1. **The evolving EU asylum and migration law**

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1. **INTRODUCTION**

European studies on migration and asylum had been limited to institutional issues, notably the debate between intergovernmental or supranational methods of integration, for more than 20 years from the Single European Act in 1986 until the Treaty of Amsterdam was adopted in 1999.¹ The Single European Act was a treaty amending the initial Treaty of Rome. It programmed the abolition of controls at the internal borders of Member States. As Daniel Thym explains in his contribution to this Handbook, such a decision logically implied the adoption of so-called compensatory measures to preserve the coherence of the new area, among which was legislation on visas, borders and asylum. However, the Single European Act had not foreseen any new competences, nor an institutional framework to implement this new European objective. It therefore opened a legal controversy regarding the use of the intergovernmental or the supranational method to implement it.²

Initially a choice in favour of the intergovernmental method was made. On the one hand, some States collaborated in the framework of the so-called Schengen cooperation, that is, an intergovernmental cooperation outside the auspices of the EU. For example, the 1990 Dublin Convention, a public international law instrument, designed to allocate responsibility among EU countries for examining asylum applications,³ was adopted in this framework. The Treaty of Maastricht, adopted in 1992, formalised EU cooperation in the area of Justice and Home Affairs. However, few binding measures were adopted because of the limitations of the intergovernmental method that applied. Thus, it quickly revealed itself insufficient to build the EU policies on migration and asylum. The fall of the Berlin Wall and the war in Yugoslavia that produced hundreds of thousands of refugees entering the EU proved the growing importance of cooperation in asylum and migration.

These developments led to a reform and the progressive adoption of the supranational method in asylum and migration that the Treaty of Amsterdam first launched in 1999. This treaty marked the ‘true beginning’ of the EU policies on migration and asylum as it defined an area for freedom, security and justice as a new primary objective for the European Union.


² One of the most seminal books on the evolution of the institutional framework in this early period was Wenceslas de Lobkowicz, *L’Europe et la sécurité intérieure, une élaboration par étape* (La Documentation française 2002).

³ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) OJ C 254, 1.
Moreover, the so-called Tampere conclusions, adopted by the European Council in 1999, identified more concrete policy objectives and gave the necessary political impetus to the development of these new policies.

Despite these important institutional changes, the Treaty of Amsterdam merely planned the progressive introduction of the supranational method. It therefore foresaw a transition period of five years (i.e. May 1999 until May 2004), during which time, the intergovernmental method would continue to apply. It is crucial to keep in mind that it is within that intergovernmental institutional framework that the roots of the EU migration and asylum policies were adopted. These included, for instance, the Directive on Family Reunification and the so-called Dublin regulation on the determination of the responsible Member State for the examination of asylum claims, both of which were adopted in 2003.

Scholarship has focused on the respective merits of the intergovernmental and supranational methods regarding the quality of the legislation produced under these two different frameworks, in particular regarding the level of harmonisation in the legislation of Member States. The presumption was that the supranational method would produce better results than the intergovernmental method in terms of the level of harmonisation. In addition, civil society representatives considered that the resulting policies would become less restrictive due, in particular, to the co-decision procedure which allows the European Parliament to participate fully in the legislative procedure, contrary to its purely consultative role under the intergovernmental method. However, the evolution of the institutional framework did not lead to a revolution in the migration and asylum policies, as Florian Trauner and Ariadna Ripoll Servent illustrated here in a seminal article. Even if one should not underestimate the influence of the European Parliament on the content of the legislation adopted, the institutional change has only had a limited impact. For several reasons, the Council of Ministers representing the Member States continues to be in a strong negotiating position. First, because of the growing role of the European Council, composed of the heads of State and government, in defining the strategic guidelines for legislative and operational planning in the area of freedom, security and justice on the basis of Article 68 TFEU; second, because of the obligation for the European Parliament to seek compromise with the Council under the co-decision procedure which illustrates that the supranational method is actually partly intergovernmental; third, the fact that the debate is framed by the first generation of rules which the Council adopted unanimously on its own, and which the Council can decide to keep by blocking the legislative process.

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4 Tampere is a city of Finland where the European Council took place under a Finnish Presidency of the EU. See European Council, Tampere Presidency Conclusions (15–16 October 1999). On the meaning of the Tampere conclusions over time, see Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration (European Policy Centre 2019).

5 See Philippe De Bruycker, The Emergence of a European Immigration Policy (Bruylant 2003); Philippe De Bruycker and Constança Urbano Dias de Sousa (eds), The Emergence of a European Asylum Policy (Bruylant 2004).


7 Article 68 TFEU reads as follows: ‘[t]he European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice’.
If the institutional debate is nowadays less prominent, it is not inconsequential. While the battle for the share of the legislative power at EU level is over, the organisation of executive power within the EU is constantly evolving. Member States are increasingly relying on EU agencies to jointly implement EU policies, especially asylum and border control. The principle of executive federalism enshrined in Article 291 TFEU and the following requirement by which Member States are to implement EU law no longer accurately depicts the operational realities. On the contrary, we are witnessing the emergence of an integrated administration where the EU level, including EU agencies, and national administrations jointly implement policies. It also raises several challenges for EU agencies broadly revolving around balancing independence, accountability and respect for fundamental rights.

Overall, in some ways, the EU’s migration and asylum policies have significantly evolved. For example, we have witnessed a certain ‘maturity’ in terms of the scope of the EU’s competences and the legislative acquis underpinning them has been refined through multiple rounds of legislative harmonisation. Nonetheless, in some aspects, it is stasis which characterises these policies. For example, the piecemeal and voluntaristic approach in the development of the EU’s legal migration policy has been a constant. The tension between enhancing protection and deflecting protection responsibilities to third countries has plagued the development of the EU’s asylum policy from the outset. Even as it became apparent that legislative harmonisation alone would not suffice to realise the goal of common policies, relatively little attention was paid to their implementation component or to their administrative governance. The resulting landscape is undoubtedly a complex one.

Our Handbook adopts both a cross-policy and thematic approach to analyse these fast-evolving areas. It provides a comprehensive examination of the major issues in each policy field and includes insights into cutting-edge research while identifying key research orientations for the future. Contributors are expert scholars, either senior or at earlier stages of their career. While most of the contributions rely squarely on legal analysis, other authors adopt an interdisciplinary approach drawing also from socio-legal research, migration studies or political science theories.

The Handbook is split into four distinct parts. Part I explores cross-cutting issues that influence EU asylum and migration policies such as the constitutional framework, judicial protection, freedom of movement and digitalisation through the creation and workings of European databases. Part II focuses on the EU asylum policy analysing its legal instruments, that is, directives on qualification, reception conditions and asylum procedures, critically assessing their compatibility with international refugee law while also focusing on specific issues such as the vulnerability of asylum seekers and the gender dimension of asylum. This part also explores the deficiencies of the ‘Dublin system’ for the determination of the responsible Member State and evaluates the impact of the external dimension of the asylum policy. Part III deals with the key instruments of legal migration (family reunification and labour
migration), while offering insights into the related areas of anti-discrimination and integration. Part IV focuses on the fight against irregular migration (EU external borders, visa, return and readmission policies as well as the role of the EU agency Frontex) highlighting trends such as externalisation and criminalisation, in particular the delineation of trafficking and smuggling. This analysis is preceded by this introductory chapter. Herein, we provide a holistic panorama of the evolution of EU migration and asylum policies drawing from the contributions in this collection as well as from our own research. We focus on three key components of these policies: the legislative acquis; elements of administrative governance and implementation; and, their external dimension and cooperation with third countries (Section 2). We then offer some perspectives on future policy and research directions (Section 3).

2. EU MIGRATION AND ASYLUM POLICIES AND THEIR COMPONENTS

Legislative harmonisation is key to the development of the policies on migration and asylum and therefore the first object of our critical analysis (Subsection 2.1). As illustrated by a persistent disjunction between ‘the law on paper’ regarding the obligations of Member States according to EU law and their implementation in practice, legislative harmonisation is not the only component of the common policies established by the TFEU (see §1 of Articles 77, 78 and 79 TFEU). Henri Labayle was the first to construct a sophisticated analytical framework on the notion of a common policy in 2005.\[11\] Moving beyond the absence, at the time, of an explicit mention in the Treaties of these policies as ‘common’, he identified substantive criteria, namely: (1) what could be described as the quality of the legislative output; (2) the clarity of objectives as developed in the Treaties and in policy documents; (3) the intensity of the exercise of the Union’s competence; (4) the institutional arrangements underpinning the policy; and (5) what he termed the operational dimension, which included the first traces of practical cooperation efforts.\[12\] More recently, authors such as Tsourdi\[13\] have drawn on this framework combining it with interdisciplinary theories on administrative governance,\[14\] to delve deeper into the administrative components of these policies. Based on these lines of scholarship, aside from legal harmonisation, we focus on the administrative dimension of these policies (Subsection 2.2) and their external dimension and collaboration with third states (Subsection 2.3).


\[12\] Ibid, 15–33.


2.1 Legislative Harmonisation

If it is not its only component, legislative harmonisation is obviously at the core of the EU’s migration and asylum policies. It has attracted most of the attention of the scholarship that has often denounced the agreement of the EU legislator on the common denominator of Member States and therefore a low level of harmonisation reducing the rights of migrants and refugees. Such approach can be challenged because it is difficult to identify a point of reference for doing this evaluation and, also, because the scale of harmonisation varies from one area to the other, with, for instance, a quite high level for the qualification directive harmonising the notion of refugee and a very low level with the directive on family reunification. We therefore analyse successively the areas of asylum (2.1.1), legal migration (2.1.2), return (2.1.3), visas (2.1.4), external borders (2.1.5), integration policy (2.1.6) and intra-EU mobility of third-country nationals (2.1.7).

2.1.1 Asylum

Cooperation on asylum preceded the transfer of relevant competences to the EU. The main outcomes of the first intergovernmental phase of cooperation on asylum were a limited number of instruments, namely the Dublin Convention, a public international law instrument, and the 1992 Resolutions, a set of soft law instruments adopted by the Council of Ministers. While the Maastricht Treaty formalised EU cooperation on asylum, few binding measures were adopted because of the limitations of the intergovernmental method that applied.

