



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

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- I. Institutional framework
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# Area of Freedom Security and Justice

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

# Why constitutional law

## 1. Essential functions and prerogatives of the State

- Internal security
- Access to national territory
- Administering justice

## 2. Implications on the rights status of the individual

- Deprivation of liberty
- Refusal of entry
- Expulsion

## 3. EU action & MS action

- State solidarity
- Solidarity amongst the People
- Free movement



**Area of Freedom, Security  
and Justice**

# How to cooperate

## Ordinary legislative procedure

Art. 294 TFEU

European Commission (exclusive right to initiative)



European Parliament (co-decision)



Council of EU (QMV)

# Article 78 TFEU

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

# Article 79 TFEU

- 1. The Union shall develop a **common immigration policy** aimed at ensuring, at all stages, the **efficient management** of migration flows, **fair treatment** of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to **combat, illegal immigration** and trafficking in human beings.
- 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure (40), shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of **long-term visas** and **residence permits**, including those for the purpose of **family reunification**; (b) the definition of the **rights** of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and **repatriation** of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children.
- 3. The Union may conclude **agreements with third countries** for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.
- 4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide **incentives and support for the action of Member States** with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.
- 5. This Article shall not affect the **right of Member States to determine volumes of admission of third-country nationals** coming from third countries to their territory in order to seek work, whether employed or self-employed.

# Article 80 TFEU

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

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

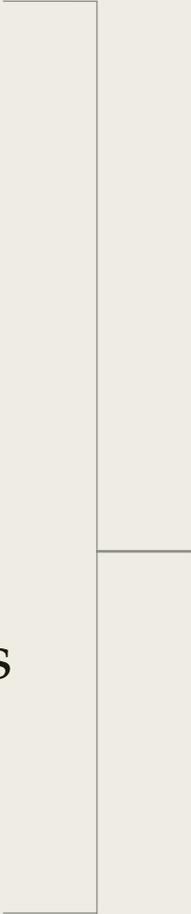
# 1951 Convention Relating to the Status of Refugees (Preamble)

- (...) considering that the grant of asylum may place **unduly heavy burdens** on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without **international co-operation**.

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

# “Islands of solidarity”

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



loyalty - trust  
- fairness -  
necessity

# State- or individual-centred solidarity?

## Member State obligation

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

## Asylum seeker

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

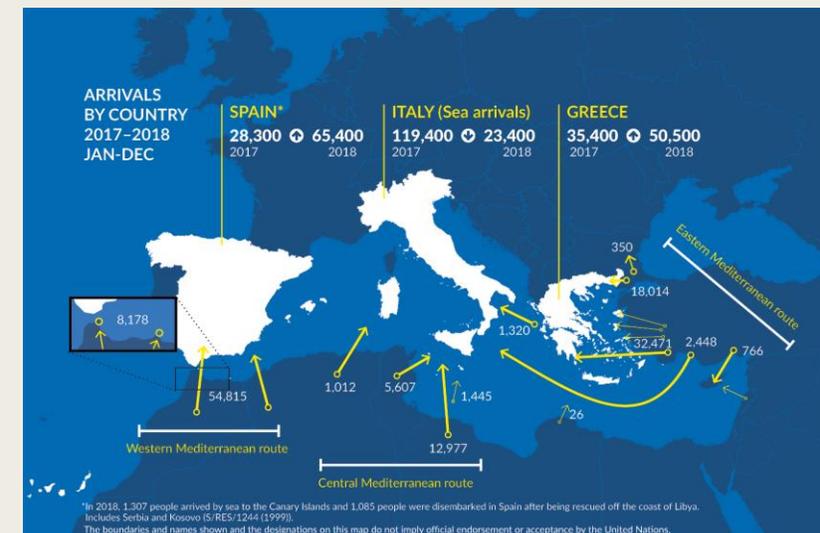
# Structural or emergency solidarity?

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

- Reality
- Securitization
- Agencification
- Externalization

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

Commissioner  
Avramopoulos



# Slovak Republic and Hungary v. Council

State-centred solidarity?

## ■ A. Facts:

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

## ■ B. Pleas

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

## ■ C. Answer and Reasoning:

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

# Slovak Republic and Hungary v. Council

## Opinion of Advocate General Bot

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

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

Individual-centred solidarity?

## ■ A. Facts:

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

## ■ B. Questions:

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

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

## ■ C. Answer and reasoning:

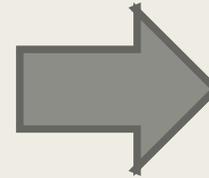
determination of MS responsible, but Art.51.1. CFR; MS cannot be unaware of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State, **rebuttable assumption**.

