated into the NDICI (Recital 8).

The Commission's proposal for a recast NDICI Regulation was tabled in June 2018.<sup>1052</sup> A preliminary agreement has been reached in March 2021 by the co-legislators.<sup>1053</sup> If adopted,<sup>1054</sup> the **new NDICI instrument** will be established under EU development cooperation policy (Article 209 TFEU) and the technical assistance with non-developing countries provision (Article 212 TFEU), with 10% of its budget directed towards activities aimed at 'supporting management and governance of migration and forced displacement' and 'addressing the root causes of irregular migration and forced displacement when they directly target specific challenges related to migration and forced displacement' (Recital 50). These will most likely include financial and material assistance to the migration authorities of countries of origin or transit, such as the TCG, the LYCG, and the Nigerien security and law enforcement officials implementing the anti-migrant smuggling plan, **presenting similar problems** regarding human rights compliance and poverty reduction as does the current framework. Although the provisional

<sup>1046</sup> Akkerman, 'Expanding the Fortress' (n 723), p. 52.

<sup>1047</sup> De Guerry and Stocchiero, *Partnership or Conditionality?* (n 955), p. 24.

<sup>1048</sup> Ferstman, 'Human Rights Due Diligence' (n 995); and Moreno-Lax and Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', in Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019) 81.

<sup>1049</sup> EU signs final contracts under the €6 billion budget of the Facility for Refugees in Turkey, Press Release, [17.12.2020](#).

<sup>1050</sup> 'EUTF extended until 31 December 2021', Press Release, [15.12.2020](#).

<sup>1051</sup> 'Learning Lessons from the EUTF - Phase 2 - Paving the way for future programming on migration, mobility and forced displacement', Altai Consulting ([February 2021](#)), p. 225.

<sup>1052</sup> Commission Proposal for a Regulation establishing the Neighbourhood, Development and International Cooperation Instrument, COM(2018) 460 final, 14.6.2018 ('NDICI recast Proposal').

<sup>1053</sup> European Parliament, Provisional Agreement resulting from Interinstitutional Negotiations, PE 689.709, [15.3.2021](#).

<sup>1054</sup> Immenkamp, *Neighbourhood, Development and International Cooperation Instrument*, European Parliamentary Research Service Briefing, PE 690.632 ([June 2021](#)).

agreement establishes that the general objective is to 'uphold and promote the Union's values, principles and fundamental interests worldwide in order to pursue the objectives and principles of the Union's external action, as laid down in Article 3(5), Articles 8 and 21 of the Treaty on European Union (TEU)' (Recital 1), and incorporates direct references to respect for refugee law and human rights (Recitals 12 and 50, Article 8(10), and Annexes II, III and VI), it also includes 'cooperation on migration' among the criteria for determining whether additional resources can be allocated to partner countries (Article 20), thus **replicating the flawed model of migration control conditionality** that imposes the EU domestic agenda on third countries.<sup>1055</sup> This practice will continue to be **at odds with the principles of development assistance and EU external action at large**. The problem has never been the absence of provisions recalling primary law obligations, but effective compliance on the ground. On the other hand, the **new instrument integrates** the EDF into the NDICI, and therefore **into the EU budget**, thus **increasing democratic scrutiny** by the European Parliament, which should be kept informed about its implementation through regular exchanges of views and information by the Commission (Article 8(13)).

The provisional agreement appears indeed to establish an **enhanced role for the European Parliament in the definition of the instrument's main strategic choices**, providing for delegated act procedures for secondary policy choices, notably the definition of specific objectives and priority areas of cooperation (Article 4(7)), to which the Parliament can object (as opposed to implementing act procedures). The provisional agreement also envisages a political commitment by the Commission to inform the European Parliament *before* any mobilisation of the emerging challenges and priorities cushion, an allocated amount of money to be used in case of unforeseen circumstances or emergencies, including migratory pressure and forced displacement (Article 17). The Commission should take into consideration the Parliament's remarks in this regard (Recital 70). **However**, the rapid response component of the NDICI, defined as funding enabling early actions to respond to crisis and post-crisis situations, including those which may result from migratory flows and forced displacement (Article 4(a)), **provides for an exception** to the obligation of the Commission to publish programming documents (Article 12) and to communicate action plans and technical arrangements to the European Parliament (Article 25(2)). Since cooperation with third countries on migration management could easily fall under this category, this provision **might eventually deprive the European Parliament of the possibility to effectively oversee the NDICI's implementation** in this area. In fact, the LIBE Committee has expressed concerns in this respect.<sup>1056</sup>

The preliminary agreement also sets up a **more robust monitoring framework compared to the previous instruments**, requiring the Commission to establish an appropriate risk assessment and monitoring mechanism and to develop operational guidance to ensure that human rights are taken into consideration in the design and implementation of NDICI's financed actions (Article 8(11)). The Commission should also submit annual reports to the European Parliament and to the Council on progress towards the achievement of the NDICI's objectives, including adherence to development effectiveness principles (Article 41). Finally, the preliminary agreement specifically **links respect for democracy, human rights, and the rule of law with sound financial management and effective Union funding**, envisaging the possibility (in a 'may' clause) of suspending assistance in case of degradation in democracy, human rights or rule of law standards in third countries (Recital 39).

<sup>1055</sup> ECRE, *Migration Control Conditionality: A Flawed Model*, ECRE Policy Note No 5 (2020).

<sup>1056</sup> European Parliament, Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Foreign Affairs, the Committee on Development and the Committee on Budgets on the implementation report on the EU Trust Funds and the Facility for Refugees in Turkey, 2020/2045(INI), AD\1231264EN.docx, 11.5.2021, p. 8.



Although this is a welcome development, **the discretionary nature of the clause** and the fact that it is only found in the Preamble, rather than in the operative part of the instrument, **is bound to reduce its effectiveness.**

In any event, it is **uncertain whether actions now financed through the FRT and the EUTFA will be entirely funded via the recast NDICI** or whether another coordination mechanism (based on Articles 210(2) and/or 214(6) TFEU) and/or a separate trust fund, pulling resources from the several new instruments for financing external action under new MFF,<sup>1057</sup> will be created. In fact, Article 27 of the preliminary agreement on the new NDICI envisages the possibility of allocating EU funding through trust funds set up by the Commission, or comparable instruments pulling resources from both the EU and MS,<sup>1058</sup> **allowing for the continuation of the current situation** and its related concerns.

In the end, it will all depend on whether the Parliament actually uses its capacity of influencing the selection of actions to be funded (or their suspension when they entail human rights violations) with the means at its disposal, including those foreseen in the preliminary agreement on the recast NDICI (such as exchanges of information, regular views, or the possibility of opposing decisions taken through delegated acts). And, if these prove insufficient, whether it will have the political will not to discharge the Commission's use of the budget to preclude non-compliance with the relevant standards.

