Can We Still Afford the Consequences of Failing Forward?

The Ineffective Attempts of Reforming the EU Asylum System from a Hungarian Perspective

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Abstract

The study guides the reader through the idea, negotiations and main pillars of solidarity and responsibility under the new European Pact on Asylum and Migration. It highlights its anomalies, pointing out the signs that render the Pact yet another incomplete step in the series of failing forward cycles, therefore raising the question whether we can still afford to fail forward in the area of asylum and migration. The study also intends to shed light on the reasons why Hungary failed to channel its own practical experiences effectively during the negotiations of the Pact. It is also discussed what practical tests of the regulatory frameworks Hungary had carried out that led to its total rejection of the Pact with the focus of providing a more refined interpretation of the country's rejecting position in European negotiations. Finally, the paper introduces the latest initiatives in innovative solutions and identifies hindering factors that posed major obstacles in achieving meaningful reforms, continuously resulting in the phenomenon of failing forward in the field of European asylum and migration policy.

Keywords: Common European Asylum System, CEAS, migration, Hungary, New Pact on Asylum and Migration

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1. Introduction

In his memoirs, Jean Monnet famously stated that "Europe will be forged in crises and will be the sum of the solutions adopted for those crises."[1] Over the past years the world has been affected by a cluster of related crises with compounding effects, such that the overall impact exceeds the sum of each part, also described as a state of 'polycrisis'.[2] The combined action of the interwoven crises influences the migration outlook in a unique way as on the one hand, it creates multifaceted drivers that shape people's aspirations for migration, and on the other hand, the polycrisis challenges the capacity of existing migration policy instruments and key stakeholders to provide adequate responses to unforeseen situations.

Hungary, being under a significant migratory pressure at the EU's external borders by illegally arriving migrants on the Western Balkan route, has experienced the effects of these various crises that interact with increasing speed and severe impact.[3] Consequently, Hungary has also been a country of early reaction and in the meantime, a country that took the courage to draw honest conclusions about the effectiveness of each new initiative and to make further changes to its regulatory concept for the sake of efficiency. Apart from national innovative solutions Hungary has been active in channeling its own crisis management experiences into the negotiations on the reforms of the European asylum and migration policy.

The aim of this study is to discuss what practical test of the regulatory frameworks has been carried out by Hungary that led to its total rejection of the EU's New Pact on Asylum and Migration with the focus of providing a more refined interpretation of the country's rejecting position in European negotiations. The study also intends to shed light on the reasons of why Hungary failed to channel its own practical experiences effectively during the negotiations of the Pact. Consequently, the idea and the main elements of the reforms are also discussed from the critical viewpoint of a transit country, also drawing conclusions from a pan-European approach.

The study employs the concept of failing forward in order to examine the outcome of the negotiations of the new European Pact. "By advancing integration through incomplete agreements, the EU has created the very condi-

1 Jean Monnet, *Memoirs,* Doubleday and Company, 1978, p. 417.
2 World Economic Forum, *The Global Risks Report 2023,* 18th Edition, 2023, at https://www3.weforum.org/docs/WEF_Global_Risks_Report_2023.pdf.
3 *See e.g.* Nikolett Pénzváltó, 'A nyugat-balkáni útvonal – migrációs trendek magyar szemszögből', *Nemzet és Biztonság,* Vol. 15, Issue 1, 2022, pp. 4–16.

tions for the emergence of crises, and this has, in turn, spurred on further agreements to deepen integration."[4] This EU policy-making pattern where EU institutions address crises with temporary, often incomplete, solutions, which, while not fully resolving the underlying issues, push the EU towards further integration, constitutes the concept of failing forward.[5] Therefore, we must always be able to provide an adequate solution to the existing and upcoming migration challenges as legislation cannot operate in a vacuum, notwithstanding what many legislators imagine. Employing this theoretical lens, the study also raises the question whether we can still afford the consequences of failing forward as we look with concern at the security situation in Europe, taking into consideration global migration trends. The study guides the reader through the Pact's proposal, negotiation and adoption, highlighting its anomalies and pointing out the signs that make the Pact yet another incomplete step in the series of failing forward cycles, therefore raising the question whether we can still afford to fail forward in the area of asylum and migration.

2. Hungary Going Clear on to the End… and Beyond

At present, there are three layers of rules regulating asylum procedure in Hungary based on which refugee status or subsidiarity protection could be gained. Although the main rules of procedure have been set out by transposing the applicable EU asylum acquis, there are two other special sets of rules applicable under particular circumstances.

A "state of crisis due to mass migration" was introduced into Hungarian law in September 2015, and as a result, from 28 March 2017 until 26 May 2020 (but in practice until March 2020), asylum applications could only be submitted in the transit zones, with the exception of those applicants staying lawfully in the country. All asylum seekers, excluding unaccompanied children below the age of 14, had to stay in the transit zones for the whole duration of their asylum procedure. Nevertheless, judgment *C-808/18* rendered in an infringement procedure the CJEU declared[6] that Hungary had failed

4 Marco Scipioni, 'Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis', *Journal of European Public Policy,* Vol. 25, Issue 9, 2018, pp. 1357–1375.

5 Erik Jones *et al.,* 'Failing forward? Crises and patterns of European integration', *Journal of European Public Policy,* Vol. 28, Issue 10, 2021, pp. 1519–1536.

6 Judgment of 17 December 2020, *Case C-808/18, Commission v Hungary,* ECLI:EU:C:2020:1029.

to fulfil its obligations deriving from certain elements of EU migration and asylum acquis.[7]

Since 26 May 2020, another set of special conditions are applicable to submitting an asylum application, deviating from the general rules.[8] This second set of special procedural provisions was first implemented in view of the emergency situation caused by the COVID-19 pandemic. Currently, the armed conflict and humanitarian disaster in Ukraine, and the prevention and management of their consequences in Hungary provide the factual basis[9] for their implementation. As a result, in the present state of emergency, the regular procedure can be used only by those who carry out a special procedure before entering the country.[10] It is also important to note that, according to Hungarian legislation, if one enters Hungary without a legal title authorizing the entry and stay, authorities may stop them and remove them from Hungarian territory through the border fence with Serbia. Nevertheless, it also needs to be stated that on 22 June 2023, the CJEU found that not allowing people to seek asylum on the territory of Hungary violates EU law.[11]

However, it is worth getting to know more about the processes that led to the emergence of these regulatory layers within the Hungarian system, which also greatly influenced the position Hungary takes regarding EU reform initiatives in the field of asylum and migration.

