

Chapter 10 Solidarity through EU Funding in the EU's Migration Policies

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1 Introduction

Legislative harmonisation has proven ineffective as the main means to realise implementation and inter-state solidarity in the EU's migration policies, used here as a shorthand for the EU's asylum, migration, and external border control policies. Crisis vocabulary has dominated the public discourse on migration in both the EU and its Member States since 2015. Nevertheless, the dysfunctions in the EU's migration policies are not primarily due to unforeseen and uncontrollable external events. Such events, for example the spike in arrivals of individuals seeking asylum in the EU as a result of armed conflict in Syria, merely heightened existing inherent challenges.

Scholars, including myself, have analysed the limitations inherent in the legal design and implementation modes of EU's policies, most notably the existence of a structural solidarity deficit, the EU's ambivalent approach to protection, and the decision to exclude migrants and asylum seekers from the EU's free movement area, as decisive factors behind what is a crisis of values and governance.¹ Therefore solidarity, or lack thereof, is in fact a key component of the perceived crisis in migration.

1 See Daniel Thym, 'The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53(6) *Common Market Law Review* 1545–1574; Evangelia (Lilian) Tsourdi, 'The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System', in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) 191; Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law: Third Edition* (Oxford University Press 2021) 793–823; Maarten Den Heijer, Jorrit J. Rijpma, and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 *Common Market Law Review* 607.

Transnational solidarity conflicts as understood in this volume, that is political contestation around the scope and means of realising solidarity in migration,² have erupted between the Member States. At the intra-EU level, transnational solidarity conflicts relate to the lack of a reliable basis to distinguish between a Member State's 'inability' and its 'unwillingness' to comply with its implementation obligations in these policy fields. In addition, conflicts relate to the appropriate means to operationalise solidarity, such as through funding, operational support, or physical redistribution of migrants and asylum seekers. Beyond the EU, transnational solidarity conflicts extend to the EU's role in the international protection plane, and its efforts to both uphold and deflect protection obligations.

Funding has come to the forefront. In the intra-EU level, initially limited and labelled as 'symbolic politics', EU funding has steadily grown, and intricate management arrangements have developed for its disbursement and control. Still, several components of EU (migration) funding are essentially crisis and emergency-driven measures trying to cater for structural needs. Externally, the EU and its Member States are increasingly using funding instrumentally to pursue migration management objectives, such as containment and externalising migration control.³ This is often coupled with conditionality arrangements. This means in practice that, where third states 'pursue satisfactorily' migration management objectives, for example, by immobilising protection seekers in their territory, they are 'rewarded' with funding.

Against this backdrop, this contribution critically assesses the role of the solidarity principle in the EU migration policies. Adopting the understanding in this volume of solidarity as social practice rather than a matter of a pre-discursive essence grounding a common identity,⁴ it scrutinises EU funding as one such practice embodying solidarity. To do so, I first evaluate the nature, content, and scope of solidarity as a legal principle in migration and its implications for policy administration. Having recourse

2 See Hildebrand, Farahat and Violante in this volume.

3 See eg Evangelia (Lilian) Tsourdi, Federica Zardo, and Nasrat Sayed, 'Funding the EU's External Migration Policy: 'Same Old' or Potential for Sustainable Collaboration?', April 2023, Evangelia (Lilian) Tsourdi and Federica Zardo, 'Migration Governance through Funding: Theoretical, Normative, and Empirical Perspectives' (forthcoming, 2024 *Journal of Immigrant and Refugee Studies*), Natascha Zaun and Olivia Nantermoz, 'The Use of Pseudo-Causal Narratives in EU Policies: The Case of the European Union Emergency Trust Fund for Africa' (2022) 29(4) *Journal of European Public Policy* 510–529.

4 See Marius Hildebrand, Anuscheh Farahat, and Teresa Violante in this volume.

to legislation, case-law, and secondary sources, I identify whether binding legal obligations flow from the solidarity principle and analyse how these (should) impact the operationalisation of EU funding.

The next sections situate funding as one of the means to share responsibilities and ascertain the potential of EU funding to realise solidarity. This contribution limits itself to the intra-EU level. The research analyses issues such as the level of available financing; the type of actions EU funding supports; the modalities around co-financing; and, the funding distribution methods among Member States. I focus both on previous and on the current (2021–2027) multi-annual financial frameworks to provide a longitudinal view and comment on policy and legal evolution in this respect. Finally, I reflect on the role that EU funding will play in operationalising solidarity between the Member States in the New Pact on Migration and Asylum. Throughout the analysis, I also scrutinise the interplay between the design operationalisation of EU funding and transnational solidarity conflicts.

The research reveals a nuanced picture: funding has the capacity to boost inter-state solidarity and its design and operationalisation carries potential to alleviate transnational solidarity conflicts. Nonetheless, there are limitations to achieving inter-state solidarity through funding, while the current broader emphasis on externalising protection and its impact on migrants' fundamental rights might overshadow advances in realising inter-state solidarity.

2. What Solidarity in the EU's Migration Policies?

The first section scrutinises the relationship between EU law and solidarity in migration in order to conceptualise its scope and implications. Solidarity is often designated, in legal writing, as a principle of EU law, but it is controversial whether this should be viewed as a binding legal principle or as a political norm.⁵ To complicate matters, there is no single notion of

5 Daniel Thym and Evangelia (Lilian) Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies' (2017) 24(5) *Maastricht Journal of European and Comparative Law* 605, 607. See also Armin von Bogdandy, 'Founding principles', in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law: 2nd ed.* (Hart Publishing 2011) 11–54, at 53–54, and Malcom Ross, 'Solidarity – A New Constitutional Paradigm for the EU?', in Malcom Ross and Yuri Borgmann-Prebil

the 'solidarity principle' applicable across various EU policies, but rather different expressions of solidarity in different provisions of the EU Treaties. Peter Hillel has eloquently spoken about 'islands of solidarity' within EU law.⁶ The introductory contribution to this volume poignantly conceptualises the tension between 'solidarities' and crises in different areas of EU integration pointing to an even more complex policy and legal landscape.⁷

Solidarity exists as a founding principle of the entire EU legal order, as a structural element of the European integration project. Levade has described it as naturally flowing from the doctrine of international federalism that Bourgeois, and later Scelle, developed.⁸ In this sense, solidarity is co-substantial to the EU construction, and has a constitutional value.⁹ The presence of solidarity in the Treaties marks its growing importance. In an initial stage, the aims of the Community included 'closer relations between its Member States'.¹⁰ However, starting with the Maastricht Treaty, 'solidarity' replaced the term 'relations'. Armin von Bogdandy understands this substitution as a conceptual transition from a Union based on international relations, to the Union as a federal polity.¹¹

No precise definition of 'solidarity as founding principle' exists in the Treaties. Solidarity's foundational status nevertheless finds several expressions in the TEU and TFEU. The Union is founded on the value of solidarity.¹² It should promote solidarity between generations,¹³ and economic, social, and territorial cohesion and solidarity among Member States.¹⁴ Finally,

(eds.), *Promoting Solidarity in the European Union* (Oxford University Press 2010), 23–45, at 41–44.

6 Peter Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with

Particular Regard to Monetary Union' (2015) 34 *Yearbook of European Law* 257, 264.

7 See Marius Hildebrand, Anuscheh Farahat, and Teresa Violante, "Transnational Solidarity in Crisis" in this volume.

8 Anne Levade, 'La valeur constitutionnelle du principe de solidarité' in Chahira Boutayeb (ed), *La Solidarité dans l'Union Européenne : Éléments constitutionnels et matériels* (Daloz 2011) 41, 44 referring to Léon Bourgeois, *Pour la Société des Nations* (Bibliothèque Charpentier 1910) and Georges Scelles, *Précis de droit des gens : principes et systématiques* (Sirey 1932).