# Non-financial recourses

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

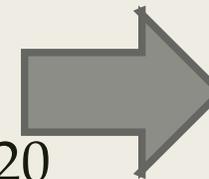
# Financial assistance 2010 - present

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



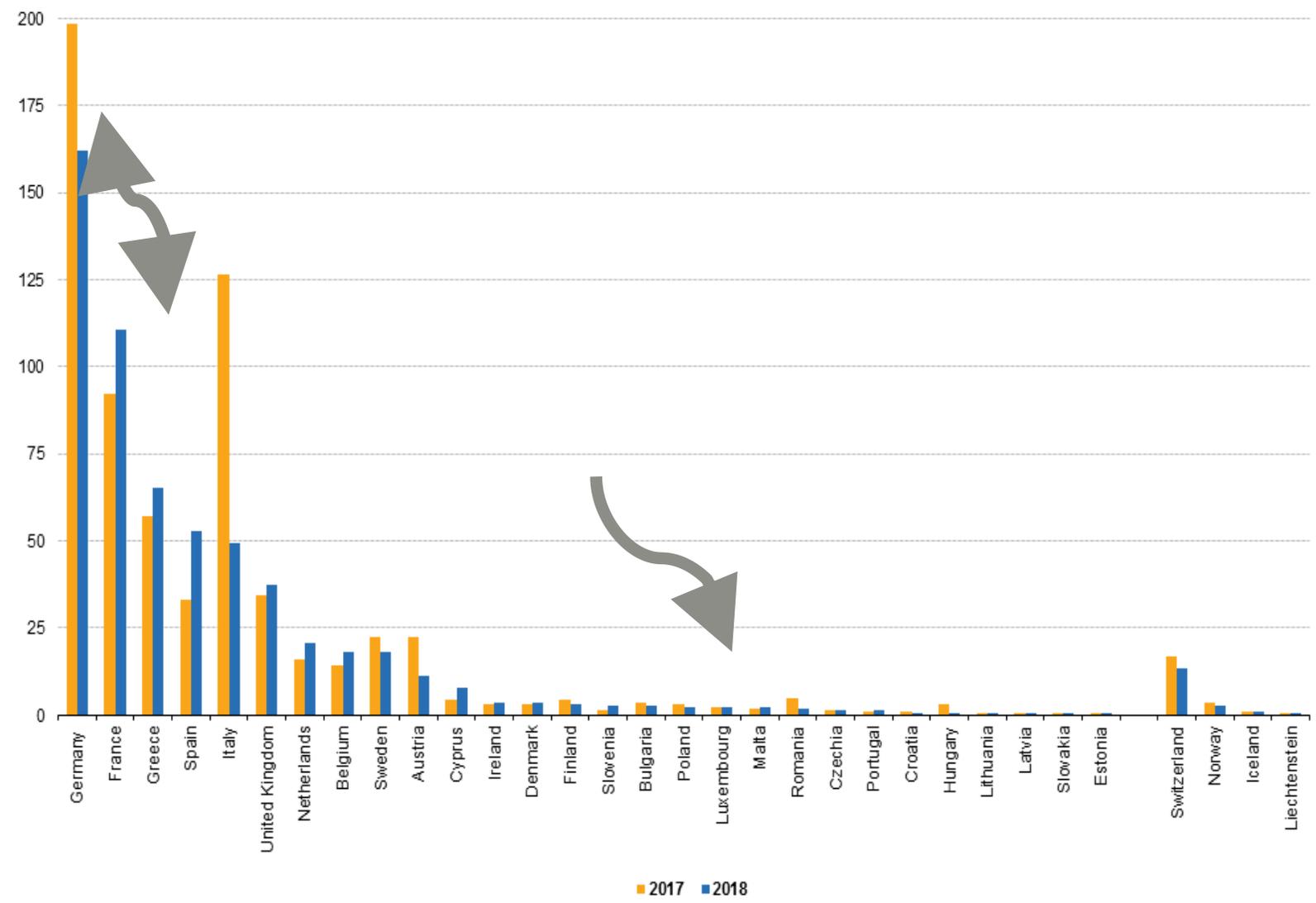
particular pressure

- Home Affairs financial framework 2014-2020



relative pressure

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



## What kind of burden-sharing and fair distribution

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

Source: Eurostat (online data code: migr\_asyappctza)

# Towards a reform of the CEAS: Dublin IV Regulation Proposal

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

## Commission's Proposal

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

# Literature (selected)

- Thym, D. and Tsourdi, E. (2017) 'Searching for solidarity in the EU asylum and border policies: constitutional and operational dimensions', *Maastricht Journal of European and Comparative Law*, 24(5).
- Ross, M. (2010) 'Solidarity: A New Constitutional Paradigm for the EU?' in Malcolm, R. and Borgmann-Prebil, Y. (eds.) *Promoting Solidarity in the European Union*. Oxford: Oxford University Press, pp. 23-45.
- Moreno-Lax, L. (2016) 'Solidarity's Reach: Meaning, Dimensions, and Implications for EU (External) Asylum Policy', *Maastricht Journal of European and Comparative Law*. Available at: <http://www.unhcr.org/59632a3c7.pdf> (accessed: 25.11.2019)
- Küçük E. (2016), "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", *Maastricht Journal of European and Comparative Law*, Vol. 22.
- Wagner M., Kraler A., Baumgartner P., (2018), "Solidarity – an integral and basic concept of the Common European Asylum System", CEASEVAL Research on the Common European Asylum System: [http://ceaseval.eu/publications/05\\_WagnerKralerBaumgartner\\_Solidarity.pdf](http://ceaseval.eu/publications/05_WagnerKralerBaumgartner_Solidarity.pdf), (accessed 25.11.2019).
- Bieber R., Maiani F., (2012), "Sans solidarité point d' Union européenne. Regards croisés sur les crises de l' Union économique et monétaire et du Système européen commun d' asile", *Revue trimestrielle de droit européen*, Vol. 48, No 2.
- Zarrella S., (2016), *Le principe de solidarité et de partage équitable de responsabilités en matière d'asile entre les États membres de l'Union Européenne*. Droit. Université de Strasbourg; Università degli studi, (Bologne, Italie), (accessed: 24.11.2019).
- Levade A., (2011), *La valeur constitutionnelle du principe de solidarité*, C. Boutayeb (sous la direction de), *La solidarité dans l'Union européenne : éléments constitutionnels et matériels*, pp.41- 52, Dalloz.
- Fernandez Sola M., (2012), *Les clauses d'assistance mutuelle et de solidarité du Traité sur l'Union européenne: contenu, délimitation et garanties politiques et juridiques*, in *Mélanges en l'honneur du Professeur Joel Molinier*, pp. 203-220. Lextenso.



THANK YOU FOR YOUR  
ATTENTION!