## 6.7 Conclusions

This chapter has provided an **overview of the external dimension of migration and asylum policy**, under the major documents shaping the EU's approach since the Lisbon Treaty, tracing the **legacy of the GAMM, the EU Agenda on Migration, and the MPF in the Commission's New Pact on Migration and Asylum**. It has examined the manner in which EU funds are employed in this area, using cooperation with **Turkey, Libya, and Niger as case studies**. The analysis revealed that the EU's approach is overwhelmingly based on **the fight against irregular migration, giving limited consideration to the rights of migrants**, including those of forcibly displaced persons in need of international protection. It has been shown that this **falls short of the legal obligation to observe and promote fundamental rights, including those of TCNs**, when the EU acts internally or externally (Articles 2 and 21 TEU and Article 205 TFEU). Such obligation is **binding on all EU institutions, bodies and agencies as well as on the MS when implementing EU law** (Article 51 CFR).

**Migration management's new status as the ultimate priority for EU funding mechanisms**, such as the FRT and the EUTFA, **has led to a misuse of external development** (Article 208 TFEU) **and humanitarian aid** (Article 214 TFEU). These should provide needs-based assistance, respectively with the long-term goal of bettering third countries' socio-economic conditions or the short-term objective of providing emergency relief to populations hit by man-made or natural disasters. Instead, EU funding has served the internal policy goal of preventing arrivals, disregarding the real needs and interests of the parties concerned. **The EU has persisted in providing financial and material support to border management projects** in Turkey, Libya and Niger, **even though multiple sources have highlighted their detrimental effect on fundamental rights**. This **falls short of the relevant legal requirements, risks undermining foreign policy coherence** and **weakens external partners' trust**, negatively

<sup>1057</sup> Lilyanova, *Financing EU external action in the new MFF, 2021-2027: Heading 6 'Neighbourhood and the World*, European Parliamentary Research Service Briefing, PE 644.173 (November 2019), p. 3.

<sup>1058</sup> Joint issues paper on The External Dimension of the EU's Migration Policy under the New Pact on Migration and Asylum, Council doc. 6470/21, [5.3.2021](#), p. 5.



impacting the EU's ability to effectively address the root causes of forced displacement and build equal partnerships.

The **use of informal arrangements** (EU-Turkey Statement, bilateral MoUs) **and extra-budget instruments** (EUTFA) in this field poses additional risks to the EU legal system, as it **side-lines judicial and democratic accountability**. This **undermines** the right to judicial protection, good administration standards, and the principle of **institutional balance**. It also erodes the **competences of the European Parliament**,<sup>1059</sup> and compromises its mandate as a budgetary authority alongside the Council in a sensitive area with strategic importance for the EU's position in the global arena.

### Recommendations:

#### *Proposals on litigation*

37. The Parliament **should challenge the legality of any measures that impinge upon its competences under the Treaties**. Cooperation with third countries must be pursued following the rules provided for in the Treaties on 'development cooperation' (Article 208 TFEU), on 'economic, financial and technical cooperation with third countries', including 'financial assistance' (Article 212 TFEU), and on 'humanitarian aid' (Article 214 TFEU), which require that '[t]he Parliament and the Council', rather than the MS or the Council alone, 'adopt the measures necessary for the[ir] implementation' jointly and through 'the ordinary legislative procedure' (Articles 209(1), 212(2) and 214(3) TFEU). Otherwise, the Parliament should challenge non-compliance (Article 263 TFEU), to preserve its competences as co-legislator in the areas concerned and to guarantee Parliamentary scrutiny and the observance of the principles of democracy and political accountability (Article 2 TEU).
38. The Parliament should also **contest the validity of any measures that fail to observe fundamental rights**. The soft-law instruments scrutinised in the previous sections should be repealed and replaced with hard-law alternatives that comply with the principle of legality and the rule of law, which requires that any measure interfering with fundamental rights be provided for by laws that are published and accessible by the individuals concerned, offering guarantees against arbitrariness, subject to the principle of proportionality, and preserving the essence of the rights concerned (Article 52(1) CFR). Arguably, such laws, when referring to EU-level action, need to take the form of legally-binding instruments (i.e. EU Treaties or legislative acts), adopted following the relevant procedure and involving the European Parliament. Failure to do so, allows the Parliament to contest their validity (Article 263 TFEU).

#### *Proposals on implementation*

39. To honour the **right to good administration** (Article 41 CFR) and the European Ombudsman's recommendations, the Parliament should insist that all agreements with third countries and all EU external actions be adopted following a **comprehensive compliance system**,<sup>1060</sup> covering the entire formulation-implementation-revision cycle, including:
  - A **pre-conclusion human rights impact assessment** that determines the concrete human rights situation along the specific migration route to which the envisaged agreement/action/funding refers and that establishes any human rights risks the intended measure may foreseeably give rise to;

<sup>1059</sup> For detailed analysis, see García Andrade, 'EU External Competences in the field of Migration: How to Act Externally When Thinking Internally?' (2018) 55 Common Market Law Review 157.

<sup>1060</sup> Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights* (n 167), p. 33-35.

- Specific **benchmarks** and **indicators** should be used for the pre-conclusion assessments so that, if the country concerned does not meet STC requirements, no operational cooperation that affects the rights of TCNs should be established;
- **Mitigation measures** should be designed to counter any surmountable risks that may be detected, to guarantee compliance with human rights;
- For any **funding** allocated, a **demonstrable and measurable link to the safeguarding and consolidation of human rights** should be shown (Article 21(2)(a)-(b) TEU);
- If and only when human rights risks have been adequately mitigated, a detailed and enforceable **human rights conditionality clause** should be inserted in all agreements/actions/funding decisions finally adopted, making specific provision for the protection of TCN rights;
- Appropriate **operationalisation clauses** that provide for **specific safeguards** when the agreement/action/funding is being implemented should be included;
- A **body in charge of the adequate implementation** of the agreement/action/funding adopted should be created with powers to check compliance with fundamental rights;
- **Implementation guidelines** should be produced, on the basis of the concrete benchmarks and indicators, specifying the ways in which the agreement/action/funding at hand should be applied in practice so as to ensure compliance with EU law;
- The implementation body should **report periodically** on the ways in which EU law compliance, specifically with the rights of TCNs, has been ensured in practice;
- An **independent, transparent, and ongoing monitoring mechanism** with objective and up-to-date data on implementation should be introduced that includes representation of experts from different backgrounds, who are given access to all materials necessary to perform their task and allowed to conduct unannounced visits to relevant locations and interview competent actors. If it emerges that an agreement/action/funding scheme contributes to the infringement of fundamental rights, it should be discontinued;
- A **periodic evaluation** should be undertaken by an independent body at regular intervals with the responsibility to assess how EU law compliance, specifically with TCN rights, has been guaranteed, reviewing the full remit of activities and formulating recommendations for improvement or derogation of specific actions/components as appropriate;
- There should be a **follow up mechanism**, overseen by the European Parliament, whereby evaluation results and expert recommendations are duly incorporated in the relevant agreement/action/funding and reviews and adjustments introduced as necessary;
- It should remain possible at all times for the persons impacted by the relevant agreement/action/funding to challenge any decisions with a detrimental effect in a process that complies with **effective remedy** standards;
- Pre-assessment reports, the text of the relevant agreement/ action/funding adopted, the implementation guidelines, the implementation reports, the monitoring reports, the post-implementation evaluations and the follow up (review and reform) reports should be communicated to the European Parliament and be **publicly accessible** (e.g. in a dedicated e-portal) to ensure compliance with Article 41 CFR;
- Any **damage** sustained should be **repaired** through an effective system of redress (Article 47 CFR) and the **action/omission giving rise to the violation** immediately amended for compliance with the relevant right or, when not possible, **suspended or cancelled**.