9 *Ibid.*, 45.

10 See Art 2, EEC Treaty.

11 See Armin von Bogdandy, 'Founding Principles' (n 1), 11–54, 53.

12 See TEU, Art 2.

13 See TEU, Art 3(3), 2nd indent.

14 See TEU, Art 3(3), 3rd indent.

it should promote solidarity and mutual respect among peoples.¹⁵ From this we understand that even 'foundational' solidarity has different faces in the Treaties. It is a value that underpins the entire EU construction. Thereafter, this value is diffused in both a state-centred solidarity aim (*among the Member States*) and individual-centred solidarity aims (*between generations and among peoples*).

From the wording of these provisions, it becomes clear that they contain general orientations and aspirations and cannot form the basis of legally binding duties in and of themselves. These expressions of 'foundational solidarity' therefore can only assume a concrete role through the vehicle of a general principle of EU law.¹⁶ They, therefore, need the CJEU as a 'bridge' by which to enter the EU legal order. What has been the stance of the Court to date? In what concerns state-centred solidarity, von Bogdandy observes that 'it has not been the basis for much judicial activism'.¹⁷ The Court found no generalised duty for the Union institutions, or other Member States, to assist a Member State in financial difficulty based on the solidarity principle. It has been more proactive, though, in establishing entitlements for mobile EU citizens based on individual-centred transnational solidarity.¹⁸

However, the solidarity principle is not limited to this aspirational role in the Treaties. In fact, the EU Treaties contain many more *solidarities*, some of which are the source of binding legal obligations. The principle of solidarity and fair-sharing of responsibility in migration, asylum, and border control belongs to this category. The next sections first ascertain the different expressions of solidarity within the EU's migration policies (section 2.1), before scrutinising the legal nature, scope, and impact of the principle of solidarity and fair sharing and responsibility in Article 80 TFEU (section 2.2).

15 See TEU, Art 5(5).

16 Even this position is the object of debate. For support of solidarity's status as a general principle of EU law see: Case C-273/04 *Republic of Poland v Council* (2007) ECR 2007 I-08925, Opinion of Advocate General Poiares Maduro, para. 51. For the opposite opinion see: Abdelkhaleq Berramdane, 'Solidarité, loyauté dans le droit de l'Union européenne', in Chahira Boutayeb (ed), *La Solidarité dans l'Union Européenne: Eléments constitutionnels et matériels* (Dalloz 2011) 53, 67. Berramdane believes that to be the case: 'en raison de son contenu insaisissable et de son champ d'application imprécis'.

17 Von Bogdandy, 'Founding Principles', (n 1), 53.

18 See Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015).

2.1 Solidarities in the EU's migration policy

There are different expressions of solidarity within the EU's migration policies. First, state-centred solidarity and fairness towards third country nationals underpins the entire AFSJ area.¹⁹ Article 67(2) TFEU plays a programmatic role, offering political directions creating binding legal obligations. Although it frames policies on asylum, immigration and external border control, it does not constitute the legal basis for their adoption.²⁰

Next, through Article 78(3) the Treaty 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'; this can be conceptualised as *emergency solidarity*.²¹ Article 78(3) TFEU on the emergency solidarity measures, is legally binding and, in fact, has been put to use in order to adopt two emergency relocation Council decisions in September 2015.²² Hungary and Slovakia contested this in actions for annulment before the CJEU, but the Court rejected their arguments.²³

The Treaty also introduces in Article 80 TFEU a far-reaching article on the principle of solidarity and fair-sharing of responsibility that underpins (or should underpin) the EU asylum policy; this can be conceptualised

19 TFEU, Art 67(2).

20 See instead, Arts 77–79 TFEU.

21 TFEU, Art 78(3).

22 See Recital 1 of the Preamble to 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 L 239/146 (the 1st Emergency Relocation Decision); and Recital 1 of the Preamble to 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 L 248/80 (the 2nd Emergency Relocation Decision).

23 See Case C-643/15 *Slovak Republic v. Council of the European Union* and Case C-647/15 *Hungary v Council of the European Union*, ECLI:EU:C:2017:631 (European Court of Justice, 6 September 2017) and analysis in Bruno de Witte and Evangelia (Lilian) 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(No.5) Common Market Law Review 1457.

as *structural solidarity*. All these are state-centred,²⁴ intra-EU, forms of solidarity.

As I have analysed in detail elsewhere,²⁵ there is also a place for the individual in these state-centred forms of solidarity, hence solidarity in migration is also transnational in the sense of solidarity between people. First, individual refugees and asylum seekers are the *indirect* beneficiaries of these actions. That is by enabling states to respond to their obligations, the situation of the individual improves. This is one facet of the issue; apart from the state-centred solidarity, directly affecting states and indirectly benefiting individuals, there are also individual-centred forms of solidarity at play.²⁶ For example recognised beneficiaries of international protection have full access to national solidaristic welfare,²⁷ while asylum seekers have access to reception conditions that must ensure a dignified standard of living but may fall short of national welfare standards.²⁸ Thus these forms of solidarity follow to an extent, the logic regarding transnational solidarity for EU citizens. This is because currently the EU largely relies on Member States' resources and national welfare systems to realize its common asylum policy.

24 See Valsamis Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24(5) Maastricht Journal of European and Comparative Law 721, 722–724.

25 Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24(5) Maastricht Journal of European and Comparative Law 667.

26 For literature raising this perspective see Jürgen Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law' (2016) 22(2) European Public Law (2016) 289, at 290.

27 See Art 29(2) of European Parliament and European Council Directive 2011/95/EU 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 L 337/9 (the recast Qualification Directive). Some differentiation is permissible for subsidiary protection beneficiaries, see Art 29(2) of the recast Qualification Directive.

28 See Art 17(5) of European Parliament and European Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (2013) OJ L180/96 (the recast Reception Conditions Directive).

2.2 The principle of solidarity and fair-sharing of responsibility: a critical anatomy

Article 80 TFEU generates legally binding duties. Scholars had argued earlier that at the very least, it is a standard of review under European constitutional law,²⁹ in a similar manner to fundamental rights. I had at that time argued that, in addition, its wording supports the creation of concrete duties.³⁰ In a string of cases, the CJEU interpreted the provision in this manner. The Court first proclaimed the legally binding character of the principle of solidarity in the EU asylum policy in a 2020 infringement action against Poland, Hungary and the Czech Republic.³¹ It then reiterated this finding in a 2021 case relating to energy solidarity (ie to Article 194 TFEU),³² highlighting that the principle of solidarity under Article 80 TFEU is not of an abstract nature but rather generates concrete obligations under EU asylum law.³³

Article 80 TFEU states that the principle of solidarity and fair-sharing of responsibility *shall* govern the three ‘policies’, ie asylum, immigration, and external border control. Based on the linkages between the three policies and an analysis of Article 80 TFEU through the conceptual history of solidarity, in particular, the dominant Roman law tradition of obligation in solidum and the French tradition of solidarism, Karageorgiou and Noll concluded in a recent piece that Article 80 should be read as an alliance

29 See in this sense, Esin Küçük, ‘The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?’ (2016) 22(4) European Law Journal 448, at 454–456.

30 Evangelia (Lilian) Tsourdi, ‘Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System’ (2017) 24(5) Maastricht Journal of European and Comparative Law 667, 672–675.

31 See joined Cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and the Czech Republic* ECLI:EU:C:2020:257, paras. 70, 80, and 90 (CJEU, 2 April 2020) as well as analysis in Evangelia (Lilian) Tsourdi, ‘Relocation Blues – Refugee Protection Backsliding, Division of Competences, and the Purpose of Infringement Proceedings: *Commission v. Poland, Hungary and the Czech Republic*’ (2021) 58(6) Common Market Law Review 1819, 1835–1839.