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7 *See* Ágnes Töttős, 'The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule, Hungary Seeking Derogation from EU Asylum Law', *Hungarian Yearbook of International Law and European Law,* Vol. 9, 2021, pp. 212–232.

8 Based on Act LVIII of 2020 and Government Decree No. 292/2020. (VI. 17.).

9 Government Decree No. 424/2022. (X. 28.)

10 If one is outside Hungary, they shall first submit a so-called "declaration of intent" to the Hungarian embassy in Belgrade (Serbia) or Kyiv (Ukraine). To do this, one needs to make an appointment at the relevant embassy. They may be summoned to the embassy for an interview. If the Hungarian authorities approve the declaration of intent, one will receive a one-time travel document with which they can travel to Hungary and apply for asylum. If the person is already in Hungary, they do not need to submit a declaration of intent to the embassy if they belong to any of the following groups: *(i)* Recognized beneficiaries of subsidiary protection staying in Hungary (and he/she would like to be recognized as a refugee); *(ii)* Family members of recognized refugees or beneficiaries of subsidiary protection staying in Hungary; *(iii)* Any person who is in detention, custody or imprisoned, except for those who have crossed the state border of Hungary in an irregular manner. In these cases, one can apply for asylum by visiting any of the National Directorate-General for Aliens Policing client offices in person and expressing their wish to do so.

11 Judgment of 22 June 2023, *Case C-823/21, Commission v Hungary,* ECLI:EU:C:2023:504.

2.1. Extraordinary Situations, Extraordinary Solutions – Take One!

The border procedure applicable till 2017 was tested before the ECtHR as a result of which the ECtHR declared that Hungary violated Article 3 ECHR by failing to conduct an efficient and adequate assessment when applying the safe third country clause to Serbia.[12] After 28 March 2017, extraordinary rules applied regarding the asylum procedure. The aim of the so-called reinforced legal border closure was to prevent migrants with an unclear status from moving freely within the country or the EU, thereby reducing the security risk of migration. Within this special legal framework, the procedures in the transit zones in Hungary were no longer special procedures, since the asylum authority examined the applications according to the general rules by first assessing the admissibility of the application, and in case of an application being admissible, assessed it on its merit. Another major amendment of the rules meant that the applicants were accommodated in the transit zone for the whole duration of the asylum procedure, however the possibility of leaving the transit zone through the exit gate to Serbia was still an option.

In the infringement procedure *C-808/18*[13] the CJEU however identified four aspects of Hungary's asylum system's non-compliance with EU law.[14] *(i)* Firstly, in providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke and Tompa, while adopting a consistent and generalized administrative practice drastically limiting the number of applicants authorized to enter those transit zones daily. *(ii)* Secondly, in establishing a system of systematic detention of applicants for international protection in the transit zones, without observing the guarantees provided for in the Asylum Procedures Directive and the Reception Conditions Directive. *(iii)* Thirdly, in allowing the removal of all third-country nation-

12 Ágnes Töttős, 'The ECtHR's Grand Chamber Judgment in Ilias and Ahmed versus Hungary: A Practical and Realistic Approach. Can This Paradigm Shift Lead the Reform of the Common European Asylum System?', *Hungarian Yearbook of International Law and European Law,* Vol. 8, 2020, pp. 169–191.

13 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter: Reception Conditions Directive).

14 *See* Ágnes Töttős, 'The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule, Hungary Seeking Derogation from EU Asylum Law', *Hungarian Yearbook of International Law and European Law,* Vol. 9, 2021, pp. 212–232.

als staying illegally in its territory, with the exception of those who are suspected of having committed a criminal offence, without observing the procedures and safeguards laid down in the Return Directive. *(iv)* Finally, in making the exercise by applicants for international protection who fall within the scope of the Asylum Procedures Directive of their right to remain in its territory subject to conditions contrary to EU law.[15] Even before this judgement, the CJEU examined the legal nature of the placement in the transit zone and in a preliminary ruling on the *joined cases C-924/19 and C-925/19 PPU*[16] and found that given the circumstances (length, security tools, space, contacts, *etc.*) the placing of applicants for international protection in the transit zones is no different from a detention regime applied in an unlawful manner, which actually led to the immediate closure of the transit zones by the Hungarian authorities in May 2020.[17]

2.2. Extraordinary Situations, Extraordinary Solutions – Take Two!

In 2020, following the outbreak of the COVID-19 pandemic, Hungary adopted a new law requiring those who wish to seek asylum in Hungary and are outside Hungary to first submit a so-called statement of intent at the embassy of Hungary in Belgrade (Serbia) or in Kyiv (Ukraine). After examining that statement, the Hungarian authorities can decide whether or not to grant a travel document allowing entering into Hungary for the submission of the actual application for international protection. The European Commission considered that by adopting these provisions, Hungary failed to fulfil its obligations under EU law, in particular, the directive on common

15 The CJEU declared that Hungary had failed to fulfil its obligations under Articles 5, 6(1), 12(1) and 13(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter: Return Directive or RD), under Articles 6, 24(3), 43 and 46(5) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter: Asylum Procedures Directive or APD), and under Articles 8, 9 and 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereinafter: Reception Conditions Directive or RCD).

16 Judgment of 14 May 2020, *Joined Cases C-924/19 PPU and C-925/19 PPU, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság,* ECLI:EU:C:2020:367.

17 *See* at https://hu.euronews.com/2020/05/21/mar-az-ejjel-elszallitottak-a-tranzitzonakbol-a-menedekkeroket.

procedures for granting and withdrawing international protection and initiated an infringement procedure against Hungary.

In its judgment of 22 June 2023, the CJEU held that by requiring the prior submission of a declaration of intent at a Hungarian[18] embassy situated in a third country and the grant of a travel document, Hungary has failed to fulfil its obligations under the Asylum Procedure Directive. The Court found that the condition relating to the prior submission of a declaration of intent was not laid down by the directive and was contrary to its objective of ensuring effective, easy and rapid access to the procedure for granting international protection. In addition, according to the Court, that legislation deprived the third-country nationals or stateless persons concerned of the effective enjoyment of their right to seek asylum from Hungary, as enshrined in the Charter of Fundamental Rights. The Court also considered that the restriction laid down could not be justified by the objective of public health protection, and, more specifically, the fight against the spread of COVID-19, as argued by Hungary. Moreover, the procedure implemented by Hungary constituted a manifestly disproportionate interference with the right of persons seeking international protection to make an application for international protection upon their arrival at a Hungarian border.