*Proposals on budgetary control*

40. The Parliament should make **full use of its powers of budgetary control, including through the discharge procedure**, to ensure compliance with the relevant provisions of EU primary and secondary law.
41. It should use its power to **engage the ECA** (Article 287(4) TEFU) to monitor and ensure that funding decisions under the FRT, the EUTF and related allocations comply, in particular, with fundamental rights.
42. EU external development and humanitarian funding should not be made dependent upon cooperation on migration containment, as this clashes with the purpose of development aid and humanitarian assistance and may undermine human rights. The Parliament should thus **contest the legality of funding measures that fail to comply with development cooperation and humanitarian aid policy objectives** (Article 263 TFEU).
43. A **complete and public overview of EU funding to third countries in the field of migration management** should be made available by the European Commission at the behest of the European Parliament, on account of its 'right of scrutiny' and the principles of transparency and good administration, to preserve the rationality of EU expenditure decisions and encourage better management of the Union's budget overall.
44. The European Parliament should insist that the European Commission provides it with **detailed information** of the **process and rationale behind the selection of specific EU-funded actions** in regular exchanges of views and annual reports, covering any risk-assessment, monitoring and evaluation procedures undertaken or planned, so as to ensure continued democratic accountability and enable it to oversee the way in which the EU budget is being used in order to fully exercise its budgetary control competences.

*Proposals for amendments of instruments under negotiation*

45. Before final approval of the recast NDICI, **the European Parliament should** make sure of the:
  - **Inclusion of a risk-assessment and ongoing monitoring and evaluation mechanism** to ensure that EU funded actions comply with EU and international obligations, including TCN rights, as well as with the principle of policy coherence for development aid.
  - **Inclusion of a provision envisaging the suspension of funds** in case of serious violations of human rights, democratic principles, and the rule of law, in line with the Cotonou Agreement and the human rights conditionality clauses usually contained in EU trade agreements.
  - Amendment of Article 17 NDICI (performance-based approach), **removing cooperation on migration as one of the criteria for receiving additional funds** from the EU.
  - **Insertion of a clause obliging the Commission to specifically justify the existence of crisis situations warranting the use of rapid response actions**, with a view to avoiding that it may use the crisis justification to opt for rapid response actions, as opposed to thematic or geographic ones, thereby evading its obligation to inform the Parliament prior to adoption.

## 7. CONCLUSIONS AND RECOMMENDATIONS

The foregoing has elucidated the current state of play of EU legislation, as well as the EU's approach to migration management in the Mediterranean. A series of conclusions have been arrived at in each chapter, alongside proposed suggestions for the European Parliament. We **summarise our findings and consolidate our recommendations** in the sections below.

### 7.1 CONCLUSIONS

**Chapter 2** has demonstrated that, despite harmonisation efforts at EU level, **truly common standards have yet to materialise**. This is particularly true regarding asylum policy, where disparities persist regarding practices and standards in the processing of asylum claims and material reception conditions across MS and legal entry channels, such as humanitarian visas, are not covered by EU law. The EU legal framework also remains incomplete with regard to legal migration, since many categories of TCN workers fall outside the EU *acquis*. **The New Pact on Migration and Asylum puts several controversial proposals on the agenda**. In the legal migration field, national schemes will continue to run parallel to EU ones and EU-wide mobility for TCNs remains largely absent. Concerning asylum policy, the basic premises of the Dublin system are maintained, if not reinforced; the envisaged interconnection between asylum and return under the proposed border procedure risks undermining access to protection. The focus on **externalisation of protection obligations** and **containment** of refugees and migrants **in transit countries** will render the **EU hostage to the whims of foreign political forces**.

**Chapter 3** has shown that **despite the number of asylum applications and arrivals at EU external borders significantly decreasing since 2015, crisis responses and crisis discourse persist**. **Solidarity** continues to be emergency-driven and **has not been structurally embedded** in the common asylum and external border control policies. The Commission's approach in **the New Pact does not seem capable of resolving current tensions** and providing a satisfactory response to the fair sharing of responsibilities challenge. The **expanding powers of Frontex and EASO** have led to significant shifts in the implementation modes of the EU asylum and external border control policies, raising **issues with regard to independence, executive powers, accountability, and fundamental rights compliance**, which have not been adequately addressed. Covid-19 has exacerbated current complexities requiring a thorough assessment.

**Chapter 4** has revealed the **shortcomings in the Commission's plan for a new common approach to SAR**, which will **structuralise current malpractices** by Frontex, EUNAVFORMED, and the MS' bilateral cooperation arrangements with third countries, including those whose legitimacy and legality have been challenged in European courts and other fora. **Rescue**, in current practice and **in the New Pact**, has been **designed as an exception to the general rule of containment of unwanted arrivals, in contravention of the SAR Conventions**. Therefore, **pullbacks and related abuse** risk becoming **normalised** as a legitimate migration management technique, regardless of human rights implications.

**Chapter 5** has problematised the **criminalisation of humanitarian assistance by SAR NGOs** in the Mediterranean. This remains a salient political issue to which the Commission is unable or unwilling to put an end. **The failings of the Commission Guidance on the Facilitation Directive have been exposed** alongside the difficulties encountered by SAR NGOs in their day-to-day activities in different MS, impeding the discharge of their mandate. The Guidance is focused on humanitarian assistance 'mandated by law', which leaves ample scope for **legal uncertainty that may foster national discrepancies and undermine the unity of EU law**. Beyond their humanitarian function, the

Guidance also fails to recognise the wider role civil society organisations play in monitoring the implementation of human rights standards. There is a **need, in this regard, for an effective monitoring and redress mechanism that protects civil society organisations as guarantors of democratic values and human rights defenders.**