Binding EU asylum legislation emerged with the entry into force of the Amsterdam Treaty, and was developed in two stages. The substantive asylum acquis as it currently stands consists of four directives, one of which (the Temporary Protection Directive) has not been applied until 2022 when the Commission presented a proposal and the Council of Ministers decided to activate it for the benefit of hundreds of thousands of refugees produced by the armed conflict in Ukraine, in addition to the so-called Dublin regulation on the determination of the Member State responsible for the examination of an asylum claim. The three main

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16 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) OJ C254, 1.
17 The French term ‘acquis’ refers to the entire set of legal rules in one area.
20 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31 (hereinafter: ‘Dublin III Regulation’).


26 TEC, art 67.


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

who are granted asylum valid throughout the Union’. Amendments to the first generation of rules were adopted between 2011–13 which are the instruments currently in force.

Even if they did not realise the Tampere objectives, those amendments strengthened the level of coherence between the instruments. There are more cross-references and increasingly the legal instruments can be properly understood when they are ‘read together’. The level of overall harmonisation is certainly higher than that afforded by the previous minimum standards instruments. The co-legislators specified several areas, such as the instruments’ scope, and addressed ambiguities, such as the detailed regulation of detention grounds for asylum seekers. In addition, the instruments, in some respects, increased the level of protection. For example, the Qualification Directive and the jurisprudence of the CJEU in this field raised awareness of gender issues and contributed to the individualisation of cases. Nevertheless, drawn-out negotiations led to the dilution of the level of legal clarity of the initial Commission proposals and undermined the harmonising potential of the amended instruments. Exceptional clauses were either retained or introduced; the instruments still contain vague notions that leave considerable discretion to Member States to define the scope of their obligations; and, finally, they also include internal contradictions.

The most pronounced problems in the EU’s asylum policy do not stem from failings in the quality of the substantive acquis though, even if it is not fully compatible with the 1951 Refugee Convention in all respects, as shown by Paul McDonough and Tamara Tubakovic in their contribution to the Handbook. They can rather be traced to the limits of legislative harmonisation in bringing about uniform, or at least comparable, outcomes in practice with the implementation of the instruments adopted. Member States have different levels of economic development and welfare, and so diverse protection and reception capacity. In addition, legislative harmonisation alone has been unable to tackle the significant variations regarding who is recognised as a refugee or a beneficiary of subsidiary protection across EU Member States. Even for similar applicants, which are those from the same country, the chances of recognition vary significantly. For example, in 2019 recognition rates for Afghan nationals ranged from 32 per cent in Belgium to 97 per cent in Switzerland.
2.1.2 Legal migration

The policy on legal migration is the least advanced at EU level. This is not surprising as it was the last policy to which co-decision between the European Parliament and the Council became applicable only with the Treaty of Lisbon. This explains why it was difficult to adopt legislation on the topic, until 2009, because of the need to reach unanimity in the Council. This explains also why the instruments adopted in that area are framework directives realising only a low harmonisation level. It is actually logical that states want to keep as much control as possible over legal migration as it influences directly the composition of their population: one of the basic elements defining a state, together with a territory and a government.

Apart from these instruments, there is one EU directive that defines the type of migration policy that Member States have decided to follow. It is the Long-Term Residence (LTR) Directive\(^\text{41}\) regulating the passage from temporary to permanent migration. By adopting this directive in 2003, EU Member States have agreed to limit temporary migration to a maximum of five years of stay after which migrants acquire a permanent right of residence. Migrants may then settle definitively in their host State and cannot be expelled, other than for exceptional reasons of public policy or security. This expresses the philosophy of the European migration policy. It is clearly different from other regions in the world, such as the Gulf States where migration remains temporary. In the Gulf States migrants do not obtain the right to family reunification and are supposed to go back to their country of origin when they stop working.\(^\text{42}\)

Even if it is not comparable to countries developing an active policy to maintain or develop their population by welcoming migrants such as Canada, by adopting the LTR Directive the EU has officially accepted to become a continent where immigration is not treated like a temporary phenomenon.\(^\text{43}\) This is a clear departure from the guest worker programmes that several European States implemented after World War II. It is within this context that the EU acquis in the area of legal migration is developed by establishing through several directives three main types of voluntary migration flows: family migration, labour migration and student migration.

2.1.2.1 Family reunification

The Directive on the Right to Family Reunification was adopted in 2003\(^\text{44}\) after three years of difficult negotiations within the Council. Knowing that family migration is the main channel of entry for migrants, family reunification can be seen, as Kees Groenendijk and Tineke Strik explain in their contribution to this Handbook, either as the expression of an individual right or as a mechanism of migration management. If it is an individual right, migrants should be able to exercise it without disproportionate state interference; on the contrary, the state view is that family reunification is a type of migration flow that can be subject to state control.

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\(^{43}\) Unless a state would decide to limit residence permits to a maximum of five years and thus prevent migrants from acquiring a permanent residence right under the LTR Directive.

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The question is whether by accepting one migrant, the state of destination is also obliged to accept their family members. As family life is a human right not to be confused with family reunification, the debate is to what extent the right to family life recognised by Article 8 of the ECHR and Article 7 of the EU Charter implies a right to family reunification. The ECHR considers that a right to family reunification is derived from the right to family life if ‘there are insurmountable obstacles for the family to live in the country of origin of the migrant’, for instance in the case of a refugee that cannot go back to their country of origin to join their family. The title of the directive obviously suggests that there is an individual right to family reunification under EU law. This is correct in the sense that once certain conditions are fulfilled, Member States must admit family members. Unlike labour migration, national numerical quotas to family reunification are not allowed. However, the conditions envisaged by the directive leave considerable discretion to Member States so that the right remains illusive.

The directive did not result in harmonising Member State national rules due to the abundance of discretionary clauses that the text foresees. Neither the definition of family members, beyond the nuclear family, nor the conditions to be fulfilled in order to benefit from family reunification are harmonised. Even in what concerns the nuclear family, there are open questions such as the recognition of same-sex couples. Regarding conditions, while some Member States may require the family to meet all four of them (accommodation, sickness insurance, financial resources and even integration), other Member States may only request proof of family ties. One example of an extremely restrictive policy is the imposition of integration conditions, such as a language and a civic test before admission to the territory as required by the Netherlands. This is the opposite of the traditional view of family reunification, which is classically supposed to function as an integration mechanism rather than as a reward for proving ‘integrability’ in the host Member State. Paradoxically, Member States can therefore follow a very restrictive or very liberal policy on the basis of the same directive.

Several Member States have progressively introduced more demanding conditions under the directive, in particular integration conditions, contributing to a restrictive trend in the EU. The CJEU has considered these conditions compatible with the Family Reunification Directive as long as they do not render family reunification excessively difficult. As Kees Groenendijk and Tineke Strik highlight in their contribution to the Handbook, this evolution has transformed the directive into an instrument that protects family members against extremely restrictive policies, such as the policy in Denmark, a Member State which is not bound by the directive.

2.1.2.2 Labour migration

The EU labour migration system is based on demand rather than supply and therefore does not include point permits allowing migrants to be admitted as jobseekers on account of their abilities. The legal basis for labour migration policy (Article 79 TFEU) provides the EU with wide-ranging competences to build a common immigration policy. Nevertheless it excludes

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45 ECtHR, Jeunesse v. The Netherlands, App No 12738/10, 3 October 2014, para 106.
46 See analysis in the contribution of Kees Groenendijk and Tineke Strik in this Handbook.
47 See, e.g., K and A, C-153/14, ECLI:EU:C:2015:453.
48 See more analysis on differentiated integration in the contribution of Daniel Thym in this Handbook.
quotas for migrant workers that remain the exclusive competence of Member States.\(^49\) This limitation has not created problems in practice, except in partnership agreement negotiations with third countries where the Commission must refer to Member States when it wants to offer entry quotas for labour migrants.

Initially, in 2001, the Commission proposed a horizontal approach covering all categories of migrant workers in a single instrument.\(^50\) The Council rejected this proposal outright as it was not ready to harmonise labour migration at that point. After this failure, the Commission returned in 2005 with a Policy Plan\(^51\) based on the distinction between different categories of workers. On this basis, three directives were adopted:

- The directive on highly skilled workers, that is, the Blue Card Directive (BCD) aiming at attracting this category of workers to the EU. The basic conditions for third-country nationals to be admitted under this directive are quite demanding,\(^52\) except for the degree, a bachelor (BA) which implies only three years of higher education studies. It is commonly admitted that the 2009 directive has been a policy failure because of its lack of added value. Very few Blue Cards have been delivered\(^53\) as national administrations, employers, and workers preferred to use more attractive national systems. A new directive adopted on 20 October 2021,\(^54\) after four years of difficult negotiations, has therefore replaced the 2009 BCD. More Blue Cards should be delivered under this new scheme in particular to young workers as the basic conditions have been relaxed.\(^55\) The possibility for Member States to keep national schemes parallel to the EU Blue Card has been maintained. However, it will no longer be possible to treat Blue Card applicants or holders less favourably than highly skilled workers under a national scheme in several areas,\(^56\) so that the competition between the EU blue card and national schemes should accordingly diminish overtime. Moreover, the new BCD will be more attractive as its mobility provisions offer blue card holders in a first Member State more possibilities to relocate and work in a second Member State.\(^57\)

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\(^{49}\) TFEU, art 79(5).
\(^{52}\) A work contract of at least 12 months and a salary of at least 1.5 times the average gross annual salary in the Member State concerned.
\(^{53}\) In 2019, only 36,806 Blue Cards were delivered, i.e. 30 per cent of the total number of permits delivered to highly skilled workers by Member States. Source: Eurostat: Residence Permits – statistics on authorisations to reside and work.
\(^{55}\) The length of the required work contract has been reduced to six months; the requirement of five years’ professional experience reduced to three years for information and technology managers and professionals and the salary threshold to a minimum of 1.0 times and a maximum of 1.6 times the average gross annual salary.
\(^{56}\) Concretely: procedural rights, application fees, fast-track applications, labour market access, equal treatment and family reunification.
\(^{57}\) See analysis below in Subsection 2.1.7.
● The Directive on Intra-Corporate Transferees (ICTs) in 2014 aiming at reducing the administrative burden of multinational companies by facilitating the transfer of personnel (managers, specialists and trainees) between their different undertakings, that is, one outside the EU and one inside the EU or between two undertakings located in different Member States.