32 Case C-848/19 P, *Federal Republic of Germany v. European Commission* (Energy Solidarity), ECLI:EU:C:2021:598 (ECJ, 15 July 2021). See also, Kaisa Huhta and Leonie Reins, ‘Solidarity in European Union Law and its Application in the Energy Sector’ (2023) 72(3) International and Comparative Law Quarterly 771–791.

33 Energy Solidarity, para. 42.

clause, countering a threat of irregular immigration.³⁴ While intellectually rich, I find that this interpretation unduly limits the scope of Article 80 TFEU, while priming one of the policy areas – ie external border control – over the other two. This does not seem to find support in the treaties, neither in the text of Article 80 TFEU itself, nor in the rest of the TFEU chapter on the AFSJ.

Thereafter, Article 80 TFEU mentions that it is applicable to the policies 'and their implementation'. Thus, it impacts both the legislation and the implementation phases. The language of the provision, ie 'including its financial implications', indicates that it is not limited to the financing of implementation. Article 80 TFEU states that 'whenever necessary', acts adopted by the Union as part of the policies in question 'shall contain appropriate measures to give effect to this principle'. This wording not only permits but, in fact, *requires* the adoption of concrete measures. The wording also clarifies that the solidarity and fair-sharing of responsibility principle is structural to these policies and should not be linked exclusively with emergency. Instead, that is the function of Article 78(3) TFEU which aims at the adoption of 'provisional measures', such as the emergency relocation decisions that remained in force between 2015 and 2017.³⁵

Finally, Article 80 TFEU, as well as Article 78(3) TFEU establish solidarity that is limited *between* Member States and the *EU and its* Member States. More broadly, the solidarity principle, although present in international migration, for example in the international refugee regime, does not create binding duties, either through treaty norms or through customary norms. Solidarity-related initiatives, such as refugee resettlement, are voluntary. The Common European Asylum System has an external dimension with 'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection' at its core.³⁶ It is clear that the goal of the co-operation is Euro-centric, that is the management of *inflows* of arriving asylum applicants.

34 See Eleni Karageorgiou and Gregor Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law? (2022) 4 Jus Cogens 131, 138–147.

35 European 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 L 239/146 [Emergency Relocation Decision I], and European 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 L 248/80 [Emergency Relocation Decision II].

36 TFEU, Art 78(2)(g).

This wording does not demonstrate solidarity obligations with third states. If anything, the EU has connected the ‘management’ of inflows with deflection and externalisation, that is the polar opposite of solidarity with third states.³⁷

As to the content of the term solidarity itself, it should be clearly distinguished from the EU concept of loyalty, ie the responsibility to implement. The two concepts are complementary, but not co-extensive.³⁸ Such conceptual unpacking has not taken place at the EU policy level, to the detriment of the development of inter-state solidarity in the EU migration policies. This has also fuelled political conflicts in relation to solidarity. The conflation of the different notions, ie solidarity and loyalty, had led in practice to the somewhat tragicomic expectation that Member States desirous of solidarity measures should fully implement their obligations under the *acquis* in order to be ‘deserving’ of solidarity measures. In addition, the mainstream perception of solidarity was that it constituted a predominantly emergency-based measure, given that it was not embedded in the policies’ design. Calls for structural fair responsibility sharing were largely ignored. Taken together, all these elements would in practice cancel out any role for the solidarity principle! If the Member States at the external border were fulfilling the entirety of their obligations under the asylum and external border control *acquis* and dutifully financing most of the operations from their national budgets, then the policies would be found to be functioning effectively and, hence, there would be no need for the *exceptional* recourse to solidarity.

A final element is what value should be given to the reference to ‘fair-sharing’ in Article 80 TFEU. The Treaty does not solely mention the principle of solidarity. Rather, it refers to the principle of ‘solidarity *and* fair sharing of responsibility’. A special importance is attached to those latter terms, which read together with the rest of the wording of the provision, I argue establish an obligation of result. The three policies under Article 80 TFEU and their implementation should be conducted in such a manner to ensure that responsibilities are shared fairly and equitably among the Member States.

37 See eg Evangelia (Lilian) Tsourdi, Andrea Ott and Zvezda Vankova (eds), ‘The EU’s Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration’ (2022) 7(No.1) European Papers 87.

38 See for analysis Daniel Thym and Evangelia (Lilian) Tsourdi, ‘Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions’ (2017) 24(5) Maastricht Journal of European and Comparative Law 605.

Therefore, EU and inter-state arrangements and solidarity actions do not aim to merely offer *some measure of* support or to '*promote a balance of effort*'.³⁹ They aim to support up to the point where each Member State contributes their fair share. More ambitiously, the aim should be to structure the policies and their implementation in such a way that asymmetrical burdens do not occur in the first place. In this sense, the fair-sharing of responsibility makes solidarity in asylum policy a 'solidarity plus'. This goal is not present in other EU state-centred solidarities. Article 222 TFEU does not establish an obligation for the EU and the Member States to assist a disaster-stricken state to the extent that the consequences of the natural or man-made disaster have been equitably shared. The no bailout clause underpins the Economic and Monetary Union, making strict conditionality in the form of austerity measures a prerequisite for assistance.⁴⁰

The reason behind this strong formulation could be the acknowledgment that Article 80 TFEU relates to policies that concern regional public goods. Notably, Suhrke conceptualized refugee protection as a global public good, a good whose benefits once provided: (i) cannot be excluded from other members of the international community (non-excludability) and (ii) do not diminish or become scarce when enjoyed (non-rivalry).⁴¹ Later, Betts argued that in refugee protection it is unlikely these non-excludable benefits will accrue equally to all members of the international community. States with greater proximity to a given refugee outflow benefit more from a neighbouring state's contribution, thus making refugee protection a regional public good.⁴² From this, it follows that asylum protection is a collective responsibility falling upon both the EU and the Member States.⁴³ The same can be argued about external border control at the EU context. In fact, the 2019 Frontex Regulation enounces European integrated border

39 Compare, former Art 63(2)(b) TEC.

40 See Art 125 TFEU.

41 See Astri Suhrke, 'Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action' (1998) 11(4) *Journal of Refugee Studies* 396.

42 See Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2009) 29.

43 See Roland Bieber and Francesco Maiani, 'Sans solidarité point d'Union européenne: regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile' (2012) 48(No. 2) *Revue trimestrielle de droit européen* 295, 314, and the *travaux préparatoires* of the Draft Treaty Establishing a Constitution for Europe on understanding safeguarding external borders as a common responsibility; European Convention Working Group X 'Freedom, Security and Justice', Working Document 31, 2002, para. 2–3

management as ‘a *shared* responsibility of the Agency and of the national authorities responsible for border management’, while recognising in the same article that ‘Member States shall retain primary responsibility for the management of their sections of the external borders’.⁴⁴ Seen in this light, the call for fair-sharing under Article 80 TFEU seems fully justified.

In search of what constitutes a ‘fair-share’, it is important to focus on relative capacities, rather than absolute numbers.⁴⁵ This presupposes a system of evaluation of the individual share of responsibility of each Member State on the basis of objective indicators.⁴⁶ This would not aim at establishing numerical caps, but rather at objectively assessing the protection or more broadly the implementation ‘responsibility share’ of each Member State, in the sense of a percentage of the total. Pending such a system, a Member State cannot objectively substantiate a claim that it is ‘overburdened’. Instead, these arguments raise the suspicion of the rest, who are also called upon to shoulder part of the common responsibility. This has been the source of interstate transnational solidarity conflicts. Through an objective assessment of the implementation capacity of each Member State, ‘inability to comply’ with a state’s obligations would be clearly distinguished from ‘unwillingness to comply’, thus preventing tensions between Member States over distributing part of the common responsibility.