**Chapter 6** has critiqued **the external dimension of migration and asylum policy** under the major documents shaping the EU's approach, tracing the **legacy of the GAMM, the EU Agenda on Migration, and the MPF in the Commission's New Pact on Migration and Asylum**, including the manner in which EU funds are employed in this area. The analysis of EU cooperation with **Turkey, Libya, and Niger as case studies** has revealed an **overwhelming focus on the fight against irregular migration, paying limited attention to the rights of TCNs.** Furthermore, **migration management becoming the ultimate priority of EU funding mechanisms has led to a misuse of development (Article 208 TFEU) and humanitarian aid (Article 214 TFEU),** without consideration for the real needs and interests of the parties concerned, **even when their detrimental effect on fundamental rights is clear** from multiple sources. This **falls short of the legal obligation to observe and promote fundamental rights** when the EU acts externally (Articles 2 and 21 TEU and Article 205 TFEU), which is **binding on all EU institutions, bodies and agencies as well as on the MS when implementing EU law (Article 51 CFR).** It also **risks undermining foreign policy coherence** and may lead to **mistrust by external partners,** negatively impacting the EU's ability to address the root causes of migration and build relationships based on an equal partnership. The **use of informal arrangements** poses additional problems, as it **side-lines judicial and democratic accountability,** undermining the rights to effective judicial protection and good administration, and the principle of **institutional balance,** eroding the **competences of the European Parliament** and its budgetary authority.

## 7.2 RECOMMENDATIONS

In light of the findings arrived at in the foregoing chapters, we submit that the Parliament should:

*Regarding the current legislative acquis, implementation, and ongoing practice*

1. Evaluate the Commission's practice regarding the **introduction of infringement procedures** against MS that do not fully apply the Directives in the area of legal migration and asylum;
2. Launch a study on the **discrimination risk that some categories of TCN workers compared to other categories of TCN workers** face under EU law due to differences in the scope of the equality principle between the category-specific Directives regarding legal migration;
3. Ensure that refugees and **migrants deprived of their liberty,** on arrival, during the asylum process, or during pre-removal proceedings, **have access to an effective remedy** against the decision ordering the deprivation of liberty, as well as to a review at regular intervals;
4. Launch a study to analyse the **accountability mechanisms** pertaining to Frontex and EASO to ensure effectiveness and avoid duplication;
5. Launch a study on MS' asymmetric responsibilities in border and asylum policies, to **concretely evaluate the breadth of the solidarity gap** between the current situation and the desirable size of EU fair sharing and compensation mechanisms;
6. Launch a study to **scrutinise the compatibility of MS' Covid-19 responses at the borders with EU and international refugee law and human rights,** specifically the principle of human dignity (Article 1 CFR), the right to asylum (Article 18 CFR), and the prohibitions of inhuman and degrading

treatment (Article 4 CFR), arbitrary detention (Article 6 CFR), collective expulsion (Article 19(1) CFR), and *refoulement* (Article 19(2) CFR);

7. **Extend the terms of the Frontex Scrutiny Working Group** to cover not only incidents in the Aegean, but also facilitation of pullbacks in the Central Mediterranean. A **similar investigation** should be opened **into** the workings and effects of **EUNAVFORMED Operations** to elucidate potential violations and legal responsibilities;
8. **Establish a permanent SAR Observatory for the Mediterranean** to monitor human rights violations occurring in the course of, or as a result of, maritime interventions.<sup>1061</sup> Collaboration with third countries should be closely supervised to prevent instances of unlawful pullbacks/pushbacks and related practices. The work of the Observatory can feed into ongoing and future investigations and support the work of Scrutiny Working Groups, FRA, the Consultative Forum of Frontex, and its Fundamental Rights Officer;
9. Promote the **formal recognition in all EU legal and policy instruments** affecting their position **of the work and status of SAR NGOs as human rights defenders**, whose activity is protected under international law. The UN and EU human rights defenders' framework should be applied to civil society organisations acting within the EU;
10. Support the **introduction of independent monitoring of the acts carried out against humanitarian actors and human rights defenders working with migrants** and **launch a formal, independent investigation into** human rights breaches occurred in this context since the 'refugee crisis'. This should not only include criminal convictions, but also all cases of criminal investigations as well as harassment, intimidation and undue prosecution;
11. Call for the **urgent deployment of EU/MS SAR capacities in the Mediterranean**, either in the form of dedicated MS missions or an EU-wide SAR operation. In parallel, request **the Commission, Frontex, EUNAVFORMED and the MS to decriminalise and facilitate cooperation between merchant ships and civil society rescuers**;
12. Require MS to **release NGO vessels from impoundment** so that they can return to sea. MS should, in addition, help NGOs meet any other needs related to their work or technical requirements introduced in legal provisions, including during the Covid-19 health crisis;
13. Call on the MS to **refrain from misusing criminal and administrative proceedings and technical requirements to obstruct NGOs' life-saving work**;
14. Require that all agreements with third countries and all EU external actions regarding migration be adopted following a **comprehensive compliance system**, covering the entire formulation-implementation-revision cycle, so as to honour the **right to good administration** and the European Ombudsman's recommendations, including:
  - A **pre-conclusion human rights impact assessment** that determines the concrete human rights situation along the specific migration route to which the envisaged agreement/action/funding refers and that establishes any human rights risks the intended measure may foreseeably give rise to;

<sup>1061</sup> The Search and Rescue Observatory for the Mediterranean ([SAROBMED](#)) project, recording SAR and interdiction incidents during 2015-19 through a consortium of researchers and civil society organisations, offers a model that could be replicated.



- Specific **benchmarks** and **indicators** should be used for the pre-conclusion assessments so that, if the country concerned is not safe, no operational cooperation that affects the rights of TCNs should be established;
- **Mitigation measures** should be designed to counter any surmountable risks that may be detected, to guarantee compliance with human rights;
- For any **funding**, a **demonstrable and measurable link to the safeguarding and consolidation of human rights** should be shown (Article 21(2)(a)-(b) TEU);
- If and only when human rights risks have been mitigated, a detailed and enforceable **human rights conditionality clause** should be inserted in all agreements/actions/funding finally adopted, making specific provision for the protection of TCN rights;
- Appropriate **operationalisation clauses** that provide for **specific safeguards** when the agreement/action/funding is being implemented should be included;
- A **body in charge of the adequate implementation** of the agreement/action/funding adopted should be designated with powers to check compliance with fundamental rights;
- **Implementation guidelines** should be produced, on the basis of the aforementioned benchmarks and indicators, specifying the ways in which the agreement/action/funding should be applied to ensure compliance with EU law;
- The implementation body should **report periodically** to the Commission, the Council, and the European Parliament, on the ways in which EU law compliance, specifically with the rights of TCNs, has been fulfilled in practice;
- An **independent, transparent, and ongoing monitoring mechanism** with objective and up-to-date data on implementation should be introduced that includes representation of experts from different backgrounds, who are given access to all materials necessary to perform their task and allowed to conduct unannounced visits to relevant locations and interview competent actors. **If it emerges that an agreement/action/funding scheme contributes to the infringement of fundamental rights, it should be discontinued;**
- A **periodic evaluation** should be undertaken by an independent body at regular intervals with the responsibility to assess how EU law compliance, specifically with TCN rights, has been guaranteed, reviewing the full remit of activities and formulating recommendations for improvement or derogation of specific actions/components as appropriate;
- There should be a **follow-up mechanism**, overseen by the European Parliament, whereby evaluation results and expert recommendations are incorporated in the relevant agreement/action/funding and reviews/adjustments introduced as necessary;
- It should remain possible at all times for the persons impacted by the relevant agreement/action/funding to challenge any decisions with a detrimental effect in a process that complies with **effective remedy** standards;
- Pre-assessment reports, the text of the relevant agreement/ action/funding adopted, the implementation guidelines, the implementation reports, the monitoring reports, the post-implementation evaluations and the follow up (review and reform) reports should be communicated to the Commission, the Council, and the European Parliament and be made **publicly accessible** (e.g. through a dedicated e-portal);
- Any **damage** caused should be **repaired** through an effective system of redress (Article 47 CFR) and the **action/omission giving rise to the violation** immediately amended for compliance with the relevant right or, when not possible, **suspended or cancelled**.