● A Directive on Seasonal Workers in 2014 which is the best example of circular migration, as these workers are supposed to go back and forth between their country of origin and their host EU Member State where they can only stay between five and nine months per year. It is the only instrument adopted to date that concerns low or non-skilled migrants in sectors such as agriculture or tourism. It combines provisions regulating the admission procedure as well as the rights of seasonal workers (e.g. change of employer, accommodation, facilitation of complaints) that are important in combatting exploitation.

Two other directives were adopted respectively in 2004 and 2005, and later merged into a single instrument, in 2016, concerning students and researchers who, like highly skilled workers, belong to the categories of migrants that the EU targets. Regarding students, the directive regulates the basic admission conditions (being registered at a high education establishment before applying for admission to the territory; proving to have sufficient financial resources, etc). Interestingly, it guarantees the right for students to work for a minimum of 15 hours per week in all EU Member States, which can help them fund their studies by earning money. With regard to researchers, the directive is very innovative and inspired by the relevant French system. This is based on a host convention signed between a research organisation and a researcher where all pertinent issues are addressed (e.g. research project, duration of stay, financial resources of the person), while the ministry competent for migration only checks the aspects related to public order and security. This mechanism offers the advantage that it is not necessary to identify the category to which the researcher belongs (i.e. employed worker, self-employed worker, trainee, etc) and to follow the specific procedure foreseen for each category. One may, however, wonder if European research organisations and third-country researchers are aware of the existence of this beneficial system. Interestingly, there is also a real novelty, as the directive creates a job-seekers permit allowing students and researchers to stay for up to nine months after the end of their studies or research project, to seek employment or to set up a business.

On top of the category-specific instruments, there is the so-called 2011 Single Permit Directive (SPD), which is a horizontal directive applying to all persons working in the EU. Apart from establishing a common set of minimum rights for all TCN workers, this directive

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62 Directive 2011/98 of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L343/1.
focuses on the admission procedure. It aims to facilitate entry by merging the residence and work permits in one single administrative act. The SPD therefore establishes a single application for a combined residence and work permit. However, the procedure at national level can still involve different authorities competent for residence or for work. Therefore, national administrative systems may involve complex and lengthy procedures as the directive only requires the adoption of a decision ‘as soon as possible and in any event within four months of the lodging of the application’. Moreover, appeals against a refusal must generally be addressed to different judges, depending on their subject matter (residence or work).

A ‘fitness check’\textsuperscript{63} evaluating the effectiveness and efficiency of the legal migration directives was completed in 2019 by the Commission. The instruments were considered largely ‘fit for purpose’. The check identified several positive effects proving the added value of the EU framework: a certain degree of harmonisation of admission conditions; simplified administrative procedures; a right to intra-EU mobility, which was, however, deemed too limited;\textsuperscript{64} and improved recognition of the rights of TCNs, who, in important areas, are to be treated in the same way as EU nationals. Nonetheless, the check emphasised that the current legal framework had a limited impact on the overall migration challenges facing Europe, identifying some critical shortcomings. For example, it highlighted the need to ensure stronger enforcement of the directives’ provisions, and mentioned the limited material scope of the existing instruments (e.g. they do not cover problems occurring in different migration phases such as entry visas) as well as their restricted personal scope (e.g. other than seasonal workers they do not include major categories of low or non-skilled workers, nor do they include self-employed persons).

\subsection*{2.1.3 Return}

A 2008 directive\textsuperscript{65} underpins the EU’s return policy. The Return Directive was initially criticised as the ‘directive of shame’, with particular reference to provisions allowing pre-return administrative detention of up to 18 months.\textsuperscript{66} Nevertheless, it gradually became apparent that the directive provided a rather protective framework for returnees. In her contribution to this Handbook, Madalina Moraru illustrates this to be the case specifically for the prioritisation of voluntary departure, the overall limitation of pre-removal detention, and the procedural guarantees the directive inscribes. This protective framework was further fleshed out by the case-law of national courts and the CJEU.\textsuperscript{67} As Cornelisse and Moraru argue, elsewhere, judicial interactions have resulted in extended judicial review over a legal field which has traditionally been considered an exceptional branch of law under the purview of executive control.\textsuperscript{68} This has allowed irregularly staying migrants to have their interests translated into

\begin{itemize}
  \item \textsuperscript{63} European Commission, Fitness check on EU legislation on legal migration, SWD(2019)1055, 29.3.2019. A fitness check is a study aiming at evaluating a package of several legislative instruments.
  \item \textsuperscript{64} See analysis below under Subsection 2.1.7.
  \item \textsuperscript{65} Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L348/98.
  \item \textsuperscript{67} See for analysis the contributions concerning both the EU and national levels in Madalina Moraru, Galina Cornelisse and Philippe De Bruycker, \textit{Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union} (Hart 2020).
  \item \textsuperscript{68} Galina Cornelisse and Madalina Moraru, ‘Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance’ (2022) 7(1) European Papers 127.
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rights, that can be litigated and enforced.\textsuperscript{69} In this Handbook, Cornelisse fleshes out how CJEU and national case-law curbed Member States' efforts to use criminal sanctions in order to control and fight irregular immigration. She argues that in the future states’ insistence of making irregular immigration a criminal offence could even lead to the introduction of enhanced procedural rights similar to those currently applicable in criminal proceedings.\textsuperscript{70}

Nonetheless, the proportion of effectively applied return decisions remains rather low, for example 29 per cent in 2019.\textsuperscript{71} As analysed by Tamás Molnar in this Handbook, this is also linked with the functioning of the EU’s readmission policy and factors pertaining to third states, such as: insufficient cooperation; significant delays in identifying their nationals and issuing travel documents; and; gaps in the national administrative capacity to implement readmission agreements. At this point it is worthwhile clarifying the notion of readmission and its relation to return. It is not the act of readmission which could potentially violate the prohibition of refoulement. Readmission is an act of the state of origin of the returnee accepting to take back a migrant who is the object of a return decision adopted by the state of destination, here an EU Member State. A readmission request made by the EU Member State is only the accessory of a return decision. Thus, if there is a legal problem, it is at the level of the return decision and not of readmission. It is therefore the EU Member State which would violate the principle of non-refoulement. The non-affectation clauses referring to the Geneva Convention and human rights instruments often included in readmission agreements\textsuperscript{72} are thus superfluous from a strict legal point of view and would be better suited to the preamble rather than in the provisions of the readmission agreements.

In order to incentivise third countries to cooperate, the EU has resorted to conditionality, for example through the EU visa policy or the disbursement of EU funding.\textsuperscript{73} The European Commission seeks to reform the EU’s return policy in order to render it more effective. A first effort of reform, in 2018, was heavily criticised in terms of jeopardising procedural guarantees.\textsuperscript{74} The proposal’s main amendments were a new mandatory return border procedure, and linking return policies to asylum by requiring the issuing of a single administrative decision for rejecting an asylum claim and establishing a return decision.

Return and readmission are inscribed in a broader fight against irregular migration policy framing. The fight against irregular migration also intersects with different policies, such as

\textsuperscript{69} Ibid.
\textsuperscript{70} Referring, for example to ECHR, art 6 or instruments such as the Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1.
\textsuperscript{72} See as an example Article 18 of the agreement between the EU and Turkey on the readmission of persons residing without authorisation, [2014] OJ L243/3.
\textsuperscript{73} See the contributions of Tamás Molnar, Paula García Andrade, and Elspeth Guild and Maja Grundler in this Handbook.
the external border control policy which the next subsection analyses. Moreover, it has spurred the development of the criminalisation of migration – or, as coined by Juliet Stumpf, ‘crimmigration’ – which broadly encompasses the entire arsenal of coercive measures (including, among others, the use of detention, the seizure of civil society organisations’ ships active in search and rescue and the criminalisation of humanitarian assistance) currently available in the context of immigration enforcement, the origins of each of which can be traced in the criminal justice system.

Pivotal in the fight against irregular migration is the criminalisation and prosecution of human smuggling, which at EU level is undertaken by the so-called ‘Facilitators’ Package’ – a rather old set of legal instruments comprising Directive 2002/90/EC and Framework Decision 2002/946/JHA. The EU’s approach challenges the principles underpinning the UN Protocol against Smuggling which centres on the express inclusion of the requirement to obtain a benefit, clearly indicating that its drafters wished to exclude from the definition of human smuggling acts which did not have a material/financial motive, such as humanitarian assistance. On the contrary, Member States enjoy discretion as to whether to criminalise the facilitation of unauthorised entry and transit where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

This clause has led to a plethora of prosecutions for humanitarian assistance ranging from the initiation of criminal investigations against NGOs for cooperating with smugglers and the preventive seizure of vessels belonging to NGOs under the suspicion that they form part of organised criminal networks, to actions against citizens for humanitarian conduct in solidarity with migrants and refugees, such as driving migrants across borders, renting rooms, providing medical services or language courses. The New Pact on Migration and Asylum does not squarely address this discrepancy. Only a soft-law instrument is foreseen, a Guidance on the implementation of EU rules on the facilitation of irregular migration targeting NGOs conduct-

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79 See 2000 UN Protocol against the smuggling of migrants by land, sea and air, art 3(3).
80 Facilitation Framework Decision, art 2(1).
ing search and rescue operations at sea.\textsuperscript{82} As Violeta Moreno-Lax analyses in detail elsewhere, despite its stated aim, this instrument cannot satisfactorily address this issue.\textsuperscript{83}

Another controversy, which Conny Rijken critically assesses in this Handbook, is the blurring of boundaries, both conceptually and practically, between human smuggling and human trafficking. During their travel, migrants can fall victim to a number of crimes, a process which she calls ‘victimimmigration’. In her contribution, she documents how migrants become victim to human trafficking and especially how violent practices of smuggling turn into trafficking. This blurring of lines is problematic for the protection of victims of trafficking who are not recognised as such but instead qualified as irregular migrants. Even where they are appropriately identified, trafficking victims have difficulties to access protection due to restrictive conditions in EU anti-trafficking legislation for acquiring a residence permit, while also facing a number of difficulties to access refugee protection.