Finally, it has been argued that the term ‘necessary’ in Article 80 TFEU is linked to two fundamental principles of EU law: subsidiarity and pro-

<<https://dorie.ec.europa.eu/en/details/-/card/284341>>, European Convention Working Group X ‘Freedom, Security and Justice’, Working Document 22, 2002, para. 4 <<https://dorie.ec.europa.eu/en/details/-/card/284355>>.

44 European Parliament and Council Regulation (EU) 2019/1896 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 (hereinafter: 2019 EBCG Regulation), Art 7(1).

45 See Eiko Thielemann, Richard Williams and Christina Boswell, ‘What System of Burden-Sharing between Member States for the Reception of Asylum Seekers?’, *European Parliament* (2010) p. 18, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/419620/IPOL-LIBE_ET\(2010\)419620_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/419620/IPOL-LIBE_ET(2010)419620_EN.pdf) accessed 1 May 2024; Harriet Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’ (2013) 34 *Liverpool Law Review* 175, 181.

46 See Philippe De Bruycker and Evangelia (Lilian) Tsourdi, ‘In Search of Fairness in Responsibility-Sharing’ (2016) 51 *Forced Migration Review* 64. See also the indirect endorsement of this approach by the CJEU in the context of the distribution of asylum seekers in the framework of the emergency relocation schemes in *Case C-643/15 Slovak Republic v. Council of the European Union*, and *Case C-647/15 Hungary v Council of the European Union*, ECLI:EU:C:2017:631, para. 299–301 (European Court of Justice, 6 September 2017).

portionality.⁴⁷ In these policy areas where competence is shared, respect for the subsidiarity principle dictates that the Union may only act if the objectives will be better achieved at Union level. The same authors go on to argue that in the context of asylum, migration, and external border control, policymaking requires a double scrutiny, (i) establishing whether or not measures at Union level are required and (ii) determining whether or not Member States will be able to implement them unaided, or whether additional solidarity measures will be required.⁴⁸ Thus, if it is clear that individual Member States might not be able to implement a measure, then Union action may be required.

This research goes a step further. I argue that the structural character of the solidarity principle in Article 80 TFEU implies that the policies should be designed such that asymmetrical burdens do not occur in the first place. This is a logical consequence of achieving fair-sharing as a result. Where asymmetrical burdens result from the policy design, then there is an obligation not only to adopt palliative measures, but rather to redesign the policies so as to alleviate the structural imbalances. This reasoning could have far-reaching consequences for the administrative governance of these policies. The principle of solidarity and fair-sharing, for example, could form the basis of increased integration between the EU and the national levels, as one of the potential avenues to offset imbalances.⁴⁹

3. Operationalising solidarity and fair-sharing of responsibility: what role for funding?

The chapter next explores the EU's efforts to concretely operationalise solidarity and fair-sharing of responsibility in the EU's migration policies, with a main focus on critiquing to what extent solidarity can be realised through financial sharing. A focus on the operationalisation of solidarity is crucial to ascertain whether the law in practice lives up to the constitutional standard of law on the books whose scope and normative content I analysed and argued in the previous section.

47 Dirk Vanheule et al., 'The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration', *European Parliament* (2011) p. 100 [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET\(2011\)453167_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET(2011)453167_EN.pdf) accessed 1 May 2024.

48 Ibid.

49 See Bast, 'Deepening Supranational Integration', (n 22), 302–304.

Overall, Member States are largely expected to fund the implementation of EU's asylum and migration policies through their own national budgets. This is the case even under the latest multi-annual financial framework covering the period 2021–2027. EU funding is not premised on a so-called compensatory logic, where Member States can draw from the EU budget for the operationalisation of these policies. This is the case despite these policies delivering regional public goods, such as asylum provision and external border control. This chimes in with Sangiovanni's conceptualisation of 'reciprocity-based internationalism' that grounds imperatives for solidarity on all governance levels, and thus also the inter-state level, as a demand for a fair return in the mutual production of important collective goods.⁵⁰

While EU policy-makers presented funding as one of the main means to realise intra-EU solidarity in these policy fields,⁵¹ EU funding available has been modest. The New Pact on Migration and Asylum instruments further embed funding as a means to operationalise solidarity and pay greater attention to the administrative and governance aspects of the policies. Nonetheless, these instruments also operate under the allocations and consequently the limitations of the current multi-annual financial framework.

3.1 The Many Modes of Responsibility Sharing: A Critical Overview

In ascertaining the different modes of responsibility sharing, I draw from Gregor Noll's conceptual framework that identifies four ways of operationalising solidarity, namely through: normative, physical, operational, and financial arrangements.⁵² The four operational facets of solidarity fit well with the conceptualisation of solidarity as a set of social practices that embody solidarity.

Normative sharing refers to legislative harmonisation, and this is considered an element of solidarity, as it prevents Member States to 'compete' with each other in lowering their standards to become less attractive desti-

50 Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(No.2) Oxford Journal of Legal Studies 213, 218–232.

51 See eg European Commission Communication, 'Enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust' COM(2011) 0835 final, 2 December 2011.

52 For an in-depth analysis, see Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000) 263.

nations. In terms of outcomes the harmonisation did not lead to a complete 'race to the bottom', rather states sought to share their restrictive practices, and maintain some of their own domestic standards.⁵³ As Zaun argues, strong regulators (a term she uses to describe States with an effective government and refugee protection, such as Germany and France) sought to reflect their pre-existing domestic policies in EU standards.⁵⁴ This led, for example, to the establishment of highly differentiated standards in the 2005 Asylum Procedures Directive prompting commentary that through this instrument exceptional procedures were normalized.⁵⁵ Several exceptional clauses were either retained or introduced in the recast legal instruments on asylum reception or procedures.⁵⁶ In other fields such as qualification, where in addition to strong regulatory national frameworks, a robust international legal framework underpinned the regulatory choices, the level of harmonisation was higher.⁵⁷ While the significance of establishing a level playing field is widely acknowledged, the relative contribution of legislative harmonisation to operationalising an overall concept of solidarity is contested.⁵⁸

Physical sharing relates to the actual (re)distribution of individuals between Member States, whether it concerns those seeking asylum, those who are found in need of international protection, or those who are under a return obligation to their country of origin. The EU's responsibility allocation system at the time of writing, the so-called Dublin system, undermines fair-sharing of responsibility between the Member States, in allocating most

53 Philippe De Bruycker and Constança Urbano Dias De Sousa (eds), *The Emergence of a European Asylum Policy* (Bruylant 2004).

54 Natascha Zaun, *EU Asylum Policies: The Power of Strong Regulating States* (Palgrave Macmillan, 2017) 38.

55 Cathryn Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles' in Anneliese Baldaccini, Elspeth Guild, and Helen Toner (eds), *Whose Freedom, Security and Justice? EU immigration and asylum law after 1999* (Hart Publishing 2007) 151.

56 Reception Conditions Directive 2013, Art 11(6); Asylum Procedures Directive 2013, Art 43(3); Asylum Procedures Directive 2013, Art 31(8).

57 See for analysis, Christof Roos and Natascha Zaun, 'Norms Matter! The Role of International Norms in EU Policies on Asylum and Immigration' (2014) 16 *European Journal of Migration and Law* 45–68.

58 Eiko Thielemann, 'Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing' (2004) 6 *European Journal of Migration and Law* 47.

responsibility to states at the EU's external (maritime) borders in practice as ample scholarship has analysed.⁵⁹

The emergency relocation decisions implemented during 2015–2017 constituted decisive – and controversial – attempts to realise a physical sharing model.⁶⁰ Notably, their effectiveness was undercut through several factors, including their own legislative and administrative set up.⁶¹ Both emergency decisions numerically capped the beneficiaries concerned,⁶² restrictively defined the eligible applicants for relocation,⁶³ and expired after two years.⁶⁴ In the same way as the general Dublin III Regulation, both decisions failed to take into account the preferences of asylum seekers.