3. The Path to a New Pact on Asylum and Migration

3.1. First Initiatives and Instructions on the Way Forward

The Commission in its 2016 Communication "Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe"[19] considered that the Common European Asylum System (CEAS) needs to be made more crisis proof in the future and presented two packages of altogether seven reform proposals in 2016. However, the negotiations ran aground as "Member States remained unwilling to leave their entrenched positions, which were firmly anchored to their respective roles in the EU migration system":[20] the first group being the frontline Member States (MED5), the second group the destination countries in North-West Europe

18 *Case C-823/21, Commission v Hungary.*

19 Communication from the Commission to the European Parliament and the Council, Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final.

20 *See* at https://www.tandfonline.com/doi/full/10.1080/07036337.2023.2209273.

and the transit states on the Eastern part of the EU, including the V4,[21] many having extensive external border sections. Negotiations among these three blocks were heavily politicized and led to a stalemate as both the Mediterranean states and the eastern states thought the reform elements cannot be separated from each other, they must be accepted as a package, on the other hand, the Western Member States would have been willing to conclude the negotiation of the seven legislative files even individually.

The European Council also drew its conclusions in two respects with regard to migration and asylum reforms. It set out in its June 2018 conclusions that "a precondition for a functioning EU policy relies on a comprehensive approach to migration which combines more effective control of the EU's external borders, increased external action and the internal aspects."[22]

In 2019 the leaders reconfirmed their dedication in this regard when setting out the New Strategic Agenda 2019–2024.[23] The European Council Conclusions adopted in December 2023 and March 2024 equally reaffirmed the EU's commitment to continue pursuing a comprehensive approach to migration. Therefore, it was not enough to proceed further on internal asylum reforms, if amidst the constant inflow of migrants the external borders were not protected or the third-country nationals found to be illegally staying could not be effectively returned to their countries of origin.

Furthermore, the European Council also gave policy directions as regards the procedure of adopting the reforms, especially when negotiations began to drag on: it set out a plan on returning to the policy discussions on the reform and emphasized that they "will seek to reach a consensus during the first half of 2018."[24] The necessity of finding a consensus on the Dublin Regulation was later reiterated in June 2018 by the leaders.[25] Finally, the New Strategic Agenda 2019–2024 also contained the very same instructions: "A consensus needs to be found on the Dublin Regulation to reform it based on a balance of responsibility and solidarity, taking into account the persons disembarked following Search and Rescue operations."

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21 *See* more: Ágnes Töttős, 'European Asylum Policy and its Reforms from a Central and Eastern European Perspective', *in* András Osztovits & János Bóka (eds.), *The Policies of the European Union from a Central European Perspective,* Central European Academic Publishing, Miskolc–Budapest, 2023, pp. 217–237.

22 European Council, 28 June 2018, para. 1.

23 European Council meeting (20 June 2019) – Conclusions, Annex: A New Strategic Agenda 2019–2024.

24 *See* at http://www.consilium.europa.eu/media/21620/19-euco-final-conclusions-en.pdf.

25 European Council, 28 June 2018, para. 12.

Consensus was not inevitably required by the Treaties as ordinary legislative procedure and qualified majority voting in the Council was extended to this policy area by the Lisbon Treaty.[26] A clear consequence of the new rules on legislation was that because of the new qualified majority voting rule in the Council medium-sized and smaller Member States had less weight in the institution, while larger Member States were seen as the main beneficiaries of the change.[27] Consequently, the realization that finding consensus was necessary followed among others from the failure of implementing the 2015 relocation decisions, in the knowledge that unless all the Member States are on board with the main pillars of the reforms, effective implementation cannot be guaranteed. Hungary and its allies also aimed at determining the main directions and elements of the asylum and migration reforms at the highest level with consensus.

3.2. Neither New, Nor a Pact

"Asylum and migration are amongst the most significant challenges the EU has faced in recent years. Along with security, they rank high among the priorities and concerns of many Europeans. They will inevitably remain at the center of our politics during the next mandate."[28]

The new commissioner for Home Affairs, Ylva Johansson, was entrusted by Commission President von der Leyen with the task of finding the common ground and a fresh start on migration and asylum by developing the New Pact on Migration and Asylum. This was to involve a comprehensive approach looking at external borders, systems for asylum and return, the Schengen area and working with partner countries outside the EU. The New Pact was initiated in a Commission Communication[29] on 23 September 2020, with another set of ideas and legislative proposals. While in 2020, the Commission supported a quick adoption of the proposals, or at least those that have advanced well during the negotiations, the only reform element in

26 Article 78(2) TFEU.

27 Changed rules for qualified majority voting in the Council of the EU, December 2014, p. 1, at http://www.europarl.europa.eu/RegData/etudes/ATAG/2014/545697/EPRS_ATA%282014%29545697_REV1_EN.pdf.

28 Ursula Von der Leyen, Mission letter sent by to Ylva Johansson, the Commissioner for Home Affairs, 2019, p. 4.

29 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.

which the co-legislators could reach an agreement was to turn EASO into a fully-fledged EU asylum agency.[30]

Although the newest reform proposals were prepared through rounds of consultations with the capitals, and they aimed at balancing the various interests of the different groups of like-minded countries, what was proposed was a strange mixture of already existing elements of migration and asylum policy that have a questionable effect on their own, and when seemingly arranged into one set of rules, they do not necessarily create a fully operable system that is capable of resisting crises. There was a clear element it was missing, namely impact assessment. And this was already the second big legislative package that was proposed by the Commission without impact assessment – it was already lacking from the proposals launched in 2016. What the Commission instead did was a *tour des capitales,* so mapping the position of the governments in order to search for a compromise instead of a workable solution. The measure of success is the appropriate compromise and not efficiency; this seems to underline that EU reforms in the area of asylum and migration are predestined to continue on the path of failing forward.