2.1.4 EU visa policy
The visa policy is highly Europeanised. Its legal basis is the ‘Visa Code’ that is a regulation consolidated in 2019,\textsuperscript{84} directly and uniformly applicable in all Member States bound by it (meaning those part of the Schengen area).\textsuperscript{85} There is no EU body, in particular no agency, in charge of its implementation. Instead this remains a Member State competence. The fact that thousands of Schengen State consulates are charged with implementing the Visa Code is obviously inhibiting coherence as they may interpret and apply it in different ways. Nevertheless, the visa policy relies upon the Visa Information System (VIS), a database where all data related to visas are stored and which is accessible to all Member States implementing the EU visa policy.\textsuperscript{86} Member State authorities can use the VIS to detect multiple applications as well as to trace the travel history of the applicant, such as the visas she may have been refused or issued in the past, in order to make sound decisions on this basis.

A Schengen visa is in principle valid for the entire Schengen area and can therefore be used to travel in all (Member) States part of it. It is a short-term visa, valid for travels limited to a maximum period of 90 days. Instead, instruments of the immigration policy, for instance the Family Reunification Directive, regulate long-term visas to settle in one Member State. In other words, the holder of a Schengen visa benefits from the freedom to circulate but not to reside in the Schengen area, that is, their rights are clearly much more limited than those of EU citizens. The advantage from a user perspective is that since the creation of Schengen they need to only have a single visa for the entire area instead of ‘as many visas as visited states’.

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\textsuperscript{82} Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, C(2020) 6470, 23 September 2020.


\textsuperscript{85} The 26 Schengen countries are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

\textsuperscript{86} For its evolution see the chapter of Niovi Vavoula in this Handbook.
However, one may wonder if obtaining a Schengen visa nowadays is more difficult than it was to obtain several national visas in the past.

For the purpose of the visa policy, the world is divided into two groups: third countries whose nationals do not need a visa to enter the Schengen area (the so-called ‘visa white list’) and third countries whose nationals are under a visa obligation in order to do so (the so-called ‘visa black list’). In other words, the nationality of the person determines if they are required to obtain a visa. The classification of third countries in one group or the other is based on a risk analysis of different factors including, in particular, the risk of irregular migration but also public security, the economic benefits (in particular tourism) and external relations with the third countries. One third country will be placed on the black list if its citizens are considered at high risk of irregularly migrating, meaning if there is a high risk that they would remain illegally in the Schengen area after the expiry of a visa if it were delivered to them. Consulates are supposed to detect such persons and to refuse them a visa.

The visa policy is the best example of the so-called phenomenon of externalisation, meaning that controls are not taking place only where the border is geographically located but also in other places, in particular before the arrival of the person at EU territory. Visas ensure that a pre-control takes place in the country of departure where the person must apply for a visa at the consulate of a Schengen State. As carriers can be fined if they transport persons without having a visa, they need to check if travellers indeed have a valid visa and refuse embarkation if not. As a result, the visa policy prevents persons without a visa to travel by regular transport means. The visa policy is therefore a preventive tool against illegal immigration.

This explains the huge juxtaposition between the visa and asylum policies of the EU as illustrated by Violeta Moreno-Lax, and Paul McDonough and Tamara Tubakovic in their contributions to this Handbook. Despite the EU’s commitment to protecting people in need of refugee status or subsidiary protection, it simultaneously creates obstacles towards reaching its borders, the only place where they can apply for protection. Whereas the CJEU considered in the X & X case that humanitarian visas are not covered by the EU acquis and remain national authorisations, the European Parliament has advanced in vain the proposal to create such ‘humanitarian visas’ to allow refugees to apply for asylum. Another issue is the difficulty visa obligations create for travellers. In order to facilitate mobility, the Visa Code has created multiple-entry visas allowing their holder to circulate between their country of origin or residence and the Schengen area without having to get a visa for each trip during a period that can go up to five years (but still only for short stays limited to three months). In order to make sure that this type of visa is effectively used, consulates are obliged to deliver them to travellers who have already respected the length of authorised travel when previously issued a visa.

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88 Case C-638/16 PPU, X and X, EU: C: 2017: 173.

Visas are also instrumentalised by the EU in its external relations, that is, in order to bargain with third countries to achieve certain results, in particular the conclusion of readmission agreements with the EU to facilitate the return of irregular migrants. The European policy on this point is pendular, passing from a ‘more for more’ approach (offering visa facilitations in exchange of a readmission agreement) to an approach of ‘less for less’ (i.e. difficulties to obtain visas in case of a lack of cooperation regarding readmission) as explained by Elspeth Guild and Maja Grundler in their contribution to this Handbook. The future will determine the effectiveness of this new policy approach.

Visa legislation is not expected to be reformed in the near future after Regulation 2019/1155 last reformed it in 2019. The creation and entry into force of the European Travel Information and Authorisation System (ETIAS)\(^9\) may, however, launch a policy debate. ETIAS will oblige travellers *not* subject to a visa obligation to get an authorisation to travel before their departure. The main purpose of the system is security, in particular the fight against terrorism. ETIAS completes the Visa Information System, registering travellers under a visa obligation, so that all travellers will actually be screened before departure. The travel authorisation is not considered as being a visa because it is issued in a few minutes on the basis of less data and also costs less. Due to the fact that ETIAS also serves the purpose of fighting irregular immigration, one may question to what extent it is necessary to have two parallel systems, that is, the VIS for persons under a visa obligation and ETIAS for those who are not. As the travel authorisation can be considered as a kind of ‘light visa’, the question is whether the abolition of the visa system and the generalisation of ETIAS to persons under a visa obligation could be envisaged instead, in order to facilitate mobility.

The issue of electronic visas is also likely to appear on the policy agenda, as the Commission was expected to present a relevant legislative proposal in 2022. While applications are already electronically processed through the VIS, there are still two ‘paper stages’. The first takes place initially when applicants fill the form and give their fingerprints and the second at the end, when they come to get their visa that is in essence a sticker affixed to their passport. The entirely electronic processing could also have an impact on the level of decentralisation of the visa policy concerning the distribution of competences between the central authority of Schengen States and their consulates.

For the rest, the EU will have to continue balancing its interest in controlling irregular migration with the benefits of a visa free policy with some countries. The crucial question is when does the abolition of a visa obligation bring more advantages, for instance in terms of facilitating tourism and diminishing the costs of consulates, than its maintenance?

2.1.5 EU external border policy

The origin of the EU external borders policy goes back to the Schengen cooperation launched with the Schengen Implementation Convention of 1990.\(^9\) Due to the abolition of controls at the internal borders between the Schengen States, it has logically been considered necessary to harmonise the control at the external borders of those states in order to preserve the level

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\(^9\) Convention Implementing the Schengen Agreement (n 87).
of control of the entire area and its coherence. While the external borders policy was initially considered as a compensatory measure to the abolition of internal border controls, it is now a self-standing, extremely Europeanised policy. The legislative centrepiece of the policy is the Schengen Borders Code (SBC), which is a regulation that has legally harmonised external border controls. In addition, an EU agency, the European Border and Coast Guard (EBCG), shares with Member States the responsibility to implement this policy. This is much more of a legal construction than an operational reality due to the asymmetric way burdens are shared between states in the Schengen Area. States located at the Southern and Eastern EU borders have more extensive external borders to control than others. The incapacity of Greece to control its external borders during the crisis of 2015/16 constitutes the best example of these congenital flaws of the Schengen Area that its designers did not take into consideration from the beginning.

The notion of Integrated Border Management (IBM) that is at the core of the EU’s external border policy has lost its meaning. It originally referred to the cooperation between the national authorities and the EU level to establish efficient and coordinated management of external borders. It is now nothing more than the long list of diverse tasks assigned to the agency following Article 3 of the EBCG regulation. The main task of border guards is obviously to control the borders which includes two different activities: first, checks at border crossing points to ensure that only authorised persons enter and leave the territory; second, surveillance to prevent persons crossing the border between crossing points and thus circumvent border checks.

The dynamic of the evolution of the external borders policy is due to several crises that the EU and its Member States had to face during the last years.

First, the inability to effectively manage the arrival of about one million refugees in 2015/16 followed by Turkey and Belarus instrumentalising migrant flows have put the issue at the forefront of the political agenda. Some Member States, Greece and Poland in particular, have exploited these events to place emphasis on border control without respecting the principle of non-refoulement. Apart from deploying military forces, barriers such as walls have been erected along the external borders at some places. As the type of border installations is left to the Member State’s choice, erecting walls is not, per se, contrary to EU law, so long as there are some crossing points, in particular where asylum seekers can apply for protection. This is often not the case in reality and leads to blatant violations of the non-refoulement principle.

Second, the Covid-19 pandemic has resurrected the public health exception that was previously considered as outdated. Public health has been voluntarily omitted by the legislator in

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95 This point is mentioned by Sergio Carrera and Ngo Chun Luk, In the Name of Covid: An Assessment of the Schengen Internal Controls and Travel Restrictions in the EU, Study for the European
Article 25(1) of the SBC that envisages only the temporary reintroduction of internal border controls for reasons of public policy or internal security. However, the Commission considered that ‘in an extremely critical situation, a Member State can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease’.96 A pandemic such as that caused by the Covid-19 virus threatening the entire population of each Member State can indeed be considered as an issue of public policy or internal security defined by the Court of Justice as ‘the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.