Moreover, the emergency relocation schemes resulted in inter-state political conflicts as to the operationalisation of solidarity. The contestation arose from the EU's decision to make participation in the second emergency relocation schemes mandatory for the Member States. This marked a departure from the voluntary and small-scale solidarity measures that had taken place up to that point. Hungary and the Slovak Republic filed actions

59 See eg Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?', in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill/Martinus Nijhoff 2016) 101 and Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law: Third Edition* (Oxford University Press 2021) 793.

60 See Emergency Relocation Decision I and II.

61 Bruno De Witte and Evangelia (Lilian) 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(No.5) *Common Market Law Review* 1457, 1459–67; Elspeth Guild, Cathryn Costello, and Violeta 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' (2017) *Study for the LIBE Committee*, 42–44 [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU\(2017\)583132_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf) accessed 1 May 2024; and Francesco Maiani, 'The Reform of the Dublin system and the Dystopia of "Sharing People"' (2017) 24(5) *Maastricht Journal of European and Comparative Law* 622.

62 1st Emergency Relocation Decision, Art 4 and 2nd Emergency Relocation Decision, Art 4(1).

63 1st Emergency Relocation Decision, Art 3(2) and 2nd Emergency Relocation Decision, Art 3(2) establishing the notion of applicants 'in clear need of international protection'.

64 The first relocation decision applied until 17 September 2017 and the second until 26 September 2017. See respectively 1st Emergency Relocation Decision, art 13(2) and 2nd Emergency Relocation Decision, art 4.

for annulment of that decision before the CJEU in December 2015,⁶⁵ constructing a series of imaginative arguments regarding procedural failings that had occurred during its adoption process. Invoking the proportionality principle to protect their national autonomy, they also attempted to strike down binding solidarity. In a lengthy judgment, the Court completely rejected the actions for annulment.⁶⁶

Nonetheless, by September 2017, ie the expiration date of the time-bound relocation schemes, Hungary and Poland had not relocated a single person, while the Czech Republic had only relocated a dozen and had not pledged to do so for over a year.⁶⁷ Through infringement proceedings initiated by the Commission, the CJEU found this refusal to violate EU law.⁶⁸ The contestation around the use of people sharing as a solidarity operationalisation mode illustrates the political salience of the issue.

The more politically palatable *operational sharing* refers to institutionalised practical cooperation through EU agencies, and most notably through the European Asylum Support Office (EASO),⁶⁹ now European Union Agency on Asylum (EUAA)⁷⁰ and the European Border and Coast Guard (EBCG).⁷¹ EU agencies are vessels of inter-state solidarity in the sense that through their modes of functioning they mobilise additional

65 Pleas in law and main arguments for Case C-643/15, *Slovak Republic v. Council of the European Union* ECLI:EU:C:2017:631 (ECJ, 6 September 2017), OJ C 38/41 of 01 February 2016; and for Case C-647/15, *Hungary v. Council of the European Union*, OJ C 38/43 of 01 February 2016.

66 See joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631 (ECJ, 6 September 2017) and De Witte and Tsourdi (n 55).

67 European Commission, 'Fifteenth Report on Relocation and Resettlement' COM(2017) 465, 3, 6 September 2017.

68 Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Mécanisme temporaire de relocalisation de demandeurs de protection internationale)* ECL:EU:C:2020:257 (CJEU, 2 April 2020) and commentary in Evangelia (Lilian) Tsourdi, 'Relocation Blues: Refugee Protection Backsliding, Division of Competences, and the Purpose of Infringement Proceedings: Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic*' (2021) 58(6) Common Market Law Review 1819–1844.

69 See European Parliament and Council Regulation (EU) 439/2010 of 19 May 2010 establishing a European Asylum Support Office (2010) OJ L 132/11.

70 European Parliament and Council Regulation (EU) 2021/2303 of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (2021) OJ 2021 L 468 (hereafter EUAA Regulation).

71 See European Parliament and Council Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (2016) OJ L 251/1.

human, operational, and financial resources for policy implementation. For example, both Frontex and the EUAA are involved in jointly implementing policy, ie agency and/or deployed national experts work alongside national authorities implementing EU's external border control and asylum policy.⁷²

Joint implementation and deployments were initially connected with the notion of emergency. Nevertheless, as the latest iterations of the agency founding regulations illustrate, the EU is moving away from such emergency-driven conceptions of agency involvement (and indirectly of intra-EU solidarity and fair sharing).⁷³ However, the limitations of their mandate, and that of the resources they have available, conditions the agencies' solidarity potential. In terms of the latter, agencies have own assets and statutory personnel but can also mobilise additional operational and human resources made available for specific time periods by other Member States.⁷⁴

Finally, *financial sharing* could relate either to the full financing of the operationalisation of the policies in question through the EU budget (compensatory logic), or to a partial financing of activities through the EU budget. The next sections of this chapter explore to what extent EU funding can realise solidarity in the EU's migration policies.

72 See for analysis, Evangelia (Lilian) Tsourdi, 'Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office' (2016) 1 *European Papers* (997 and Evangelia (Lilian) Tsourdi, 'Beyond the migration crisis: the evolving role of EU agencies in the administrative governance of the asylum and external border control policies' in Johannes Pollak and Peter Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan 2021) 175.

73 See for commentary, Evangelia (Lilian) Tsourdi, 'Policy Implementation and Enforcement Through EU Migration Agencies: A Brave New World?' in *EU Law Live Symposium on The Agencies of the European Union: Legal Issues and Challenges* 47–49, as well as Evangelia (Lilian) Tsourdi, 'European Union Agency on Asylum: An Agency 'Reborn'?' (2022) 98 *EU Law Live Weekend Edition* 2–11.

74 See Evangelia (Lilian) Tsourdi, 'The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding', in Daniel Thym and Odysseus Academic Network (eds.), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum* (Nomos 2022) 113.

3.2 Solidarity through EU Funding in Migration: A longitudinal view

EU funding specifically targeting migration policies was initially exclusively geared to asylum, with the adoption of a European Refugee Fund in 2000.⁷⁵ It was initially extremely limited, with an allocation of only €216 million over a four-year period,⁷⁶ leading academic commentators to label it 'symbolic politics'.⁷⁷ A specific financial envelope was foreseen for the case of emergency, but it was linked exclusively with the activation of the EU Temporary Protection Directive.⁷⁸ As that instrument was not activated at the time, Member States could not access that dedicated amount. The European Refugee Fund was renewed for the 2005 to 2010 period, containing a slightly enhanced financial envelope,⁷⁹ and largely following the initial design.

With the adoption of the 2007–2013 multi-annual financial framework, the EU undertook a substantial overhaul of Home Affairs funding, which led to the establishment- alongside a revamped European Refugee Fund –⁸⁰ of the following funding lines: the European Integration Fund,⁸¹ the European Return Fund⁸² and the External Borders Fund.⁸³ A major develop-

75 European Council Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund (2000) OJ L 252/12 [hereinafter 2000 ERF Decision].

76 2000 ERF Decision, art 2(1).

77 See Eiko Thielemann, 'Symbolic Politics or Effective Burden-Sharing? Redistribution, Side Payments and the European Refugee Fund' (2005) 43(No.4) *Journal of Common Market Studies* 807.

78 2000 ERF Decision, art 6.

79 European Council Decision 2004/904/EC of 2 December 2004 establishing the European Refugee Fund for the Period 2005 to 2010 (2004) OJ L 381/52 [hereinafter 2004 ERF Decision].

80 European Parliament and Council Decision 573/2007/EC of 23 May 2007 establishing the European Refugee Fund for the Period 2008 to 2013 as Part of the General Programme Solidarity and Management of Migration Flows and Repealing Council Decision 2004/904/EC (2007) OJ L 141/1 [hereinafter 2007 ERF Decision].