The New Pact of the von der Leyen Commission was meant to resolve the stalemate. Nevertheless, the so-called New Pact was neither new, nor a pact. Many Member States were surprised to see that the solidarity measures of the reforms focused once again on compulsory relocation, while this element was one of the most unacceptable in the previous proposal to several Member States. As for the designation as a Pact, which is supposed to indicate a formal agreement between parties, no such agreement preceded the issuance of the pact, even though the European Council gave clear guidance on the need to find consensus on the major elements of the reforms. Instead, complex legislation was presented that was in no way based on the political consensus of EU leaders. The Pact was formally a Commission Communication issued with a number of new proposals, a number of modified proposals, maintaining a number of the proposals issued in 2016.

While the Communication on the Pact was based on a comprehensive approach, the different areas got different emphasis as the Commission pushed forward internal reforms by legislative proposals while expending less energy on the external dimension. It was also obvious that while new challenges arose, the negotiations on the legislative reforms were pushed further, while the need for a paradigm shift was clear. Nevertheless, it would

30 Regulation (EU) 2021/2303.

have meant allowing leaders to have a meaningful discussion on the way forward. Instead, what we saw was that

> "The external dimension was characterized by heavy political (EUCO) involvement, which was meant to steer the Commission and Council for instance, on issues of instrumentalization, hybrid threats and returns. This EUCO involvement was generally perceived as a nuisance by insiders, who felt that it politicized discussions and interfered with technical level work. This would explain why seemingly limited progress has been made in the area of returns and readmissions, action plans, and partnerships with third countries. The internal dimension saw little to no EUCO involvement […]. Drawing lessons from the previous round of CEAS reform the institutional actors have been united in their attempts to keep the file away from their leaders. However, this 'technical' approach has also not been very effective."[31]

4. The Reforms of the Pact

The reforms of the Pact were to create a legal framework that balances solidarity and responsibility between the Member States, in a comprehensive approach to managing migration effectively and fairly. Following a political agreement on 20 December 2023, 10 legal acts[32] were adopted by the European Parliament on 10 April 2024, and later by the Council on 14 May. The legal instruments of the Pact, including some which had been already proposed in 2016, entered into force on 11 June 2024 and will enter into application after two years, as of 12 June 2026; except for the Union Resettlement and Humanitarian Admission Framework Regulation, which is already applicable today.

On 12 June 2024, the European Commission adopted a Common Implementation Plan for the Pact on Migration and Asylum.[33] This plan sets out

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31 *See* at https://www.tandfonline.com/doi/full/10.1080/07036337.2023.2209273.

32 Eurodac regulation, Asylum procedure regulation, Regulation establishing a return border procedure, Regulation establishing a resettlement and humanitarian admission framework, Regulation addressing situations of crisis and force majeure, Screening regulation, Asylum and migration management regulation, Regulation on consistency amendments related to screening, Reception conditions directive, Qualification regulation.

33 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Common Implementation Plan for the Pact on Migration and Asylum, COM/2024/251 final.

the key actions required to translate the new rules on migration into practice. To do so, it brings all EU countries together, launching the necessary preparations that will allow the new system to become a well-functioning reality by the end of a two-year transition period. Guided by the Common Implementation Plan, the next step was for EU countries to prepare their respective national implementation plans by December 2024 as work must be started to translate the large and complex set of legislative acts into operational reality. On 16 April 2025, the Commission also proposed accelerating the implementation of certain aspects of the Pact on Migration and Asylum by frontloading two key elements of the Asylum Procedure Regulation with the aim of supporting Member States in processing asylum claims faster and more efficiently for applicants whose claims are likely to be unfounded.[34]

4.1. The Sweaty Balance between the Principles of Responsibility and Solidarity

The negotiations based on the new Pact brought to the surface all the previous differences between the positions of the three groups of Member States. The different legislative proposals outlined a very complex reform with several elements, but the main driver of the dynamics of the discussion was how to create a balance between solidarity and responsibility that formed the two main pillars of the reform ideas.

4.1.1. The Pillar of Responsibility

In case of the pillar of responsibility, the aim of the relevant provisions is to select as soon as possible those who are entitled to international protection and those who do not have any right of residence from among the migrants arriving illegally to the territory of the EU. The central elements of achieving this goal are the introduction of a compulsory screening in case of those crossing the border illegally and the reform of the currently optional rules of the border procedure. According to the new regulations, once migrants reach the borders of the EU, only a five-day screening procedure is envisioned, and only a part of the migrants would be kept at the border for car-

34 *See* at https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1070.

rying out compulsory asylum and/or return border procedures. Most asylum seekers would need to be provided access to the territory of the EU. Even if certain groups of migrants would be kept at the external borders for specific asylum and/or return procedures, the time of applying such procedures with the legal fiction of non-entry would be very limited (12 weeks for each procedure to be concluded completely, with the possibility of extending it to 16 weeks). Consequently, even those most likely to be expelled from the EU would need to be provided entry to the territory of the EU after a certain period, yet the ratio of effective return of these migrants is still very low.

Pursuant to Articles 46 and 47 of the new Asylum Procedures Regulation[35] the adequate capacity for border procedures at Union level shall be considered to be 30,000, and it is necessary to calculate and set up the adequate capacity of each Member State and the maximum number of applications for international protection each Member State is required to examine in the border procedure per year. The Commission shall, by means of implementing acts, calculate the number that corresponds to the adequate capacity of each Member State by using a specific formula, thereby setting out a new type of quota.[36] According to the first such implementing act[37] Hungary alone needs to provide for the 25.7% of the total common capacity that is 7716 places at its external borders, and it is only Italy (26.7%, 8016) that needs to set up a slightly bigger capacity for border procedures. While the purpose of the border procedure for asylum and return should be to quickly assess in principle at the external borders whether applications are unfounded or inadmissible and to swiftly return those with no right of stay, the specific provisions of the Asylum Procedures Regulation not only create an

35 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

36 The number shall be calculated by multiplying the number set out in Article 46 by the sum of irregular crossings of the external border, arrivals following search and rescue operations and refusals of entry at the external border in the Member State concerned during the previous three years and dividing the result thereby obtained by the sum of irregular crossings of the external border, arrivals following search and rescue operations and refusals of entry at the external border in the Union as a whole during the same period according to the latest available Frontex and Eurostat data.