*Regarding ongoing negotiations and amendments to existing instruments*

15. **Scrutinise the fundamental rights implications of the envisaged Asylum and Migration Management Regulation's proposals to curb secondary movements**, such as transferring unaccompanied minors to the MS of first entry, if no family criterion is applicable, and removing the entitlement to reception conditions in MS other than the 'responsible' MS;
16. Ensure that refugees and migrants subject to the envisaged asylum and return border procedures benefit from the **right to an effective remedy** against MS decisions;
17. Ensure that the **Union Resettlement Framework** will **not introduce negative conditionality** between MS resettlement commitments and third countries' adherence to EU migration management objectives;
18. Ensure the **fundamental rights compatibility of all legislative amendments to the CEAS** instruments, in particular with the principle of *non-refoulement*, the principle of non-penalisation for irregular entry, the principle of human dignity, the right to an effective remedy, the prohibition of arbitrary deprivation of liberty, and the right to asylum;
19. Ensure the European Parliament's involvement in the **monitoring mechanism of the new EUAA** to render it more objective and impartial, e.g. through the possibility of Parliament delegations being present in on-site visits, or through reporting obligations, especially regarding escalation measures;
20. **Ensure that the EUAA Consultative Forum is vested with adequate capacities** (e.g. through reporting obligations, and allowing members to conduct on-site visits during operations), making it an independent monitor and a meaningful accountability forum;
21. Request the European Commission to **revise the SAR Recommendation** for compliance with international standards. Under the maritime Conventions, **all seafarers**, including IRINI and Frontex-coordinated assets, **are subject to the customary international legal duty to rescue**. They cannot ignore distress calls or refuse requests for assistance on convenience or 'pull factor' considerations, and should **pro-actively engage in SAR**, searching for persons in distress, retrieving survivors, and delivering them to a **'place of safety'**, **in line with the principle of non-refoulement**;
22. Request the European Commission to **revise the SAR Recommendation to guarantee that SAR NGO activities are not hindered** by the adoption of administrative, technical or criminal measures impeding their work. Unproven 'pull factor' rhetoric should be abandoned and replaced with compliance with the SAR Conventions and the rights of SAR NGOs under the **UN and EU human rights defenders' framework**;
23. **Amend the solidarity mechanisms proposed** as part of the New Pact on Migration and Asylum to guarantee compliance with Article 80 TFEU and the CFR, particularly in what regards post-disembarkation arrangements, avoiding discriminatory outcomes on account of refugees' mode of arrival, in line with the principles of **non-discrimination** and **non-penalisation** for irregular entry in Articles 3 and 31 of the 1951 Geneva Convention. **TCNs'** rights must be duly protected in any reception/relocation system, factoring in their **needs, preferences, and entitlements**, and **taking account of MS capacities** in line with the principle of solidarity and fair sharing of responsibility;
24. **Amend the Facilitation Directive** to bring it in line with the definition of migrant smuggling contained in the UN instruments. Meanwhile, the European Parliament should require the European Commission to **revise the Criminalisation Guidance** to incorporate a definition of

'humanitarian assistance' that covers activity at sea as well as on land, and makes **the humanitarian exemption clause mandatory**;

25. **Before final approval of the recast NDICI**, insist in the inclusion of:

- **A risk-assessment and ongoing monitoring and evaluation mechanism** to ensure that EU funded actions comply with EU and international obligations, including TCN rights, as well as with the principle of policy coherence for development aid, along the lines of the comprehensive compliance system recommended above;
- **A provision for the suspension of funds** in case of serious violations of human rights, democratic principles, or the rule of law, following the Cotonou Agreement and the human rights conditionality clauses usually contained in EU trade agreements;
- An amendment to proposed Article 17 NDICI, **removing cooperation on migration as one of the criteria for receiving additional funds**;
- **A clause obliging the Commission to specifically justify the existence of crisis situations warranting the use of rapid response actions**, with a view to avoiding that it may use the crisis justification to opt for rapid response actions, as opposed to thematic or geographic ones, thereby evading its obligation to inform the European Parliament prior to adoption.

*Regarding future initiatives*

26. Ensure that the **status of legal migrants** (in particular long-term residents and Blue Card holders) **becomes genuinely European** on the basis of the principle of mutual recognition, in particular regarding mobility within the EU, as per Article 79(2)(b) TFEU;
27. Launch a European added-value assessment on the **extension of the EU *acquis* to categories of TCN workers not currently covered** by it, to decide whether it is necessary or not to adopt further legislation in line with the principle of subsidiarity;
28. Launch an own-initiative report on **rendering existing regular admission schemes more accessible to international protection seekers**;
29. Launch an own-initiative report on **the mutual recognition of positive asylum decisions coupled with qualified free movement rights for recognised** beneficiaries of international protection, considering its potential impact on the reduction of secondary movements and the enhancement of compliance with the CEAS provisions;
30. Continue to pursue the **introduction of binding legislation on legal entry channels**, e.g. a European Humanitarian Visa, renewing the invitation to the Commission to table specific instruments that facilitate admission for the purposes of lodging an asylum application;
31. Revise the **composition of the management boards of EASO and Frontex**, foreseeing a role for the European Parliament as a non-voting member, at the very least, to enhance political accountability and scrutiny channels;
32. **Strengthen the role of the European Parliament as a political accountability forum** for JHA agencies, by increasing its ability to influence agency dynamics (e.g. answering ad-hoc questions in writing, keeping comprehensive records of Management Board meetings, and taking a role in the dismissal of Executive Directors);
33. **Establish political accountability arrangements before national parliaments** (e.g. reporting obligations or hearings) and/or joint accountability mechanisms involving both the European