81 European Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of Third-Country Nationals for the Period 2007 to 2013 as Part of the General Programme 'Solidarity and Management of Migration Flows' (2007) OJ L 168/18 [hereinafter EIF Decision].

82 European Parliament and Council Decision 575/2007/EC of 23 May 2007 establishing the European Return Fund for the Period 2008 to 2013 as Part of the General Programme 'Solidarity and Management of Migration Flows' (2007) OJ L 144/45 [hereinafter 2007 RF].

83 European Parliament and Council Decision 574/2007/EC of 23 May 2007 establishing the External Borders Fund for the Period 2007 to 2013 as Part of the General

ment during that period was the expansion of the scope of the financial reserve for emergency measures in the new European Refugee Fund Decisions so that it covered, not only as before temporary protection but also 'situations of particular pressure'.⁸⁴ Emergency funding came with strict requirements though, such as a 6 month implementation limit.⁸⁵ This made emergency funding difficult for Member States to absorb, for example, in 2010 Greece only managed to use only 6 per cent of the emergency funding available to it.⁸⁶

The set-up of the Home Affairs funding in the 2014–2020 multi-annual financial framework marked a departure from previous funding periods. Six funds were merged into two: the Asylum, Migration and Integration Fund (AMIF) and the Internal Security Fund (ISF).⁸⁷ A single set of administrative rules included in a 'horizontal regulation' (meaning applicable to all the different funding instruments), regulated the implementation of both the AMIF and the ISF funds. The overall amount available, while more extensive than previous funding periods, still remained modest. For example, the global resources (that is, the funding available for the entire period from 2014–2020) initially available for the Asylum, Migration and Integration Fund (AMIF) amounted to €3,137 billion.⁸⁸ This was more than the combined amount of the funds that were merged during the previous multi-annual financial framework (2007–2013), which was €2,200 billion.⁸⁹

Programme 'Solidarity and Management of Migration Flows' (2007) OJ L 144/22 [hereinafter 2007 EBF].

84 2007 ERF Decision, Recs 21 and 22, and Art 5(1)–(2).

85 2007 ERF Decision, Art. 5(2)–(3).

86 See statistics and analysis for the case of Greece in Paul McDonough and Evangelia (Lilian) Tsourdi, "The "Other" Greek Crisis: Asylum and EU Solidarity" (2012) 31(No.4) *Refugee Survey Quarterly* 67, 77.

87 Two separate instruments regulated the Internal Security Fund: European Parliament and Council Regulation (EU) 515/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC (2014) OJ L 150/143 [hereafter: ISF Borders] and European Parliament and Council Regulation (EU) 513/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA (2014) OJ L 150/93 [hereafter: ISF Police cooperation].

88 AMIF Regulation, Art 14(1).

89 See European Council of Refugees and Exiles, "Information Note on the Regulation (EU) No 2014/516 of the European Parliament and the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund," 29 May 2015 (in copy with the author).

Still, at the time of its adoption the Fund accounted for a mere 0.29 per cent⁹⁰ of the EU's entire previous Multi-Annual Financial Framework.⁹¹

The funding instruments of the 2014–20 multi-annual period contained some improvements in terms of operationalising solidarity. For example, the process for the activation of emergency funding was simplified, for example doing away with the 6 month implementation limit, while emergency assistance could amount to 100 per cent of the eligible expenditure for Member States.⁹² In addition, moderate design improvements led to a relative simplification of the management processes. One characteristic example was the elimination of the obligation for Member States to draw up annual programmes. Instead, funding operated on a multi-annual planning cycle, thus avoiding some of the repetitive paperwork for Member State authorities.⁹³

Overall though, EU funding still covered only a limited portion of national spending in this area, and it did not compensate for the asymmetric pressures the EU's responsibility allocation rules in the area of external borders and asylum create. The pre-determined share available to Member States was largely based on absolute indicators, indirectly taken up from the previous period, that failed to account for relative pressures.⁹⁴ In addition, Member States are required to set up management and control systems at national level as part of the shared management model. These systems were intricate and demanded human and financial resources for their effective operation. It is for this reason that absorbing EU funding 'costs'.

During the period of increased arrivals in 2015–2016, the need for structural forms of funding became ever more apparent. Even a host of

90 Calculation included in Alessandro D'Alfonso, 'How the EU Budget is Spent: Asylum, Migration and Integration Fund (AMIF)' EU Parliamentary Research Service Briefing 2015, 1.

91 European Council Regulation (EU, Euratom) 1311/2013 of 2 December 2013 laying down the Multiannual Financial Framework for the Years 2014–2020 (2013) OJ L 347/884.

92 HA Funds Horizontal Regulation, Art 20(2), and Rec 15.

93 There were five main stages in the multi-annual programming cycle: a stage of policy dialogue; preparation of draft programmes by Member States to be approved by the Commission; thereafter, annual implementation reporting. Halfway through the implementation period is a mid-term review that includes enhanced reporting and evaluation, and could lead to the review of national programmes. The final stage consists of implementation reporting and ex-post evaluations that feed into the next multi-annual programming cycle. See HA Funds Horizontal Regulation, Arts 13–15.

94 See for example, AMIF Regulation, Rec 37 and Annex I.

Member States with stronger national economies, such as France, Germany, and the Netherlands, had recourse to emergency funding to implement their obligations.⁹⁵ Moreover, several Member States demanded for the first time the activation of the Civil Protection Mechanism for migration-related purposes.⁹⁶ This process allows for the pooling and transfer of non-financial resources and depends on the voluntary contribution of Member States. In the case of the 2015–2016 ‘refugee crisis’, the non-financial resources consisted of items such as tents, blankets, etc. that were vital for emergency humanitarian assistance for those arriving. Items were under-supplied compared to demand.⁹⁷ A further development was the creation of an intra-EU humanitarian aid budget line.⁹⁸ This budget line, which draws from the general EU budget, is not specific to migration. However, its first activation related to the refugee crisis: several tranches of money were released for projects in Greece, mainly supporting reception capacity.

3.3 Solidarity through funding in the current multi-annual framework 2021–2027

There is no radical overhaul in the philosophy or scope of EU migration funding in the current funding period, ie the period 2021–2027. An enhanced financial envelope for these policies compared to the previous period, ie €25,7 billion, was initially foreseen for the budget heading relating to migration and border management.⁹⁹ Expenditure for these policy

95 See eg European Commission Communication, ‘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 October 2015.

96 See European Council Decision 1313/2013/EU of 17 December 2013 on a Union Civil Protection Mechanism, (2013) OJ L 347/924 [hereinafter Union Civil Protection Mechanism Decision].

97 See European Commission Communication, ‘On the State of Play of Implementation of the Priority Actions under the European Agenda on Migration’ COM(2016) 85 final, 10 February 2016, annex 9 Accepted Member States’ Support to Civil Protection Mechanism for Serbia, Slovenia, Croatia and Greece, 4.

98 See European Council Regulation (EU) 2016/369 of 15 March 2016 on the Provision of Emergency Support within the Union (2016) OJ L 70/1 [hereinafter Humanitarian Assistance Regulation].

99 European Commission, ‘Heading 4: Migration and Border Management’ (European Commission https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en accessed 1 May 2024).

areas is still a minor share of the EU budget (2.1 %, excluding the resources from the Next Generation EU recovery instrument), but these allocations represent a significant increase in relative terms, as compared with the 2014–2020 period.¹⁰⁰ Overall, despite the boost in existing resources, the amounts available bring EU funding only marginally closer to a compensatory logic. A significant part of the financing for the operationalisation of these policies is still to be drawn from national budgets following the logic of policy implementation by Member States.