The disorder that the EU faced regarding the reintroduction of internal border controls at the beginning of the Covid-19 crisis is due to the fact that Member States remain competent to take such decisions. This system of multi-level governance which is generally considered as good practice makes coordination difficult in case of a crisis requiring swift reactions. Due to the urgent actions of Member States, it has been impossible for the European Commission to organise the necessary cooperation between them. In fact, the Commission was often running after the events by producing soft law instruments such as communications, recommendations, guidelines and roadmaps. These were useful, but often came late. The border controls or closures that were put in place at the peak of the crisis have been quickly replaced by health measures such as completing a passenger locator form, passing a medical test or presenting a negative result, or a period of quarantine, all of which do not seem to constitute disproportionate restrictions under EU law. Those who predicted that the reintroduction of internal border controls due to the pandemic is one more step towards the end of Schengen, were luckily wrong.

Finally, on top of the previous crises, the terrorist attacks on Paris in 2015 have called into question the abolition of controls between Schengen States. Several Member States reintroduced internal border controls on numerous occasions and some have controls that have persisted for more than two years, the current maximum allowed by the SBC. As explained by Melanie Fink and Jorrit J. Rijpma in their contribution to this Handbook, it is in a context of legal controversy, in particular with the European Parliament, about those Member State practices that the European Commission presented a reform of the SBC. After the failure of a first initiative in 2017,98 the Commission put forward a long-awaited second proposal on 14 December 2021.99 This legislative proposal keeps the limit of two years for the reintroduction of internal border controls100 but allows Member States to go over that limit ‘where there are
exceptional situations justifying the continued need for internal border controls without fixing a maximum. This proposal seems to be more in line with Article 72 TFEU than the current system. Article 72 TFEU does not limit States’ prerogatives to safeguard public order and internal security to a certain time period. At the time of writing, it remains to be seen if the European Parliament will accept this proposal. It vehemently resisted the 2017 Commission proposal which it considered as a way to legalise Member States’ practices to retain internal border controls above the limits set by the Schengen Borders Code.

2.1.6 Integration policy

As analysed above, there is an implicit philosophy of migration underpinning the EU migration and asylum policies that has materialised through the Long-Term Residents Directive: migrants should not remain limited to a temporary status after five years of legal residence in a Member State and should, after that period, acquire the right to stay definitively in their host state. Since the EU does not envisage the stay of migrants as temporary, it is logical for its Member States to develop a policy to integrate migrants into European societies. This is done in two different ways. First, by guaranteeing the individual rights of migrants for which there is a strong legal basis under Article 79(2)(b) TFEU; second, by coordinating Member States’ integration policies for which Article 79(4) TFEU provides a limited legal basis.

2.1.6.1 Integration through rights

It is obvious that migrants will not integrate if they do not enjoy civil, political, social, economic and cultural rights, or if they are discriminated against. Legal rules are necessary to ensure that they benefit from these rights as their situation is the opposite of EU citizens. The latter benefit from the principle of non-discrimination under Article 18 TFEU prohibiting discrimination on grounds of nationality that goes together with the right to freedom of movement and of residence. On the contrary, TCNs do not benefit from that freedom under the Treaty, nor do they benefit from the principle of non-discrimination that Article 18 TFEU enshrines, despite its open wording. Secondary legislation has been adopted to fill the legal gap opened by the Treaty. The Single Permit Directive therefore contains provisions defining the minimum common rights that all migrant workers enjoy on the territory, while Article 11 of the LTR Directive extends to migrants the principle of equal treatment with EU citizens in several areas.

The objective of the Tampere conclusions according to which ‘a more vigorous integration policy should aim at granting them [TCNs] rights and obligations comparable to those of EU citizens’ (point 18) could give the impression that there is a consensus on this issue. However, with the implementation of the Amsterdam treaty in the early 2000s, it quickly became apparent that integration and its link to the rights of migrants is subject to the contested views of the differing Member States. Some, indeed, think following the classical view that promoting

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101 2021 SBC reform proposal, art 27, para 5.
102 See Advocate General Opinion, Joined Cases C-368/20 and C-369/20, NW, ECLI:EU:C:2021:821, pending before the CJEU at the time of writing.
103 Report by Tanja Fajon on the proposal for a regulation as regards the rules applicable to the temporary reintroduction of border control at internal borders, European Parliament document A8-0356/2018, 29 October 2018.
104 Article 18 prohibits literally discrimination on the basis of nationality in a general way but its scope has been interpreted as applying between EU citizens and not extending to TCNs.
migrants’ individual rights is a tool of integration, while others consider, on the contrary, that migrants should be integrated before acquiring more rights.

This reversal of the causal relation between integration and rights is reflected by the integration clauses contained in two directives. Article 5(2) of the LTR Directive allows Member States to add compliance with integration conditions among the requested conditions to acquire LTR status. While, on the one hand, five years of continuous residence in a Member State may as such be considered a sufficient indicator of integration, on the other hand, it may be reasonable for domestic authorities to impose additional integration conditions to verify the degree of integration of the applicant prior to the delivery of a LTR permit, which is linked with a permanent right of residence. Article 7 of the Family Reunification Directive goes a step further by allowing Member States to impose integration conditions among the prerequisites that family members have to fulfil before being admitted on the territory, in other words to check their integrability. The Court of Justice, while imposing some limits, has validated in essence the principle of these integration conditions.¹⁰⁵

Equality prescribed in law does not necessarily guarantee the realisation of equality in practice and it is clear that a lot remains to be done to reduce *de facto* discrimination, even when migrants acquire the nationality of their host state. Two directives have therefore been adopted under the framework of the anti-discrimination policy. The first is Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹⁰⁶ and the second is Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.¹⁰⁷ Both instruments ensure that associations or organisations may engage on behalf of or in support of complainants to facilitate access to justice and reverse the burden of proof in case of presumption of discrimination.

The relationship between the principle of non-discrimination and migration and asylum law requires a clarification. Migration and asylum rules, by their very nature, differentiate between EU citizens and TCNs on the basis of nationality and could be considered as discriminatory. This is the reason why a specific article, Article 3(2), has been included in both anti-discrimination directives to indicate that these instruments:

> do not cover difference of treatment based on nationality and are without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Even if the principle behind such provisions seems logical, one may consider that they go a step too far by justifying not only differential rules on the entry and residence of migrants, but also rules on their legal status and thus their individual rights. It can be argued that rules on the entry and residence of TCNs should not be considered discriminatory because they constitute the core without which migration and asylum law simply cannot exist. However, the same does not hold true for the rules on the status of migrants once a State has admitted them. In this vein, the ECHR has developed case-law considering the criterion of nationality could

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form the basis of a discrimination claim, in the same way as the criterion of sex, where social rights of third-country residents are concerned.\(^{108}\)

2.1.6.2 Integration through policy coordination

Other than integration through rights, the EU’s integration policy is realised through coordination of Member States’ policies. The Lisbon Treaty introduced a relevant legal basis which states that ‘[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories’.\(^ {109}\) This provision excludes harmonisation of Member State legislation in the area of integration and thus establishes a more limited support competence of Member States’ policies. This EU policy method has been called the ‘Open Method of Coordination’ (OMC), where ‘open’ refers to the fact that its worklings include various partners, such as civil society. One of the reasons why the EU’s competence in this area has been limited is linked with the principle of subsidiarity as integration mainly takes place within regions and municipalities, rather than at national level.

The EU has developed a series of practical tools in the area of integration, such as a coordination network, action plans, funding instruments, training modules and a web portal.\(^ {110}\) The most influential tool is the ‘Common Basic Principles for Integration’ (CBPI) adopted in 2004 by the Council of Ministers for Justice and Home Affairs. These are non-binding guidelines addressed to the Member States to assist them in formulating integration policies. The CBPIs reflect a large consensus among Member States, and, in this sense, they remain a set of general and pragmatic principles. On the whole, they reflect the model of a diverse society which is open to migrants and strives for their inclusion and non-discrimination, while at the same time they include the obligation for migrants to adapt to their new host country.

Without referring to specific models (assimilation, multiculturalism, etc) that vary across Member States, and in any case are never applied in practice as purely as they are conceptualised in theory, the first CBPI number defines integration as, ‘a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States’. This definition seems simple but is meaningful as it establishes a shared duty of accommodation between migrants and the receiving society. The second CBPI requires respect for the basic EU values to which all residents, including migrants, must adhere closely. Since the adoption of the Treaty of Lisbon, it is Article 2 TFEU which gives content to these values, and which includes ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. The Article also states that ‘these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. This a rich catalogue from which it is possible to draw several conclusions about

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\(^{108}\) See, e.g., the seminal case of the ECtHR, *Gaygusuz v. Austria*, App No 545/631.

\(^{109}\) See TFEU, art 79(4).

the aims of the integration policy, in particular regarding the place of Islamic women in the society.

The fourth CBPI according to which ‘basic knowledge of the host society’s language, history and institutions is indispensable to integration and enabling migrants to acquire basic knowledge is essential to successful integration’ touches upon a controversial issue. This CBPI refers to obligations of migrants in relation to being acquainted with the language and history of their host state. In some EU Member States these competences are the object of mandatory courses (sometimes to be followed in the country of origin). The CPBI does not enter into the details on how to realise these goals, for instance if their realisation should be driven by incentives or sanctions.

The third and fifth CBPI which relate to employment as a key part of the integration process and education as a critical policy preparing individuals to participate in society (in particular descendants of migrants who often face specific difficulties in the school system) are instrumental. This is also the case of the ninth CBPI according to which ‘the participation of immigrants in the democratic process … supports their integration’. This guiding principle is phrased in a way that supports political rights for TCNs as a vector of integration – a controversial and sensitive issue.

Following the eighth CBPI, ‘[t]he practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law’. The explanations accompanying this CBPI clarify that ‘[t]he cultures and religions that immigrants bring with them can facilitate greater understanding among people, ease the transition of immigrants into the new society and can enrich societies’. These pronouncements may seem naïve in some cases, such as where the practice of female genital mutilation is concerned. This is viewed as a rite of passage for women and girls in some cultures, whereas it constitutes a severe violation of women’s fundamental rights, including the prohibition of inhuman and degrading treatment. Other practices such as wearing an Islamic veil generate persistent controversies and opinions diverge on whether they should be prohibited. This is illustrated by the CJEU case of Achbita111 which concerned a woman who was fired from her job for wearing a headscarf. The Court ruled that this prohibition constitutes an indirect discrimination but that it can be justified by the company’s objective to pursue an image of neutrality towards its clients. Several scholars have harshly criticised the reasoning behind this ruling.112 This reveals that the public expression of religious beliefs is not the object of consensus in European societies, despite their increasing diversity.