Parliament and national parliaments, along the lines of the European Union Agency for Law Enforcement Cooperation's (Europol) Joint Parliamentary Scrutiny Group;

34. **Actively follow up on implementing the internal fundamental rights oversight mechanisms** included in the envisaged EUAA, such as hiring a Fundamental Rights Officer and resourcing their office, and running the individual complaints mechanism in a manner that guarantees compliance with the rights to good administration (Article 41 CFR) and an effective remedy (Article 47 CFR), including through effective judicial protection, to ensure adequate redress of any violations;
35. **Evaluate the legal and practical feasibility**, alongside the financial and operational implications, **of new solidarity mechanisms** under the New Pact, including 'return sponsorships', considering both the horizontal and vertical dimensions (i.e. inter-State and vis-à-vis refugees and migrants) to ensure full compliance with the relevant standards;
36. Prepare an own-initiative report, in line with its previous Resolutions, on the **launch of an 'integrated SAR response' in the Mediterranean**, involving Frontex, the EUNAVFORMED, and the EU MS. The deployment should aim at restoring SAR capacity and activity at sea in line with the EU *acquis* and the international maritime Conventions. SAR responsibility cannot continue to primarily rest on the shoulders of private actors;
37. Call for the adoption of EU-wide **Covid-19 safety procedures that comply with the human rights and protection needs of rescuees, NGO workers, and reception staff**, where SAR boats disembark in EU ports as 'places of safety';
38. Request the European Commission and the MS to draw a plan that **enables safe, quick and predictable disembarkation of SAR boats in a 'place of safety'**, in line with international standards, thus discontinuing cooperation with the Libyan Coastguard and the facilitation of 'pullbacks' that lead to the delivery of survivors to unsafe ports in Libya and elsewhere outside Europe;

#### *Proposals on litigation*

39. **Challenge the legality of any measures that impinge upon its competences under the Treaties.** Cooperation with third countries must be pursued following the rules provided for in the Treaties on 'development cooperation' (Article 208 TFEU), on 'economic, financial and technical cooperation with third countries', including 'financial assistance' (Article 212 TFEU), and on 'humanitarian aid' (Article 214 TFEU), which require that '[t]he Parliament and the Council', rather than the MS or the Council alone, 'adopt the measures necessary for the[ir] implementation' jointly and through 'the ordinary legislative procedure' (Articles 209(1), 212(2) and 214(3) TFEU). Otherwise, the Parliament should challenge non-compliance (Article 263 TFEU), to preserve its competences as co-legislator in the areas concerned and to guarantee Parliamentary scrutiny and the observance of the principles of democracy and political accountability (Article 2 TEU);
40. **Contest the validity of any measures that fail to observe fundamental rights.** The soft-law instruments scrutinised in this study (regarding Turkey, Libya and Niger) should be repealed and replaced with hard-law alternatives that comply with the principle of legality, which requires that any measure interfering with fundamental rights be provided for by laws that are published and accessible by the individuals concerned, offering guarantees against arbitrariness, subject to the principle of proportionality, and preserving the essence of the rights concerned (Article 52(1) CFR). Arguably, such laws, when referring to EU-level action, need to take the form of legally-binding instruments (i.e. EU Treaties or legislative acts), adopted following the relevant procedure and

involving the European Parliament. Failure to do so, allows the Parliament to contest their validity (Article 263 TFEU);

*Proposals on budgetary control*

41. **Make full use of its powers of budgetary control, including via the discharge procedure**, to ensure compliance with relevant EU primary and secondary law provisions;
42. **Engage the European Court of Auditors** (Article 287(4) TFEU) to monitor and ensure that funding decisions under the Facility for Refugees in Turkey, the EU Trust Fund for Africa and related allocations comply, in particular, with fundamental rights;
43. EU external development and humanitarian funding should not be made dependent upon cooperation on migration containment, as this clashes with the purpose of development aid and humanitarian assistance and may undermine human rights. The Parliament should thus **contest the legality of funding measures that fail to comply with development cooperation and humanitarian aid policy objectives** (Article 263 TFEU);
44. Request the European Commission to **make available a complete and public overview of EU funding to third countries in the field of migration management**, in line with the principles of transparency and good administration (Article 41 CFR), to preserve the rationality of EU expenditure decisions and encourage better management of the Union's budget overall;
45. Insist that the European Commission **informs** the European Parliament **of the process and rationale behind the selection of specific EU-funded actions**, including any risk-assessment, monitoring and evaluation procedures undertaken or planned, to ensure continued democratic accountability. This is needed to enable Parliamentary oversight of EU budget use and for the Parliament to fully exercise its budgetary control competences.

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## ANNEX

### TABLE 1: LIST OF SAR NGO BOATS ACTIVE IN THE MEDITERRANEAN AND AEGEAN, 2015 – 2021

This information is assembled on the bases on interviews and online research coupled with consultation of FRA resources. Please note, because of the nature of SAR operations, for some vessels certain information may be missing or incomplete.<sup>1062</sup>

No	Vessel	Organisation	Flag	History	Current status
1	Aita Mari	Salvamento Marítimo Humanitario (SMH)	Spain	Active now but blocked from May to July 2020 due to administrative seizure in Palermo (Sicily) for technical irregularities related to maritime security and blocked from the Spanish government from January to April 2019.	Active
2	Alan Kurdi	Sea-Eye	Germany	Detained by the Italian authorities in October 2020. The crew had just completed a two-week quarantine off the coast of the Sardinia following the rescue and disembarkation of 133 refugees when the authorities banned the ship from sailing due to a list of supposed safety irregularities. These included carrying too many passengers. The ship's captain Joachim Ebeling said: 'If [the authorities] were really concerned about the safety of the people we rescued, [they] would not spend hours on end looking for ways to detain us at every opportunity.' This is the second time the Alan Kurdi has been delayed by the Italian authorities in 2020. In August 2020, Sea-Eye filed a lawsuit against the Italian Ministry of Transport and Palermo Port Authority for the blockage. In April 2021, the regional administrative court of Sardinia lifted the detention so the ship could undergo its biyearly inspection and maintenance works. A decision on the legality of the detention is scheduled for November 2021.	Inactive
3	Alex Mediterranea	Mediterranea Saving Humans	Italy	Seized in July 2019 until February 2020 shortly after beginning operations. An investigation was launched by the Prosecutor of Agrigento (Sicily) against the captain and the mission head for the aiding of illegal immigration and	Inactive

<sup>1062</sup> For more detail on legal cases, see FRA, 'Table 2: Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea', [15.12.2020](#).