37 Commission Implementing Decision (EU) 2024/2150 of 5 August 2024 laying down rules for the application of Regulation (EU) 2024/1348 of the European Parliament and of the Council, as regards the adequate capacity of Member States and the maximum number of applications to be examined by a Member State in the border procedure per year.

unreasonable burden for two particular states, but also contradict the main aim of selecting different groups of migrants as early as possible on their route to the EU. Interestingly, none of the Member States located on an earlier part of the Balkan route is obliged to have such big capacities.

4.1.2. The Pillar of Solidarity

As regards the pillar of solidarity, the goal is that Member States need not collect the necessary assistance when affected by migration pressure on an ad-hoc basis, but rather have a solidarity pool of these solidarity offers that can be mobilized at any time, which makes the response faster and more predictable. To achieve this, forecasting is also essential, so that the assets to be provided can be planned to some extent. That is why the Asylum and Migration Management Regulation,[38] which replaces the Dublin Regulation, creates a solidarity mechanism based on an annual migration management cycle. Furthermore, the crisis management regulation[39] also establishes additional solidarity tasks beyond the annual solidarity mechanism.

In preparation for the annual solidarity cycle, the Commission prepares its report on the expected migration and asylum trends and needs for the following year by 15 October of the previous year. In addition, the Commission also proposes the creation of a Solidarity Pool to manage the expected migration challenges in the coming year, in response to the identified potential migration pressure and the potential needs of the Member States expected to be affected. With regard to this stock of solidarity measures, the Commission will also propose a pan-European target number of not less than 30,000 relocations, or EUR 600 million (*i.e.,* the relocation of one person has been equated with EUR 20,000 by the Commission). The Commission's proposal also determines for each Member State how much the indicative contribution (fair share) per Member State is; the formula used for this is the same as that used in the 2015 relocation decisions (50–50% consideration of GDP and population). Member States can make three types of offers to the solidarity pool: *(i)* relocation (asylum seekers or even recognized at

38 Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

39 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

the request of the beneficiary Member State); *(ii)* financial contribution (paid to the Union, from which the beneficiary Member State benefits, or a project implemented by the beneficiary Member State, which is implemented with a third country directly related to the given migration pressure); *(iii)* alternative measures (*e.g.* operational contribution, provision of personnel or equipment based on the needs of the beneficiary Member State).

Although the Member States are theoretically free to decide what type of offer they make and to what extent, at the same time, their room for maneuver is limited in several respects: financing projects implemented with third countries can only be done through the beneficiary Member State; agencies, especially Frontex, have priority as providers of operational assistance in relation to the offers of personnel or equipment for border protection, the offer provided through Frontex is not considered an additional solidarity offer; a Member State's own border protection expenditure does not qualify as an offering through the solidarity mechanism; in the case of all alternative offers, the offeror and recipient Member State must also agree on the method and the value of the given offer.

The finalized solidarity pool, compiled and adjusted through consultation by the Member States, is adopted by the Council in an executive act with a qualified majority, the provisions of which are binding. Based on the above, although the Member States have room for maneuver both in terms of the instruments to be offered and the amount of the offer, the fact that the Council adopts this implementing act with a qualified majority entails the risk that the Council establishes an obligation different from that offered by the particular Member State should there be a need for more or different type of offers. The Member States' contributions stipulated in the solidarity pool should not be fulfilled immediately, but at the request of a Member State facing migration pressure, to the extent necessary to respond to the given situation.

4.2. Hungary's Position

Central European countries many times functioned as an 'early warning region' voicing their concerns regarding the inoperability of the present acquis. Nevertheless, their position has been constantly disregarded. Throughout the negotiations Hungary remained firmly convinced of the need to develop a Common European Asylum System which aims at tack-

ling the root causes of illegal migration, minimizes and ultimately eliminates the incentives for illegal migration and discourages persons who wish to abuse the asylum system, and includes the possibility for examining asylum applications in third countries. Consequently, solely fine-tuning the existing system, such as extending border procedures from 4 to 12 weeks, or cementing expensive experimentations with non-effective relocation, would not be effective.

Furthermore, Hungary was clear in advocating not for a compromise measured with mathematical precision, but instead reforms that serve the purpose of deterring migrants that only claim asylum for economic purposes, stemming illegal migration at the earliest possible point on their route to the EU, and even those eligible for asylum would be provided protection closest to their country of origin instead of incentivizing migration using criminal organizations to reach the EU. The fact that all the efforts dedicated to border protection at the external borders could still be overridden by masses of people submitting unfounded claims for asylum, and even more capacities must be developed for the purpose of temporarily holding back such people whose identity is often times unknown, contradicts the country's expectations.

As regards solidarity contributions, they are expected without taking into account measures carried out on the country's own territory even where the borders on which border protection and asylum management efforts are carried out are also the external borders of the Schengen area. Consequently, Hungary has persistently advocated that resources from national budgets spent on the protection of the external borders of the EU should be regarded as a means of solidarity. Instead, it was presented with a compromise of a solidarity mechanism that would not represent a viable solution for dealing with migratory crises, inter alia as it aims to solve the crisis situations primarily through *de facto* and *de jure* mandatory relocation, while doing so would only lead to an exponential increase in the migratory flows, which will consequently deepen the crises and increase solidarity needs.

In line with the repeated call of the European Council, Hungary remained firm on the need to find consensus on the main building blocks of an effective migration and asylum policy. Later, as the impact of mass illegal migration deepened and had a severe effect on the functioning of the Schengen area, Hungary also called for a Schengen summit to be established, based on the model of Eurosummit, convened regularly, involving the heads of state and government of the Schengen Area.

5. Failing Forward: Not Effective and Not Enough

While the Commission communicated that the closure of the reform process was a huge success and called for an early start of implementation, already on the day following the adoption of the Pact, fifteen Member States[40] pleaded with the European Commission to go beyond the new reforms aiming for more innovative solutions.[41] The European Council in its Conclusions adopted in October 2024[42] not only called on "the Council, the Member States and the Commission to strengthen work on all strands of action in the comprehensive approach to migration", but specified two particular areas, where it practically declared that the reforms of the Pact cannot effectively handle the arising challenges or that the reforms are minor compared to the nature and extent of the migratory pressure. Although the Commission called the adoption of the Pact a "historic agreement",[43] already in October 2024 the European Council concluded that new ways to prevent and counter irregular migration should be considered.