Finally, it is noteworthy that no CBPI addresses the issue of naturalisation of migrants, while acquiring the host state’s nationality is the ultimate step of an integration process. The granting of nationality is the exclusive competence of Member States. Nonetheless, it would be interesting for the EU to launch coordination actions between Member States in this area focusing on the exchange of information, experiences and best practices.

112 One of the most vocal critics is Joseph Weiler, see, e.g., Joseph Weiler, ‘Je suis Achbita!’ (2017) 28 European Journal of International Law 989.
2.1.7 Intra-EU mobility of third-country nationals

As Iris Goldner Lang explains in her contribution to this Handbook, Article 45 of the EU Charter on Fundamental Rights perfectly reflects the difference between EU citizens and TCNs regarding freedom of movement and residence within the EU. Its first paragraph states that ‘[e]very citizen of the Union has the right to move and reside freely within the territory of the Member States’. This right derives directly from the TFEU. Following its second paragraph, ‘freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State’. So TCNs only benefit from this freedom if secondary law foresees it and within the limits it sets. Regarding freedom to move for stays of less than three months, the Schengen acquis grants them this right, if they continue to fulfil the entry conditions, in particular, possessing sufficient financial resources. They only benefit from freedom of residence to the extent that directives extend them that right based on the TFEU. This treaty foresees measures regarding ‘the definition of the rights of TCNs residing legally in a MS, including the conditions governing freedom of movement and of residence in other Member States’. Even if this provision does not have direct effect, it imposes on the legislator the obligation to set conditions respecting the essence of the freedom of residence. The provision does not set a deadline for achieving this. Nonetheless, more than ten years have passed since the entry into force of the Lisbon Treaty: one can argue that the time has come to realise this point.

The first directive containing relevant provisions is the 2003 Long-Term Residence Directive. Its provisions are particularly weak regarding the extension of freedom of residence to long-term residents willing to work in another Member State. Its Chapter III allows Member States to set conditions for the exercise of an economic activity in an employed or self-employed capacity. In particular, Member States may impose a labour market test on long-term residents willing to work in another Member State, as if they were applying for a work authorisation for the first time from abroad. This indicates that the EU’s immigration policy does not follow the rationale of the EU’s internal market and defies its economic logic. In the absence of genuine EU mobility rights for LTR workers, the LTR status remains a national rather than a European status. This is even more the case, considering that long-term residents cannot accumulate time spent in different Member States towards the five-year period residence condition to acquire the status, and considering that there is no mutual recognition of status between Member States. Therefore, a long-term TCN resident moving to another Member State loses their status and must stay a further five years to acquire such status in a second Member State.

The other directives conceptualise mobility in a novel way. On the one hand, this new conceptualisation is productive. On the other hand, the rights of the concerned TCNs are not

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113 On the basis of a short-term visa for those subject to a visa obligation and on the basis of their passport for those not subject to a visa obligation. TCNs residing in the Schengen area for more than three months can move based on their residence permits.

114 See TFEU, art 79(2)(b).

115 Ibid (emphasis added).

116 Despite the fact that Article 14(2) of the LTR is a ‘may’ clause, provisions regarding long-term residents willing to study in another Member State or to stay for any other purpose as an inactive person are stronger as the provide to TCNs equivalent rights to those provided to EU citizens, with the exception that Member States can impose integration measures on TCNs if they wish to do so.
similar to those EU citizens enjoy, despite the fact that there has been some progress in that direction.

The provisions of the 2014 ICTs Directive make a distinction depending on the length of the mobility. Short-term mobility for stays of maximum 90 days may take place based on the ICT permit delivered by the first Member State, or through a simple notification to the second Member State. For long-term stays, the second Member State may apply the system for short-term mobility or request the ICT to apply for a residence permit. Interestingly, the ICT is allowed to work in the second Member State even before the permit is delivered until a decision is taken. The recourse to the principle of mutual recognition for short-term mobility is particularly remarkable as it is the first time it is used under the immigration policy. The ICT Directive system has served as a blueprint for the provisions on mobility in the 2016 Students and Researchers Directive.

The provisions of the 2009 Blue Card Directive had no added value on this issue since a Blue Card holder in one Member State that was willing to move to another had to fulfil the same conditions as a TCN applying for a Blue Card for the first time. The amended version of the Blue Card Directive marks progress, albeit very limited. The principle of mutual recognition applies to short-term mobility, but only for business activities defined in Article 2(13). On the contrary, in regard to long-term mobility, the shortening of the period required before one can move to a second Member State for work will be more attractive for mobile workers. However, the directive does not foresee mutual recognition of the permit delivered by the first Member State, and, what is more important, the second Member State is still allowed to impose a labour market test if it has chosen to impose such a test on this category of workers. The ICT Directive was promising as it announced the slow emergence of a ‘European migration space’. However, the new Blue Card Directive is very disappointing in this respect and a clear sign that the EU cannot yet be conceived as a single labour market as Iris Goldner Lang highlights in her contribution to this Handbook.

2.2 Administrative Governance

Several failures of migration and asylum policies can be attributed to shortcomings in their administrative architecture. Their initial implementation design foresaw that Member States would realise them largely through deploying their own resources in line with the theory of executive federalism. This theory can be summed up as follows: apart from exceptional cases where the EU level directly implements policies, national executives assume responsibility in the main for the application of European law (indirect implementation). Strictly applied, this leads to a neat division of labour for most policies, where legislation is adopted at EU level, and the implementation of EU law is a matter of predominantly national concern.

The theory of executive federalism, however, increasingly fails to capture the reality of implementation of EU law and the intricate links that increasingly exist between the EU and the national levels. A significant body of research on EU administrative law points to the rise of ‘integrated administration’, which defies the old categories of direct and indirect implemen-

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117 That is 12 months of residence in the first Member State, or even only six months in case of subsequent mobility, instead of the 18 months necessary under the 2009 BCD.
tation. As observed by Hofmann and Türk, ‘integrated administration in Europe is therefore not so much a multi-level system in the sense of a hierarchy superimposed on Member States’ administrations. It is a system of integrated levels’. Four areas point to developments in this sense: responsibility assignation in the EU asylum policy (Subsection 2.2.1); EU agencies (Subsection 2.2.2); EU funding (Subsection 2.2.3) and EU migration information systems (Subsection 2.2.4).

2.2.1 Responsibility assignation

Even if the EU’s common asylum system essentially consists of 27 national systems, one element had to be coordinated from the outset: responsibility assignation. This term refers to the identification of the responsible Member State for examining asylum claims. The EU’s responsibility allocation system is regulated by the so-called Dublin III Regulation. The functioning of the system entails intense transnational administrative cooperation supported by EURODAC, an EU-wide centralised database set up to assist Member States through the joint gathering of information. Moreover, efforts to overcome the solidarity deficit that the functioning of the EU’s responsibility assignation generates has spurred further administrative cooperation between the EU and Member States, for example through the functioning and activities of EU agencies as the next subsection analyses.

The basic premise of the Dublin III Regulation is that a single Member State is responsible for each application. The Regulation provides a hierarchy of criteria for identifying the responsible state. Apart from the limited number of cases related to unaccompanied minors and safeguarding family unity, this is the state primarily ‘responsible’ for the person’s presence in the EU. In practice, this means the state of first irregular entry to the EU territory is responsible instead of distributing asylum seekers on the basis of objective indicators such as the size of population of states or their GDP. This happens despite the fact that the EU treaties contain a legally binding principle of solidarity and fair sharing of responsibility. Where asylum seekers do not remain in the ‘responsible’ Member State, the state where the asylum seeker is present may seek to transfer her back to the responsible state. However, as a matter of human rights and EU law, Member States must abstain from such a transfer when

120 Dublin III Regulation.
122 Dublin III Regulation, art 3(1).
123 Dublin III Regulation, ch III.
124 For example, the Member State that issued a residence document or a visa, ibid, art 12.
there is a real risk of a breach of the prohibition of inhuman or degrading treatment.\textsuperscript{126} In addition, states may abstain from a transfer for any other reason, including on humanitarian and compassionate grounds.\textsuperscript{127} Finally, Dublin also purports to enable states to employ safe-third country practices, subject to the rules of the Asylum Procedures Directive.\textsuperscript{128} As Francesco Maiani elaborates in his contribution to this Handbook, inefficiency, distributive unfairness and arbitrariness have bedevilled the Dublin system since its very inception.

No lasting change has been made to the EU’s responsibility allocation system.\textsuperscript{129} The CJEU has developed rich and complex case-law on assessing safety and upholding human rights as part of the functioning of the Dublin system analysed in this Handbook both by Francesco Maiani, and Minos Mouzourakis and Cathryn Costello. It has also proclaimed the legally binding character of the principle of solidarity in the EU asylum policy.\textsuperscript{130} Still, it is only the EU co-legislators who are capable of drastically redesigning the system. In the meantime, the dysfunctional Dublin system has inspired the creation of similar arrangements in other Global North States, such as between the USA and Canada as Paul McDonough and Tamara Tubakovic analyse in this Handbook.

\subsection*{2.2.2 EU agencies}

Another major shift in the implementation modes of the EU’s migration and asylum policies is the key role that EU agencies assume. Initially tasked with limited cooperation activities such as information exchange, they have come to the forefront for two primary reasons: to overcome the policy implementation gap described above and to enhance inter-State solidarity. Institutionalisation of practical cooperation through EU agencies has begun to unsettle the initial implementation paradigm of indirect administration. In this section, we focus on two EU agencies: the European Asylum Support Office (EASO), recently revamped to a European Union Agency on Asylum (EUAA), and the European Border and Coast Guard Agency (EBCG, still commonly referred to as Frontex). The contribution of Melanie Fink and Jorrit J. Rijpma in this Handbook retraces and critically assesses the evolution of Frontex, while we have extensively commented elsewhere on the evolution of both EASO and Frontex.\textsuperscript{131}

\begin{footnotesize}
\begin{enumerate}
\item[126] Ibid, art 3(2); Cases C-411 and 493/10 NS v. United Kingdom [2011] ECR I-13905; Case C-578/16 PPU CK v. Republika Slovenija EU:C:2017:127.
\item[127] Dublin III Regulation, ch IV.
\item[128] Dublin III Regulation, art 3(3); 2013 Asylum Procedures Directive.
\end{enumerate}
\end{footnotesize}
By examining the *de jure* and *de facto* mandate expansion of EASO, recently revamped to become the EUAA and Frontex, two broad trends become apparent.