				refusal of obedience to a warship. 66.000 EUR fine for violating the Security Decree Bis.	
4	Aquarius	MSF and SOS Mediteranee	Gibraltar/Panama	<p>The boat began operations in 2016 and the mission ended in December 2018. MSF and its partner SOS Mediteranee said they were forced to terminate its operations due to a 'smear campaign' by European governments e.g. in November 2018, staff members were under investigation by the Prosecutor of Catania (Sicily) for "illegal management of waste"</p> <p>The ship was blocked at the French port of Marseilles in November 2018 under order of the Prosecutor of Catania (Sicily) (in absentia) since it lost its Panamanian registration at the end of September. The Prosecutor also ordered the seizure of 200.000 EUR from MSF, but this order was annulled in January 2019. The boat saved more than 27,000 people over two years.</p>	Inactive
5	Argos	MSF	Luxembourg	The ship provided SAR support from May 2015 to November 2016. The vessel had the capacity to carry 300 – 350 rescued people. The MSF crew on board was in charge of medical activities and rescue.	Inactive
6	Bourbon Argos	MSF	Luxembourg	Bourbon Argos began operations in 2015, at which time it was the largest SAR vessel operational in the Mediterranean. It ended operations in 2016.	Inactive
7	Dignity I	MSF	Panama	Dignity I ran SAR operations from 2015 to 2016. The vessel had the capacity to carry 300 rescued people.	Inactive
8	Eleonore	Mission Lifeline	Germany	Started operations in 2019. In June 2019, the Prosecutor of Ragusa (Sicily) seized the vessel in Pozzallo for violating the Security Decree Bis and launched an investigation against the captain and the mission head for aiding of illegal immigration. They were issued a 300.000 EUR fine for violating the Security Decree Bis.	Inactive
9	Golfo Azzuro	Proactiva Open Arms	Panama	<p>In May 2017, the mission was subjected to criminal investigations against 'unknown persons' involved in migrant smuggling initiated by the Prosecutor of Palermo (Sicily).</p> <p>In August 2017, the crew claimed its boat was in international waters when it was told to head to port in Libya or come under fire.</p> <p>In June 2018, the tribunal of Palermo discontinued the investigation.</p>	Inactive
10	Iuventa	Jugend Rettet	Netherlands	Saved over 14,000 people. Seized by Italian police in August 2017 on the	Inactive

				<p>allegation of cooperation with migrant smugglers.</p> <p>The chief prosecutor in the Sicilian city of Trapani said he had evidence of encounters between traffickers, who escorted illegal immigrants to the NGO boat and members of its crew.</p> <p>The Italian public prosecutor's office expanded its investigations against individual crew members of the organization. Official charges were brought in March 2021 against the 'luventa 10'.</p>	
11	Lifeline (ex-Sea Watch 2)	Mission Lifeline/Mare Liberum	Netherlands/Germany	<p>Impounded in Malta in 2018 while Maltese authorities launched investigations due to potential issues with the registration of the ship under the Dutch flag. In January 2020, the Maltese Appeal Court overturned the decision and cleared the captain of all charges.</p> <p>In July 2018, faced an accusation by the Public Prosecutor's Service against the captain for not following orders of the Italian MRCC and entering Maltese territorial waters illegally, and in May 2019, the Court of Valletta fined the captain 10,000 EUR for operating a ship that was not properly registered for rescue operations.</p>	Inactive
12	Mare Liberum	Mare Liberum (previously Sea Watch)	Germany	<p>Seized in April 2019 and 2020 on the basis of safety requirements by the German Professional Association for Transport and Traffic. In September 2020, Administrative Court of Hamburg granted the ship permission to set sail.</p> <p>Meanwhile, Greece police have opened criminal investigations into four NGOs and 33 individuals for 'facilitating the illegal entry of aliens' into Greece.</p> <p>The police did not indicate which NGOs or individuals it was investigating, but both Mare Liberum and the activist network Alarm Phone, which operates a hotline for refugees in distress at sea, fear the investigations are aimed at criminalising their life-saving work.</p> <p>Mare Liberum said in a statement that it could not put its crew members in Greece at risk.</p>	Temporarily suspended their missions, fearing legal action against them by the Greek government.
13	Mario Jonio	Mediterranean Saving Humans	Italy	<p>Seized several times by the Italian authorities at various ports in Sicily and investigations launched against captain and mission head. Faced multiple restrictions on medical staff boarding boat to attend to rescues.</p> <p>Since November 2020, it is docked at the port of Venice for mandatory</p>	Inactive

				maintenance work prescribed by the Italian Naval Registry.	
14	Minden	Lifeboat Project	Germany	Active in 2016	Inactive
15	Mo Chara	Refugee Rescue	United Kingdom	Active from 2015 on the North Shore of Lesbos, Greece.  Suspended from August 2020 to May 2021, it announced its return to sea on 13 May 2021.	Active
16	M.V. Louise Michel	Louise Michel/Banksy	Germany	Established operations in August 2020 to patrol the Mediterranean and perform SAR. Currently blocked from leaving port in Burriana (Spain) due to EU restrictions.	Inactive
17	Ocean Viking	MSF and SOS Mediteranee	Norway	Launched July 2019. Authorities impounded the Ocean Viking on July 2020, demanding extensive upgrades on the grounds that it did not meet necessary safety standards. Earlier that month, the ship brought 180 migrants rescued from sinking vessels to Porto Empedocle on the island of Sicily. Following a five-month impoundment after saving over 180 in the Mediterranean Sea, Italian authorities released Ocean Viking on 21 December 2020.	Active
18	Open Arms	Proactiva Open Arms	Spain	Recently released after a period of detention. In November 2020, the tribunal of Ragusa (Italy) dismissed previous charges from 2018 and 2019 on grounds of "criminal association" and "facilitation of irregular migration" (Catania) and disobedience of Interior Ministry orders (Ragusa). Collaborated with Frontex in November 2020.	Active
19	Phoenix	Migrant offshore Aid Station (MOAS) and SOS Mediteranee in collaboration with MSF	Belize/Norway	Its first mission ran from August to October 2014. From May to October 2015, the Phoenix had an MSF medical team of two doctors and a nurse on board to provide humanitarian medical aid. In 2017, MOAS, cited 'complex context' as the reason for the end of its then operations off the Libyan coast. The boat rescued some 40,000 migrants over a period of three years. It has since reorientated its mission to take aid to the Rohingya refugees who have fled violence in Myanmar.	Inactive
20	Prudence	MSF	Italy	Prudence was operationally active from March 2017 to October 2017, run by MSF. It stopped operations in October 2017. The reason cited was the drop in the number of arrivals through the Mediterranean, coupled with threats from the Libyan coastguard and pressure from the Italian government to cease operations.	Inactive