First of all, it declared that "Russia and Belarus, or any other country, cannot be allowed to abuse our values, including the right to asylum, and to undermine our democracies. […] Exceptional situations require appropriate measures. The European Council recalls its determination to ensure effective control of the Union's external borders through all available means […]."[44] "In addition, new ways to prevent and counter irregular migration should be considered, in line with EU and international law."[45] A possible area where new, innovative solutions are sought for is returning illegally staying migrants. In this regard the European Council also called for "determined action at all levels to facilitate, increase and speed up returns from the European Union, using all relevant EU policies, instruments and tools, including diplomacy, development, trade and visas. It invites the Commission to submit a new legislative proposal, as a matter of urgency".[46]

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40 Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Finland, Estonia, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland and Romania

41 *See* at https://www.euronews.com/my-europe/2024/05/16/15-eu-countries-call-for-the-outsourcing-of-migration-and-asylum-policy.

42 European Council Conclusions, 17 October 2017.

43 *See* at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3161.

44 European Council Conclusions, 17 October 2017, para. 38.

45 Id. para. 39.

46 Id. para. 37.

5.1. The Instrumentalization of Migration

In 2021a highly worrying phenomenon was observed as the Belarusian regime started to artificially create and facilitate illegal migration, using migratory flows as a tool for political purposes, to destabilize the EU and its Member States. The European Council Conclusions of October 2021 underlined that the EU would "not accept of any attempt by third countries to instrumentalize migrants for political purposes" and it condemned all hybrid attacks at the EU's borders.[47] The leaders also invited the Commission to propose any necessary changes to the EU's legal framework and concrete measures underpinned by adequate financial support to ensure an immediate and appropriate response.[48] On 23 November 2021, the Commission, after already raising the phenomenon in the renewed EU action plan against migrant smuggling (2021–2025), adopted a Communication summarizing the measures taken to address the immediate situation as well as additional ones underway to create a more permanent toolbox to address future attempts to destabilize the EU through the instrumentalization of migrants.[49]

On 1 December 2021, as part of these measures, the Commission adopted a proposal for a Council Decision based on Article 78(3) TFEU aimed at supporting Latvia, Lithuania and Poland by providing for the measures and operational support needed to manage in an orderly and dignified manner the arrival of persons being instrumentalized by Belarus, in full respect of fundamental rights.[50] Accompanying the proposal for an amendment of the Schengen Borders Code, this proposal addressed the instrumentalization situation from the migration, asylum and return perspective. The objective of this proposal was to support the Member State facing a situation of instrumentalization of migrants by setting up a specific emergency migration and asylum management procedure, and, where necessary, providing for support and solidarity measures. The proposed options were to complement and reinforce the proposals under the New Pact on Migration and Asylum, setting out specific, limited derogations in such special situations.[51]

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47 European Council conclusions, 21–22 October 2021, para. 19.

48 Id. para. 20.

49 Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Responding to state-sponsored instrumentalisation of migrants at the EU external border, JOIN/2021/32 final.

50 Proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, Brussels, 1.12.2021, COM(2021) 752 final.

51 Derogations proposed were as follows: possibility for the Member State concerned to register an asylum application and offer the possibility for its effective lodging only at

As a result of the negotiations, some elements of this proposal have been incorporated in the Crisis and Force Majeure Regulation[52] adopted within the Pact (including the definition of instrumentalization of migration),[53] and in the revision of the Schengen Borders Code.[54] Yet, the Commission announced in its Annual Work Program in February 2025, that it will withdraw the 2021 proposal for a Regulation addressing situations of instrumentalization, as it had not advanced in the interinstitutional negotiations since 2022.

Various measures were taken within the EU to manage the situation, and there have been some successful steps in the external dimension of migration, namely, strengthening cooperation with key countries of origin along the Eastern Land Route (particularly in the Horn of Africa, Middle East and Silk Route countries), and the main transit countries (especially Türkiye, United Arab Emirates, Egypt). Nevertheless, progress in stabilizing the situation with the overall aim of preventing undesired migration-related political pressures could not be achieved, in particular, since another State actor, Russia joined Belarus in weaponizing migration. On 7 June 2024, as a joint initiative on EU level to effectively address instrumentalization of migration, 8 countries (Denmark, Estonia, Latvia, Lithuania, Norway, Poland, Finland, Sweden) signed a letter to the Commission, in which they concluded that EU acquis does not enable the Member States to effectively counter this type of interference with their sovereignty and national security. They

> "therefore propose that in such situations Member States should be allowed to temporarily derogate from EU law based on national security.

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specific registration points located in the proximity of the border including the border crossing points designated for that purpose; possibility to extend the registration deadline to up to four weeks; possibility to apply the asylum border procedure to all applications and possibility to extend its duration.

52 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

53 Article 1(4)b): "For the purposes of this Regulation, a situation of crisis means: […] *b)* a situation of instrumentalisation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilizing the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security."

54 Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

> We should increase the possibilities for Member States to address instrumentalization of migration under their national legislation. This requires derogations based on national security, which could, if necessary, include changes to the future APR and Crisis Regulation and to the Schengen Borders Code."[55]

They based their claim on Article 72 TFEU (law and order, and internal security), which, read together with Article 4(2) TEU (national security exclusion), is considered to allow for a derogation from EU secondary legislation, but must be interpreted restrictively. They were of the viewpoint that the CJEU has not yet addressed a situation similar to the ongoing hybrid attack at the Eastern borders, and so the Court has also not taken a position on whether, in such a situation, a derogation from EU secondary legislation under Article 72 TFEU would be possible for protecting public policy and internal security for a limited period of time.

Consequently, the European Council called for firm steps in this regard in its October 2024 Conclusions, and the need for a firm act on behalf of the EU was also discussed at a like-minded meeting of 11 leaders before that meeting.[56] In December 2024 the Commission issued a Communication on countering hybrid threats from the weaponization of migration and strengthening security at the EU's external borders.[57] In this document[58] the Commission essentially legitimizes the disregard of EU secondary law on asylum and migration, *i.e.* the closure of borders and the suspension of the reception of asylum applications, citing the need to exercise Member State competences related to the maintenance of public order and internal security, based on the same Treaty articles that Hungary also invoked in its infringement proceedings over the quota. According to the Commission, migrants arriving illegally under pressure from Russia and Belarus not only

55 *See* at https://www.regjeringen.no/globalassets/departementene/jd/dokumenter/brev-og-kunngjoringer/eu-level-approach-to-effectively-address-instrumentalisation-of-migration.pdf.