On the one hand, the operational expansion of EU agencies’ mandates has led to patterns of joint implementation, with their staff and experts deployed in fields as, for example, border control and required to, among other tasks, process asylum claims. This means that agency deployed staff increasingly have executive powers, implement policy alongside national administrations and directly interact with refugees and migrants. On the other hand, these agencies’ mandates have expanded to encompass functions that far exceed support, including operational support and administrative cooperation. Reference is made to monitoring-like functions, as well as to functions which have the potential to steer policy implementation.

One example of a monitoring-like function is the ‘vulnerability assessment’ that Frontex undertakes. This relates to issues such as state resources and state preparedness to undertake external border controls. It could lead to recommendations; a binding decision of measures set out by its Management Board; or, in cases where the external borders require urgent action, a Council implementing act prescribing measures which become binding for the Member States. An example of a function which has the potential to steer policy implementation is the adoption by the EUAA of a ‘common analysis’ on the situation in specific countries of origin and the production on this basis of guidance notes to assist Member States in the assessment of relevant asylum applications.

There is a qualitative difference between the developments concerning Frontex and EASO. While the mandate expansion of the former has taken place *de jure*, EASO’s mandate expansion took place *de facto* with an expanded legal mandate for a revamped EUAA only officially adopted at the very end of 2021. The Frontex Regulation underwent a series of legislative amendments since Member States adopted the agency’s founding document in 2004. The instrument was amended consecutively in 2007, 2011, 2016 and most recently in

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133 Tsourdi, ‘Beyond the Migration Crisis’ (n 8), 184–8.
135 2019 EBCG Regulation, art 32.
136 EUAA Regulation, art 11.
The evolving EU asylum and migration law

2019.\textsuperscript{141} The 2016 amendment introduced a ‘European Border and Coast Guard’ (EBCG) which, despite its name, does not aim to replace national border guard units or centralise external border management, being essentially ‘a new model built on an old logic’.\textsuperscript{142} The 2019 Regulation describes European integrated border management (IBM) as ‘a shared responsibility of the Agency and of the national authorities responsible for border management’, while recognising that ‘Member States shall retain primary responsibility for the management of their sections of the external borders’.\textsuperscript{143}

Meanwhile, EASO’s founding regulation, adopted in 2010,\textsuperscript{144} remained unaltered until the very end of 2021,\textsuperscript{145} despite the Commission having already presented its proposal for the new EUAA in 2016.\textsuperscript{146} This meant that the 2010 instrument has not been fully attuned to the new administrative realities for a long time, such as the joint implementation patterns, and the EASO’s heightened accountability challenge.\textsuperscript{147} New functions have since been attributed to the EUAA in combination with its increasingly pivotal role in implementing intra-EU solidarity. Notably, the EUAA Regulation foresees a novel monitoring function of ‘the operational and technical application of the CEAS in order to prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems’.\textsuperscript{148} This exercise is linked with a gradation of measures ranging from recommendations of the Management Board, to the involvement of the European Commission, to the Council mandating agency deployments in the territory of a specific Member State through an implementing act.\textsuperscript{149} Despite the circumscribed language on the content of the monitoring exercise, the ‘Med 5’ group of countries in Council (Greece, Spain, Italy, Cyprus and Malta) only endorsed the final agreement with the addition of a ‘sunrise clause’.\textsuperscript{150} Accordingly, the monitoring exercise will only commence in 2024, and then only partly.\textsuperscript{151} The ‘enforcement part’ of the mechanism, that is, the gradation of measures we outlined before, will only start as and when an agreement will be reached on the successor of the Dublin system that will include concrete responsibility-sharing arrangements. This final agreement attests both to the salience

\textsuperscript{141} 2019 EBCG Regulation.
\textsuperscript{142} Philippe De Bruycker, ‘The European Border and Coast Guard: A New Model Built on an Old Logic’ (2016) 1(2) European Papers 559. See also, Violeta Moreno-Lax, Accessing Asylum in Europe (Oxford University Press 2017) Ch 6.
\textsuperscript{143} 2019 EBCG Regulation, art 7(1) (emphasis added).
\textsuperscript{147} See analysis in Tsourdi, ‘Holding the European Asylum Support Office Accountable’ (n 131).
\textsuperscript{148} EUAA Regulation, art 14, para 1.
\textsuperscript{149} Ibid, art 15.
\textsuperscript{151} See EUAA Regulation, art 73.
of solidarity for the functioning of the CEAS and of the importance that Member States place on the functions of EU agencies.

The *de jure* and *de facto* mandate expansion raises several challenges for Frontex and EASO broadly revolving around balancing independence, accountability and respect for fundamental rights. First, the supervision and operational limbs of the expanded mandates are linked. Through the development and refinement of supervision powers the agencies would be called on to play a double and, at times, contradictory role: implementing jointly, while simultaneously supervising the implementation of joint action. There is also an underlying tension between the agencies’ supervision functions and the strong role of their Management Boards in these processes. For example, Member State-dominated Management Boards are called upon to play pivotal roles in actions that could lead to politically sensitive outcomes, such as binding deployments. But it is possible that Member States will opt for a “hands off” approach to avoid political controversy. It remains to be seen if and how these challenges will be tackled.

Second, the exercise of executive powers through tasks entailing executive discretion by deployed EU agency staff results in greater direct interaction with individual migrants, potentially affecting their fundamental rights. Agency deployments in third countries raise further fundamental rights concerns and the need to coordinate action with international stakeholders. These developments bring into sharp relief the necessity to hold EASO and Frontex accountable alongside Member States involved in these operational activities. While both agencies are subject to numerous accountability mechanisms, that is, political, judicial, extra-judicial, financial and social, their effectiveness is contested or limited.

### 2.2.3 EU funding

Even under the latest multi-annual financial framework covering the period 2021–27, Member States are largely expected to fund the operationalisation of the EU’s asylum and migration policies through their own national budgets. 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 the fact that these policies deliver regional public goods, such as asylum provision and external border control. Nonetheless, EU funding available to contribute to enhancing inter-state solidarity has been even more limited.

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152 Tsourdi, ‘Beyond the Migration Crisis’ (n 8), 175, 193–4.
154 In what concerns asylum provision, Suhrke conceptualises refugee protection as a global public good, a good whose benefits once provided: (1) cannot be excluded from other members of the international community (non-excludability) and (2) do not diminish or become scarce when enjoyed (non-rivalry). See Astrid Suhrke, ‘Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action’ (1998) 11 Journal of Refugee Studies 396. Betts argues 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. See Alexander Betts,
More broadly, if reconceptualised, EU funding also holds future promise in steering policy implementation.

EU funding specifically targeting these policies was initially geared to asylum, with the adoption of a European Refugee Fund (ERF) in 2000.\textsuperscript{155} It was initially extremely limited, with only €216 million over a four-year period,\textsuperscript{156} leading academic commentators to label it ‘symbolic politics’.\textsuperscript{157} 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.\textsuperscript{158} As that instrument was not activated at that time, Member States could not access that dedicated amount.

The ERF was renewed for the 2005 to 2010 period, containing a slightly enhanced financial envelope,\textsuperscript{159} and largely following the initial design. In the 2007–13 financial framework, the EU undertook a substantial overhaul of Home Affairs funding, which led to the establishment, alongside a revamped ERF,\textsuperscript{160} of the following: the European Integration Fund,\textsuperscript{161} the European Return Fund\textsuperscript{162} and the External Borders Fund.\textsuperscript{163} A major development during that period was the expansion of the scope of the financial reserve for emergency measures in the new ERF Decisions so that it covered, not only as before temporary protection but also ‘situations of particular pressure’.\textsuperscript{164} Emergency funding came with strict requirements though, so it has been difficult for Member States to absorb.

The set-up of the Home Affairs financial framework for 2014–20 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).\textsuperscript{165} The implementation of both

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\textsuperscript{156} 2000 ERF Decision, art 2(1).


\textsuperscript{158} 2000 ERF Decision, art 6.


\textsuperscript{164} 2007 ERF Decision, Recs 21 and 22, and art 5(1)–(2).

\textsuperscript{165} Two separate instruments regulated the Internal Security Fund: Regulation (EU) No 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 (hereinafter: ‘ISF Borders’) and Regulation (EU) No 513/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the
the AMIF and the ISF funds were regulated by a single set of administrative rules included in a ‘horizontal’ instrument, meaning applicable to all the different funding instruments. 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 2014–20) initially available for the Asylum, Migration and Integration Fund (AMIF) amounted to €3,137 billion. This was more than the combined amount of the funds that were merged during the previous multi-annual financial framework (2007–13), which was €2,200 billion. Still, at the time of its adoption the Fund accounted for a mere 0.29 per cent of the EU’s entire previous Multi-Annual Financial Framework.

The funding instruments of the previous multi-annual period contained some improvements. For example, the process for the activation of emergency funding was simplified, while emergency assistance could amount to 100 per cent of the eligible expenditure for Member States. In addition, moderate design improvements led to a relative simplification of the management processes that carried enhanced potential to influence policy implementation at national level, that is, steering capacity. One characteristic example was the elimination of the obligation for Member States to draw up annual programmes and instead funding operated on a multi-annual planning cycle, thus avoiding some of the repetitive paperwork for Member State authorities.

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 created by the EU’s responsibility allocation rules in the area of external borders and asylum. 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. 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’.

instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA (hereinafter: ‘ISF Police cooperation’).