21	Sea Eye	Sea Eye	Netherlands	Stopped operations after contestation of the Netherlands flag and seizure in Malta in July 2018.	Inactive
22	Sea Watch	Mare Liberum	Germany	Became active in the Mediterranean at the end of March 2015, arriving on Lampedusa in the middle of May 2015. Since 2017 it no longer works as a rescue ship but monitors the Aegean under the new name Mare Liberum.	Inactive
23	Sea Watch 3	Sea Watch	Netherlands	This larger and better equipped ship replaced Sea-Watch. From November 2017 to January 2018, the Sea-Watch 3 was involved in rescuing approximately 1,500 people. In January 2019, blocked in Italy for extensive inspections mandated by Dutch authorities In April 2019, Dutch government imposed stringent technical safety requirements for the ship without a transition period and blocked the ship. In May 2019, the court in the Hague ruled new requirements were legal but that the transition period had not been sufficient. The judges removed the blockade and suspended the recent requirements until 15 August 2019 (later amended until December 2019). Seized again in June 2020 and allowed to go to Spain for shipyard period in September 2020. Released in February 2021 and seized again in March 2021.	Inactive
24	Sea Watch 4	Sea Watch, MSF	Germany	Active since August 2020, this larger ship was purchased at the end of January 2020 by Sea-Watch and the coalition United4Rescue, led by the Protestant church in Germany. Médecins Sans Frontières (MSF) Joined the crew in 2020. On 15 August 2020, the Sea-Watch 4 left the port of Burriana, Spain, for her first mission. It rescued over 350 people from distress at sea and brought them to a safe haven. Sea-Watch 4 is now working alongside Sea-Watch 3. In addition to the numerous rebuilding works, new RHIBs (speedboats and rescue boats) and material for rescue operations, additional permanent staff on Sea-Watch 4 have been hired to support volunteers. In September 2020 was seized at port of Palermo for technical irregularities related to maritime security which is successfully appealed in October 2020. Released in March 2021 but under seizure again since May 2021.	Inactive

25	Sebastian K	Mare Liberum	Germany	Acquired in 2020 to expand human rights monitoring in the Aegean Sea. Germany ordered the detention of the ship in October 2020 under a change in law in the regulation on ship safety under the German Federal Minister of Transport. This has prevented it from resuming monitoring of the Greek and Turkish coastguard's treatment of refugees.	Temporarily suspended their missions, fearing legal action against them by Greek government
26	Seefuchs/Life	Sea-Eye/PROM-AID	Netherlands	Stopped SAR operations in 2018. It was then donated to PROEM-AID and renamed 'Life'.	Inactive
27	VOC Hestia	Save the Children	Italy	Began operations in the Mediterranean in September 2016 and rescued over 10,000 people. Stopped operations in October 2017 following a search by the Italian police and pressure to sign the new code of conduct (although they claimed this was unrelated to the stop in operations).	Inactive
28	VOS Prudence	MSF Belgium	Italy	Stopped operations in Oct. 2017. Its staff has been under investigation since 2018 by the Prosecutor of Catania (Sicily) on the charge of 'illegal waste management'.	Inactive



## TABLE 2: FINANCIAL INSTRUMENTS OF THE EXTERNAL DIMENSION OF THE EU ASYLUM AND MIGRATION POLICY

### Facility for Refugees in Turkey (FRT)

Source of funding	Policy Area	Objective
European Neighbourhood Instrument (ENI)	EU external action (205 TEU): Development cooperation (208 TFEU) + Economic, financial and technical cooperation with third countries (212 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of fight against poverty (208 TFEU) poverty and delivery of assistance to third countries (actions under 212 TFEU should be consistent with actions under 208 TFEU)
Development Cooperation Instrument (DCI)	EU external action (205 TEU): Development cooperation (208 TFEU) + Economic, financial and technical cooperation with third countries (212 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of fight against poverty and delivery of assistance to third countries (actions under 212 TFEU should be consistent with actions under 208 TFEU)
Instrument for Pre-Accession Assistance (IPA II)	EU external action (205 TEU): Economic, financial and technical cooperation with third countries (212 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of delivery of assistance to third countries (actions under 212 TFEU should be consistent with actions under 208 TFEU)
Instrument contributing to Stability and Peace (IcSP)	EU external action (205 TEU): Development cooperation (208 TFEU) + Economic, financial and technical cooperation with third countries (212 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of fight against poverty and delivery of assistance to third countries (actions under 212 TFEU should be consistent with actions under 208 TFEU)
Regulation 1257/96 concerning humanitarian aid	EU external action (205 TEU): Humanitarian assistance (214 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of provision of ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters (214 TFEU)

**European Union Trust Fund for Africa (EUTFA)**

Source of funding	Policy Area	Objective
European Development Fund (EDF)	EU external action (205 TEU): Development cooperation (208 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of fight against poverty (208 TFEU)
Development Cooperation Instrument (DCI)	EU external action (205 TEU): Development cooperation (208 TFEU) + Economic, financial and technical cooperation with third countries (212 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of fight against poverty (208) and delivery of assistance to third countries (actions under 212 TFEU should be consistent with actions under 208 TFEU)
European Neighbourhood Instrument (ENI)	EU external action (205 TEU): Development cooperation (208 TFEU) + Economic, financial and technical cooperation with third countries (212 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of fight against poverty (208 TFEU)
DG for European Civil Protection and Humanitarian Aid Operations (ECHO) resources	EU external action (205 TEU): Humanitarian assistance (214 TFEU)	General objective of promotion and protection of democracy, the rule of law, human rights and the principles of international law (21 TEU) + specific objective of provision of ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters (214 TFEU)
Asylum, Migration and Integration Fund (AMIF)	Policies on border checks, asylum and immigration (78-79 TFEU)	Strengthening and develop all aspects of the CEAS, including its external dimension, with due regard to the principles and objectives of the Union's humanitarian policy, and ensuring consistency with the measures funded by the Union's external financing instruments (Art. 2 AMIF Reg.) + should focus on non-development-oriented measures and serve the interests of the Union's internal policies (Art. 24 AMIF Reg.)

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, examines the EU approach on migration in the Mediterranean, covering developments from the 2015 refugee crisis up to the Covid-19 pandemic, assessing the effect these events have had on the design, implementation, and reform of EU policy on asylum, migration and external border control, and documenting the ramifications these changes have had on the actors who operate and are impacted by these policies, including immigration authorities, civil society organisations, and the migrants themselves. The study includes a review of the state of play of relevant EU asylum and migration legislation, an appraisal of the situation in the Mediterranean, and a thorough examination of the external dimension of the EU migration, asylum and border policies, focusing on cooperation with third countries (Turkey, Libya and Niger), incorporating human rights and refugee law considerations and an analysis of the implications of funding allocations under the EU Trust Fund for Africa and the Refugee Facility in Turkey. The main goal is to test the correct application of EU and international law, having regard to increased allegations of human rights violations, undue criminalisation, and complicity of the EU in atrocity crimes committed against migrants at sea, stranded in Libya, or contained in Niger and Turkey. The role of EU agencies (Frontex and EASO) is also assessed alongside the bilateral or multi-lateral initiatives adopted by MS to confront the mounting challenges at the common external borders of the EU, incorporating the principle of solidarity and fair sharing of responsibility (Article 80 TFEU) as a horizontal concern

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