56 *See* at https://www.bloomberg.com/news/articles/2024-10-15/meloni-to-gather-eu-like-minded-counterparts-seeking-tougher-migration-rules.

57 Communication from the Commission to the European Parliament and the Council on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders (December 2024) COM(2024) 570.

58 Furthermore, in December 2024, given the new security landscape, including hybrid threats at the EU external borders, the Commission made available through a specific action under the BMVI Thematic Facility, EUR 170 million to EU Member States and Schengen Associated Countries that have borders with Russia and Belarus to strengthen further their border surveillance capabilities.

pose a threat to national security and Member State sovereignty, but also endanger the integrity of the Schengen area and the security of the entire EU. Thus, if the action is sufficiently justified, proportionate, necessary, and appropriate to the aim, the Member States concerned may temporarily take measures beyond EU asylum and migration law.[59] Although the Commission refers to the responsibility of the Member State to decide and prove whether the given situation and measure meet the listed conditions, and the CJEU may ultimately rule on their legality. At the same time – given that the Commission assesses the processes taking place on the EU's Eastern borders as a special situation – it is not expected that the issue of the compatibility of any Member State action on the Eastern borders with EU law would be brought before the CJEU.

5.2. New, Innovative Ways – The 'Fearful' Externalization

After the 15 Member States' joint letter expressing their commitment to developing new solutions to address illegal migration, the Hungarian Presidency of the Council initiated a series of discussions on potential innovative approaches in the area of migration. At the same time, there had already been some initiatives, the outcome of which Member States needed to take into account. EU documents, including the Conclusions of the European Council, do not ignore the call of leaders to ensure that all steps shall be in line with EU and international law. However, we experience that government measures fail in practice owing to the human rights-centered approach of these legal frameworks. This was palpable in three recent attempts to introduce innovative solutions.

(i) Firstly, Hungary's transit zone system, which established a legal border closure and allowed only those with legally recognized status to enter the EU, was found to be contrary to EU law by the CJEU, as was the system of rules requiring a prior declarations of intent submitted from outside the EU. The focus of criticism of these sets of rules was the lack of access to the asylum procedure and the violation of the principle of non-refoulement. *(ii)* Secondly, the implementation of the Rwanda model, which was intended to be implemented by the previous UK government, was first blocked by an

59 Poland, Finland and the Baltic states have already introduced temporary rules that restrict the possibility of submitting asylum applications at border sections affected by instrumentalization.

interim order issued by the ECtHR in June 2022.[60] This found that the deportation violated the human rights of the migrants concerned. Subsequently, the UK Supreme Court, in its judgment of 15 November 2023,[61] found that the UK Rwanda Agreement was unlawful because the transfer of applicants to Rwanda would expose the asylum seekers to a real risk of ill-treatment through possible return to their country of origin since they could not expect an adequate asylum procedure in Rwanda, which could therefore not be considered a safe third country for the asylum seekers concerned. *(iii)* Thirdly, the first application of the agreement between Italy and Albania failed after an Italian court ruled on 18 October that the transfer of Bangladeshi and Egyptian men to Albania after their rescue in international waters was unlawful, as their country of origin was not considered sufficiently safe. The Italian judges referred to a ruling rendered by the CJEU of 4 October 2024[62] which states that a non-EU country can only be considered safe if its entire territory is considered safe. This innovative solution is undergoing another judicial review as the CJEU was called to give an answer to preliminary questions referred by Italian courts in November 2024 on the compatibility with EU law of the Italy-Albania Protocol on asylum applications and return procedures.[63]

5.2.1. Innovative Return Policy

Although there are various reasons why returns may fail to be executed, but one of the main underlying problems is the lack of willingness to readmit migrants on behalf of countries of origin. Even before the European Council gave a very strong push for further initiatives in the field of return policy, the Hungarian Presidency initiated various exchanges of views between the Member States, where many raised the idea of 'return hubs' as one of the

60 *N.S.K. v the United Kingdom,* no. 28774/22, formerly K.N.v. the United Kingdom, urgent interim measure.

61 *R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent),* UKSC/2023/0093.

62 Judgment of the Court (Grand Chamber) of 4 October 2024, *Case C-406/22, CV,* ECLI:EU:C:2024:841.

63 The Tribunale ordinario di Roma and the Tribunale di Palermo in Italy have referred multiple preliminary rulings to the CJEU regarding the designation of safe countries of origin under EU asylum law: *Cases C-758/24 (Alace), C-759/24 (Canpelli), C-763/24 (Mibone), and C-764/24 (Capurteli)* concern the compatibility of national legislative measures with Directive 2013/32/EU on common procedures for granting and withdrawing international protection.

potential innovative solutions that should be further explored. A ministerial working lunch debate[64] in October 2024 confirmed that the review of the current legal framework for returns should enable possible innovative solutions such as 'return hubs'. An agreed and jointly shared understanding of 'return hubs' may not yet exist, but the main principle of a "return hub" is that once a third country national has been issued a return decision but the third-country national in question cannot be promptly returned to their country of origin (*e.g.,* due to lack of documentation or the lack of cooperation by the country of origin or for other reasons), the individual could be transferred to a 'return hub' in a third country where they will remain until their return is carried out, or from where they decide to return voluntarily.

Although legal and practical challenges may arise when developing the concept and performing the practical management of 'return hubs', in March 2025 the Commission presented a proposal for a new legislative framework in the Return Regulation,[65] including a new Common European System for Returns to increase the efficiency of the return process with clear, simplified and uniform rules. The proposal not only turned the previous Directive into a Regulation, but also introduces the idea of 'return hubs', the possibility to return third-country nationals who have been issued a return decision to a third country with which there is an agreement or arrangement for return. According to the draft regulation, an agreement or arrangement can only be concluded with a third country where international human rights standards and principles in accordance with international law – including the principle of non-refoulement – are respected, and the agreement shall be accompanied with a monitoring mechanism to assess implementation and take into account any changing circumstances in the third country. Furthermore, unaccompanied minors and families with minors would be excluded from this scheme.