In June 2023, in view of the mid-term review of the multi-annual framework, the Commission proposed to increase the overall amount relating to migration and border management by EUR 2 billion to provide for sufficient funding to support Member States in managing urgent challenges related to migration and borders as well as for the implementation of the New Pact on Migration and Asylum once adopted.¹⁰¹ At the time of writing, ie February 2024, the European Parliament and the Council had reached a provisional agreement on the budget update that approved the Commission's proposal on this point.¹⁰²

The following architecture in terms of funds has been adopted: an Asylum Migration and Integration Fund (AMIF 2021),¹⁰³ and an Integrated Border Management Fund made of two components: the Border Management and Visa Instrument (BMVI),¹⁰⁴ and the Customs Control

100 See Alessandro d'Alfonso, 'Migration and border management: Heading 4 of the 2021–2027 MFF', Doc. No. PE 690.544 (European Parliamentary Research Service, April 2021) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690544/EPRS_BRI\(2021\)690544_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690544/EPRS_BRI(2021)690544_EN.pdf) accessed 1 May 2024.

101 European Commission, 'Amended proposal for a council regulation on the methods and procedure for making available the own resources based on the Emissions Trading System, the Carbon Border Adjustment Mechanism, reallocated profits and the statistical own resource based on company profits and on the measures to meet cash requirements' COM(2023) 333 final, 20 June 2023.

102 See European Parliament, 'Deal on mid-term revision of EU's long-term budget' (European Parliament, 06 February 2024) <https://www.europarl.europa.eu/news/en/press-room/20240205IPRI7408/deal-on-mid-term-revision-of-eu-s-long-term-budget> accessed 1 May 2024.

103 European Parliament and Council Regulation (EU) 2021/1147 of 7 July 2021 establishing the Asylum, Migration and Integration Fund (AMIF) for the period between 2021 and 2027 (2021) OJ L 251/1 (hereinafter AMIF 2021).

104 European Parliament and Council Regulation (EU) 2021/1148 of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (2021) OJ L 251/48.

Equipment Instrument (CCEI).¹⁰⁵ In addition, a Horizontal Regulation concerning both several funds under the cohesion policy and the migration policies funds regulates their implementation.¹⁰⁶

In terms of objectives, the AMIF mentions as one of its explicit objectives 'enhancing solidarity and fair sharing of responsibility between the Member States, in particular as regards those most affected by migration and asylum challenges, including through practical cooperation'.¹⁰⁷ The main objectives of the BMVI do not include similar wording.

AMIF 2021 continues to disburse part of the funding in the form of national programs (roughly 60 % of the fund) that it calculates based on a fixed amount that it augments in the case of Cyprus, Greece, and Malta.¹⁰⁸ Thereafter, it boosts this fixed amount through a number of absolute indicators, such as the number of protected beneficiaries, the numbers of asylum seekers, the number of legally residing third-country nationals, or the number of third country nationals subject to a return order.¹⁰⁹ These absolute indicators cannot account for the relative pressures these numbers represent for different Member States.

The BMVI also broadly follows the same logic for disbursing the amounts under the different national programs.¹¹⁰ It again foresees a fixed enhanced amount for the benefit of Cyprus, Greece, and Malta. It boosts this fixed amount, taking to account i) the length of external land borders and external sea borders of individual Member States weighted at 70 %; ii) the workload at external land and sea borders weighted at 30 %, that it ascertains through a number of absolute indicators, such as the number of crossings of the external borders at border crossing points.¹¹¹ The sharing methods of the BMVI better take to account the position and capacities

105 European Parliament and Council Regulation (EU) 2021/1077 of 24 June 2021 establishing, as part of the Integrated Border Management Fund, the instrument for financial support for customs control equipment (2021) OJ L 234/1.

106 European Parliament and Council Regulation 2120/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (2021) OJ L 213/159.

107 See AMIF 2021, Art 3(2)(d).

108 See eg AMIF 2021, Annex I.

109 See eg AMIF 2021, Annex I.

110 See BMVI, Annex I.

111 Ibid.

of individual Member States as they factor in the length of their external borders. Nonetheless, the absolute indicators the fund employs to ascertain the workload once again do not account for the relative pressures different Member States experience.

Both the AMIF 2021 and the BMVI, however, foresee an additional element of flexibility, which is the thematic facility. This is part of the funding which is not pre-allocated to national programs. Under AMIF 2021 it represents roughly 30 % of the overall available amount under the fund. Member States and the EU can direct the thematic facility under AMIF 2021 to actions such as emergency assistance, resettlement and humanitarian admission, and additional support to Member States contributing to solidarity efforts.¹¹² In fact, the regulation stipulates that the EU and Member States should direct 20 % of the initial allocation under the thematic facility to the aforementioned objective of enhancing solidarity and fair sharing of responsibility between the Member States.¹¹³ The BMVI does not explicitly mention solidarity and fair sharing under the thematic facility.¹¹⁴

3.4 Solidarity through Funding in the New Pact on Migration and Asylum

While the current multi-annual financial framework runs until 2027, the instruments of the New Pact on Migration and Asylum will bring about developments in terms of operationalising solidarity and fair sharing through funding. I comment at the time of writing based on the available legislative agreement the LIBE committee endorsed on an Asylum and Migration Management Regulation (AMMR) in its February 2024 vote.¹¹⁵ This regulation reforms the EU's system on allocating responsibility for processing asylum claims and establishes a solidarity mechanism.

¹¹² See eg AMIF 2021, Art 11 and Rec 44.

¹¹³ See AMIF 2021, Art 3(2)(d) and Art 11(4).

¹¹⁴ See BMVI, Art 8.

¹¹⁵ LIBE made the text accessible here: Council of the European Union, 'Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Regulation (EU) 2021/1147 and Regulation (EU) 2021/1060' (European Parliament, 8 February 2024) https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2024/02-14/06.R.AMM.Asylumandmigrationmanagement_EN.pdf accessed 1 May 2024 [hereafter: AMMR February 2024 version].

The AMMR presents innovations in terms of operationalising solidarity and fair-sharing of responsibility. First, it foresees a structured process for identifying Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation that can benefit from solidarity measures. Namely, the Commission will adopt a European Annual Asylum and Migration Report that, drawing from quantitative and qualitative indicators, will provide a comprehensive picture of trends and implementation in these policies and assess the need for solidarity and migration management measures.¹¹⁶ Based on this report, the Commission will annually adopt i) an implementing decision on determining Member States ‘under migratory pressure, at risk of migratory pressure or facing a significant migratory situation’; ii) a proposal for a Council implementing act establishing a so-called Solidarity Pool.¹¹⁷

The results of this process might still be politically contested and generate solidarity-related conflicts. The fact that Member States have the possibility to argue that they find themselves in situations of pressure even if the Commission has not identified them as such illustrates the point.¹¹⁸ Still, this structured process infuses elements of predictability, objectivity, and impartiality in the identification of pressure and need for inter-state solidarity. Where Member States ‘self-identify’ so to speak as experiencing pressures necessitating solidarity contributions, they still need to argue based on concrete and pre-defined qualitative and quantitative indicators and the Commission, and consequently the Council, can either endorse or decline access to solidarity measures.¹¹⁹

This framework also creates a more predictable operationalisation of inter-state solidarity through annual Member State pledges. Nonetheless, it is still exceptional situations of ‘pressure’ that trigger solidarity measures gathered under the framework of the Solidarity Pool. Under ‘normal’ circumstances Member States are expected to operationalise their national asylum and external border control systems and related obligations largely on their own financial and operational resources and personnel. What is available on a permanent basis is the so-called permanent EU migration support toolbox.¹²⁰ This toolbox in essence encompasses elements that

116 AMMR February 2024 version, Art 7a.

117 AMMR February 2024 version, Arts 7ba and c.

118 See eg AMMR February 2024 version, Arts 44c and 44d.

119 Ibid.

120 AMMR February 2024 version, Art 5(3).

this research previously identified as carrying a solidarity potential, such as operational support through EU agencies, EU funding, and the Civil Protection Mechanism.¹²¹ Nonetheless, the toolbox also contains vaguely phrased elements, such as ‘enhanced diplomatic and political outreach’, or ‘supporting effective and human rights based migration policies in third countries’.¹²² These reflect the migration-development nexus policy thinking, whose impact is indirect at best, let alone empirically contested.