5.2.2. Reforming the Safe Third Country Concept

EU law imposes both substantive and procedural obligations for the application of the safe third country concept. In line with Article 38 of the cur-

64 *See* at https://www.consilium.europa.eu/en/meetings/jha/2024/10/10/.

65 Proposal for a regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC, COM/2025/101 final.

rently applicable Asylum Procedures Directive[66] Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the a number of principles in the third country concerned, such as the safety of life and liberty, the lack of risk of serious harm, and there is a possibility to request asylum. In addition to the general requirements for a given third country, it should also be examined in the individual case of the applicant whether there is a connection between the applicant and the third country concerned, based on which it seems reasonable for this applicant to go to this country, and moreover, if the third country does not allow the applicant to enter its territory despite the fulfilment of the conditions, the Member State must ensure that the applicant has the opportunity to initiate the procedure on the merits.

The conditions of the safe third country principle have not been relaxed by the Asylum Procedure Regulation applicable under the Pact from June 2026, as it only stipulates that the Commission will review the safe third country concept by 12 June 2025 and, where appropriate, propose targeted amendments. In preparation for this, the Hungarian Presidency initiated a discussion at COREPER level, where it became clear that the majority of Member States would like to see a major amendment, despite the Commission's position, and some Member States are also proposing to delete the connection criterion. This would result in the possibility to send an asylum seeker back to a country outside the EU in order for the asylum procedure to take place there as the migrant did not seek protection in the safe country nearest to their country of origin.

6. Conclusions

It is clear that new legislation is adopted by compromise, but the question is whether new legislation also equals meaningful reforms as the concessions we make in the area of asylum and migration policy have a direct effect on the security of our countries. Reh argues that "the EU – a divided, multilevel and functionally restricted polity – is highly dependent on the legitimizing force of 'inclusive compromise', which is characterized by the recognition of

66 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

difference."[67] Consequently, without proper inclusiveness of the experiences and positions of various Member States, resulting in low legitimacy of the act, proper implementation will also be lacking. Furthermore, in an area as interdependent as the Schengen area, what one country considers to be favorable from its own perspective, cannot result in a favorable situation at the European level if it leaves it to other Member States to resolve alone.

Can we still afford the consequences of failing forward? It is not only the time, money and energy spent on trying to manage the mixed flows of migrants, whose movements are practically organized by international criminal groups of human smugglers. The Hungarian Government found it extremely important that at the October 2024 European Council meeting Member States took increasingly convergent positions and that they were finally on the right track, a track that Hungary had always advocated for. According to the Hungarian position, there is a determination not only to effectively protect the external borders of the EU, but also a determination to effectively address recurrent and new challenges in a way that is significantly different from what the EU has been pushing for so far. Therefore, Hungary found it essential to continue the dynamism of the October 2024 summit. The European Council should therefore recall the importance of continuing the work in new ways to prevent and counter irregular migration, especially by further developing the concept of return hubs and the externalization of asylum procedures. It is also welcomed that the Commission had finally recognized that Member States have the right to adopt exceptional rules for the sake of security and sovereignty, and that these are legitimate steps. Member Staes are well aware of the fact that international networks of criminal organizations are responsible for managing the illegal inflow of migrants, and it is not only state actors that can create serious situations of instrumentalization. The need may arise to allow for deterrent EU rules in such situations.

I have identified two hindering factors that posed major obstacles to achieving meaningful reforms that continuously result in the phenomenon of failing forward in the field of asylum and migration. One factor is the method of agreement. The search for a compromise is coded in the legislative processes and the institutional setup of the EU. The Commission is primarily interested in successfully concluding a comprehensive reform during its own five-year term, but implementation is primarily the responsibility of

67 Christine Reh, 'European Integration as Compromise: Recognition, Concessions and the Limits of Cooperation', *Government and Opposition,* Vol. 47, Issue 3, 2012, pp. 414–440.

the Member States, as are the consequences of the system's failure. The co-legislative function of the Council and the European Parliament also lead to a patchwork of provisions that are more mathematically composed rather than a practically workable, functional system.

> "Ministers in the Council and their representatives might hold the expertise, but they lack the authority to agree on a fundamental overhaul. The EUCO needs to mandate a search for extraordinary solutions. It might have to do these multiple times, but if the machinery gets stuck, the EUCO needs to provide new input and a new sense of direction."[68]

Although occasionally the European Council mandated ministers to seek consensus to give voice and weight to every Member State's situations and experiences, this was not strictly followed. "The EUCO essentially provides the 'organized hypocrisy' part of failing forward, it allows the system to separate the big political talk from the nitty gritty search for solutions. Political grandstanding at the height of the EU crisis has often been perceived as a nuisance."[69] Failing forward therefore necessarily involved affording a superficial role to the European Council, consequently, a vital ingredient of breaking the failing forward cycle would be to have the main building blocks of the reforms agreed at the highest level, otherwise migration and asylum reforms will not only lack legitimacy, but will also result once again in a low level of implementation.

The other problem lies in the legal framework that defines the proposed solutions. Innovative solutions are starting to emerge not only in individual countries, but it is finally on the agenda of the EU. Yet, what we experience is that regardless of the creative and innovative nature of these schemes, when governments try to make them operational, their efforts fail. They fail because the international and European legislative regimes solely acknowledge the rights of migrants and do not take into account the rights of our citizens to safety as the mass influx of people without proper identification raises numerous security concerns. Therefore there is a need not only be innovative in setting out new regimes and new ways of cooperation, but also to find a solution on how to make the interest of our own citizens be the focus of human rights protection. And it is no longer a heretic idea in the EU, as a meeting of 12 Member States that took part on the margins of the March 2025 European Council concluded that discussions should be held

68 *See* at https://www.tandfonline.com/doi/full/10.1080/07036337.2023.2209273.
69 Id.

on the possibility to change European Conventions related to migration to reflect today's realities. During the meeting Maltese Prime Minister Abela proposed that this crucial discussion take place during Malta's presidency of the Council of Europe which starts in May 2025.[70]

70 *See* at https://www.independent.com.mt/articles/2025-03-20/local-news/Migration-PM-speaks-of-reform-to-European-Conventions-to-reflect-changes-6736268723.