Coming back to the Solidarity Pool, to secure and operationalise solidarity-related pledges, the AMMR establishes new permanent governance mechanisms, such as annual High Level and Technical Level EU Solidarity fora, as well as the function of an EU solidarity coordinator that will play pivotal roles in animating inter-state solidarity through pledges and in operationalising these pledges.¹²³ Such permanent structures, mirroring UN level processes as in the Global Refugee Forum established in the framework of the UN Global Compact on Refugees, seem more apt to achieve effective and predictable inter-state cooperation compared to ad hoc bargaining. Therefore, this institutionalization drive has the potential to alleviate solidarity-related conflicts between the Member States.

The solidarity pool can consist of three types of contributions. First, relocations (ie organised intra-EU transfers) of asylum seekers or recently recognised beneficiaries of international protection.¹²⁴ Next, financial contributions, meaning financial transfers to the EU budget as external assigned revenues to benefit Member States that have access to the Solidarity Pool a given year.¹²⁵ Benefitting Member States can deploy these amounts either at boosting their own capacity, or third country capacities, in the areas of asylum, migration, or border management.¹²⁶ The fact that these amounts can target actions in third countries illustrates once again a policy mindset influenced by the migration-development nexus discourse. It also points to externalisation tendencies, to the extent that amounts will target boosting the border control capacities of third states. Finally, Member States can offer so-called ‘alternative contributions’ such as capacity building, staff support, equipment. Member States retain full discretion in

121 Ibid.

122 Ibid.

123 See eg AMMR February 2024 version, Arts 7d, 7e, 7f.

124 See AMMR February 2024 version, Arts 7c, 44a.

125 See AMMR February 2024 version, Arts 7c, 44i.

126 Ibid.

choosing between types of solidarity measures that are considered “of equal value”. However, if they pledge alternative solidarity measures, they should indicate their financial value based on objective criteria.¹²⁷ If a specific benefitting Member State has not asked for alternative measures, these should be converted to financial contributions instead.¹²⁸

The AMMR foresees a minimum of required relocations and financial contributions for the Solidarity Pool at Union level, which should at least be annually: (a) 30 000 for relocations; and (b) EUR 600 million for financial contributions.¹²⁹ In breaking with the past, solidarity has a mandatory character in the sense that Member States are to annually contribute their fair share calculated through a formula that takes into account their population size (50 % weighting) and their total GDP (50 % weighting).¹³⁰ Seeking to annually objectify each Member State’s fair share marks improvement from the current situation of *ad hoc* bargaining. Nonetheless, to appease Member States that opposed relocation, and thus alleviate solidarity-related conflicts, the AMMR foresees that Member States retain full discretion in choosing between the types of solidarity measures they will contribute.

However, if Union-wide relocation pledges fall below the envisaged minimum of 30.000 per year, or below 60% of the reference number used to calculate each Member State’s mandatory fair share for relocation, then so-called responsibility offsets become mandatory.¹³¹ What this means practically is that the contributing Member State, eg Hungary, needs to examine applications for international protection for which the benefitting Member State, eg Greece, would have normally been responsible and cannot return these asylum seekers to Greece. Instead of mandating relocations then, the AMMR essentially envisages the suspension of the inter-state transfer component (ie the ‘take back requests’) for Member States that refuse to relocate. Whether this pragmatic solution will resolve solidarity-related conflicts remains to be seen. After all, for a responsibility offset to apply, asylum seekers arriving at the border Member States should have managed to irregularly continue their journey onwards to another Member State, which is not always practicable.

127 See AMMR February 2024 version, Arts 7c, 44j.

128 Ibid.

129 AMMR February 2024 version, Art 7c.

130 AMMR February 2024 version, Art 44k.

131 AMMR February 2024 version, Art 44h.

4 Conclusion

Intra-EU, state-centered solidarity, based on Article 80 TFEU creates binding legal obligations, impacting both the adoption of legislation, and the phase of implementation. Article 80 TFEU requires the adoption of concrete measures, whenever necessary. This reference in the Treaty to the principle of 'solidarity and fair sharing of responsibility', results into what I refer to as 'solidarity plus'. The aim is to provide support up to the point where each Member State contributes its fair share. More ambitiously, the aim should be to structure the migration policies and their implementation so that asymmetrical responsibilities do not occur in the first place. This has not been the case at EU level. If anything, the EU's current asylum responsibility allocation system fuels asymmetrical responsibilities, and consequently, intra-EU political conflicts.

The EU initially hinged heavily on normative sharing to achieve inter-state solidarity, an approach with contested results. Gradually the EU started experimenting with operational sharing that led to an institutionalisation push and to joint implementation patterns through EU agencies. Physical sharing has been less developed, with ad hoc initiatives spurring political contestation. Yet, physical sharing remained present in the policy and legal debate. Financial sharing had initially been modest. It has since grown in volume, playing a key role during the 2015–2016 increased migrant arrivals to the EU. These developments point to the need for structural forms of funding to support policy implementation. This chimes in well with the EU's migration policies ultimately generating regional public goods.

Consecutive EU multi-annual financial frameworks developed the EU's migration funding implementation design and sharing methods. Flexible components, such as emergency funding, emerged. Raising EU co-financing to 100 per cent in case of emergency funding led to greater absorption rates. The current multi-annual financial framework incorporates an additional element of flexibility, the thematic facility. The framework also boosts existing financial resources compared to previous periods. Nevertheless, the amounts available bring EU finding only marginally closer to a compensatory logic.

The New Pact on Migration and Asylum brings concrete innovations. It adopts a structured approach to define Member States' relative capacities and to apportion responsibilities on this basis. Quantitative and qualitative indicators underpin the triggering of solidarity measures. This comprehen-

sive set of indicators, overall, seems to be well suited to provide a holistic picture and assess relative pressure. The Pact foresees new permanent governance mechanisms, such as the annual solidarity fora and the Solidarity coordinator that have the potential to prevent, or at least, depoliticise inter-state solidarity conflicts.

However, the AMMR's approach is still likely to miss the mark on fair sharing. Even if it creates permanent governance structures, the regulation continues to link the activation of solidarity with pressure. Thus, instead of establishing structural fair sharing, solidarity remains a palliative solution. The regulation's baseline people sharing component, ie minimum 30.000 relocations annually at EU wide level, is rather unambitious. Next, it is unlikely that benefitting Member States will consider capacity building activities in third states, or sharing of personnel and equipment, as having equivalent impact on the ground as people sharing.

What is certain is that solidarity through financial sharing in migration is gaining prominence. The EU has found an inventive way to enhance the existing amounts under the EU budget for its migration policies through generating earmarked external assigned revenues that Member States will make available by means of the Solidarity Pool. The minimum amount the regulation currently foresees at EU wide level, ie EUR 600 million, is relatively modest and will not allow for a passage to a compensatory logic. However, it could be the precursor of deeper, structural, forms of financial sharing in the operationalisation of the EU's migration policies. This could constitute a decisive piece in the puzzle of enhancing policy implementation. Unfortunately, the externalisation push that underpins the Pact instruments,¹³² are likely to overshadow these advancements in the intra-EU solidarity field.

132 See for analysis, Evangelia (Lilian) Tsourdi, 'The EU's New Pact on Migration and Asylum: three key arguments' (EU Law Analysis, 14 September 2023) <https://eulawanalysis.blogspot.com/2023/09/the-eus-new-pact-on-migration-and.html> accessed 1 May 2024.