166 Regulation (EU) No 514/2014 of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management (hereinafter: ‘HA Funds Horizontal Regulation’).

167 AMIF Regulation, art 14(1).


169 See, e.g., AMIF Regulation, art 20(2), and Rec 15.

170 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.

171 See, e.g., AMIF Regulation, Rec 37 and Annex I.
During the period of increased arrivals in 2015–16, the need for structural forms of funding became ever more apparent. Even a host of Member States with stronger national economies, such as France, Germany and the Netherlands, had recourse to emergency funding to implement their obligations. Moreover, several Member States demanded for the first time the activation of the Civil Protection Mechanism for migration-related purposes. 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 2015–16 ‘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 undersupplied compared to demand.176 A further development was the creation of an intra-EU humanitarian aid budget line.177 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.

Despite these realisations, there was no radical overhaul in the philosophy or scope of EU migration funding in the current funding period, that is, the period 2021–27. A somewhat enhanced financial envelope compared to the previous period, that is, €25.7 million, is foreseen for the budget heading relating to migration and border management. The following architecture has been adopted: an Asylum Migration and Integration Fund (AMIF 2021), and an Integrated Border Management Fund made of two components; the Border Management and Visa Instrument (BMVI) and the Customs Control Equipment Instrument (CCEI). Funding for the national programmes continues to be disbursed through absolute and not relative indicators. Both the AMIF 2021 and the BMVI, however, foresee an element of flexibility, which is the so-called thematic facility. This is part of the funding which is not pre-allocated to national programmes and can be directed to actions such as emergency assistance, resettlement and humanitarian admission, and additional support to Member States contributing to solidarity efforts. Despite the boost in existing resources, the amounts available brings EU funding only marginally closer to a compensatory logic. A significant part of the

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176 See Communication from the Commission, On the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM (2016) 85 (10 February 2016), annex 9 Accepted Member States’ Support to Civil Protection Mechanism for Serbia, Slovenia, Croatia and Greece, 4.
179 Regulation (EU) 2021 establishing the Asylum, Migration and Integration Fund (AMIF) for the period between 2021 and 2027, OJ L 251 (hereinafter: ‘AMIF 2021’).
181 Regulation (EU) 2021/1077 establishing, as part of the Integrated Border Management Fund, the instrument for financial support for customs control equipment, OJ L 234.
182 See, e.g., AMIF 2021, Annex I.
183 See, e.g., AMIF 2021, art 11 and recital 44.
financing for the operationalisation of these policies is still to be drawn from national budgets following the logic of policy implementation by Member States.

### 2.2.4 EU migration databases

EU policies (will) rely increasingly on databases. There are six of them in the area of migration and asylum: the Schengen Information System (SIS)\(^{184}\) containing alerts on persons to be refused entry or stay for the failure to respect immigration rules, as well as being criminals; EURODAC\(^{185}\) with the fingerprints of asylum seekers to ensure the functioning of the Dublin system determining the responsible Member State for the examination of an asylum application; the VIS\(^{186}\) with data on short and long stay visas and residence permits; the Entry Exit System (EES)\(^{187}\) registering the movements of TCNs visiting the Schengen area for a short stay; the European Travel Information and Authorisation System (ETIAS)\(^{188}\) containing the data of TCNs exempted from visa obligations on entry to the Schengen Area; and the European Criminal Record Information System (ECRIS)\(^{189}\) for the exchange of information on

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\(^{185}\) Regulation 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1 (hereinafter: ‘recast Eurodac Regulation’).


TCNs convicted of crimes. The first three systems were already operational in 2022 while the last three will be operational within one or two years from that date.

It is high time for migration and asylum lawyers to get acquainted with these technical tools. Each database has its own set of purposes and registers different categories of migrants and types of data although they are increasingly interconnected. There are some horizontal challenges though such as the right of individuals to get access to their data and ask for their rectification or erasure, the proportional use of databases and the availability of non-judicial and judicial remedies. The latter can be used to challenge issues such as a visa denial, a denial of the possibility to travel to the EU or to enter or stay in one Member State, or the fact that a third-country national is returned or detained because they are registered in one or several databases.

The creation of EU information systems in this area is linked to the abolition of internal border controls. When this abolition was decided for the Schengen Area, it appeared necessary to establish a database common to the concerned States to gather and exchange information with a view to fighting irregular migration and criminality. Since the creation of the SIS in 2004, databases in the area expanded in three waves as explained by Niovi Vavoula in this Handbook and underpinned by different causes: first, modernising immigration control; second, fighting terrorism; third, generalising surveillance of mobility. The expansion of the number of databases corresponds to an extension of their purposes, personal scope and data collected. More recently interoperability allows for data sharing between databases.

The initial purpose of contributing to the management of migration and asylum policies extended very quickly to the fight against criminality, in particular terrorism. Eurodac is the paradigmatic example of this phenomenon. This database was created in 2000 with the purpose to assist in determining which Member State is responsible for the examination of an asylum claim pursuant to the Dublin Convention. In 2013, its purpose was extended to law enforcement, and in a Commission proposal in 2020 to assist with the control of irregular migration to the Union and with the detection of secondary movements within the Union and the identification of irregularly staying TCNs and stateless persons. The VIS is certainly the best example of a multi-purpose database with no fewer than 11 purposes, including, on top of facilitating the visa application procedure, among others: the facilitation of checks at the external borders and within the territory of Member States; the identification and return


191 See recast Eurodac Regulation.

192 Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818 COM (2020) 614 final (hereinafter: ‘amended Eurodac proposal’).
of irregular migrants; the prevention, detection and investigation of terrorist offences or other serious criminal offences; and the prevention of threats to internal security. Multi-purpose databases are not illegal as such, so long as each purpose has its own legal basis. However, this multiplication obviously poses a challenge for the principle of purpose limitation, a fundamental principle of European data protection law.

The personal scope of the information systems has also been expanded and includes irregular migrants and convicted third-country nationals or suspected criminals under the SIS; applicants for international protection and TCNs apprehended in connection with the irregular crossing of an external border under Eurodac; applicants and holders of short and long-stay visas and residence permits under the VIS; TCNs who are exempted from a visa obligation under ETIAS and even TCNs disembarked following a search and rescue operation. Eurodac is once again the paradigmatic example of this evolution. When the amended Commission proposal issued in 2020 will be adopted, it will become the database storing information not only of asylum seekers and migrants irregularly crossing a border, but also of all TCNs illegally staying in the Schengen area. In the end, it seems that all TCNs are registered in at least one database, with the exception of family members of EU citizens or those benefitting from free movement rights. Information systems also collect an increasing type of data. Biometrics are nowadays used in databases, with fingerprints and facial images systematically collected. The most remarkable development took place with the VIS and ETIAS where alongside the information that is usually collected, that is, name, nationality, passport data, physical and email address, etc, the database will store information regarding the level of education and the professional occupation of individuals.

Finally, interoperability refers to data sharing between databases and will allow the requesting authorities to review all databases with a single query through a European Search Portal (ESP). One of interoperability’s objectives is preventing and combatting irregular migration by facilitating police authorities to identify the persons concerned in view of their return to their country of origin. It is at the core of the political and legal debate on databases. The European Commission differentiates between interoperability and interconnectivity by highlighting that with the former, contrary to the latter, ‘the systems keep their specific data provisions, with specific rules on access for competent authorities, separate purpose limitations rules for each category of data and dedicated data retention rules’. On the contrary, the European Data Protection Supervisor (EDPS) considers that:

the decision of the EU legislator to make large-scale IT systems interoperable would not only permanently and profoundly affect their structure and their way of operating, but would also change the way legal principles have been interpreted in this area so far and would as such mark a point of no return.

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193 Amended Eurodac proposal.
194 See the contribution of Iris Goldner Lang in this Handbook for analysis on these points.
195 A facial image is an image measuring the characteristics of the face of a person.
197 European Data Protection Supervisor, Opinion 4/2018 on the proposals for two regulations establishing a framework for interoperability between large-scale information systems, 16 April 2018, point 143.
He further notes that:

while interoperability might have been envisaged initially as a tool to only facilitate the use of the systems, the proposals introduce new possibilities to access and use the data stored in the various systems in order to combat identity fraud, facilitate identity checks and streamline access by law enforcement authorities to non-law information systems.198

Different stakeholders have also adopted varying positions regarding the consequences of interoperability for human rights. The European Commission assessed its impact on human rights extremely positively by highlighting that interoperability will: contribute to the protection of individuals’ right to life; uphold the prohibition of slavery and forced labour; support the detection of missing children; prevent situations where asylum applicants are unlawfully apprehended, detained and made subject to undue expulsion; and that it will have a positive impact on individuals’ right to private life through their correct identification.199 Even if interoperability may indeed have some positive effects on the rights and situations mentioned above, it is surprising that the Commission ignored its potential negative impact on other human rights.

On the contrary, in her ‘anthology of human rights challenges’ in this Handbook, Niovi Vavoula highlights that interoperability raises questions with regard to the respect of the principles of necessity and proportionality when interfering with the rights to private life and data protection. From her point of view, the logic that has been followed, for instance with the inclusion of long stay visa and residence permit holders in the VIS, is to fill information gaps rather than address clear operational needs. This is based on the idea that mobile TCNs represent a security risk for the European Union and its Member States. There is also an issue of discrimination. It is hard to deny that TCNs are subject to mass surveillance at EU level contrary to EU citizens. Regarding security concerns, one may wonder why this is the case since most of the recent terrorist attacks in the EU were perpetrated by EU citizens (even if often of a migrant family background) rather than TCNs.

The adoption of the regulations establishing the migration and asylum databases has concluded the debate at the legislative stage. However, disputes will continue before European courts, and in particular the CJEU, that has already ruled key cases like Digital Rights Ireland.200 Therein, it declared Directive 2006/24, a directive on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communication networks, invalid for not respecting the principle of proportionality in the interference of the right to private life and data protection.

2.3 From an ‘External Dimension’ to the Impetus of Externalisation

Primary EU law currently contains an explicit, albeit vaguely worded, legal basis for an external dimension of the CEAS,201 and an explicit legal basis on the external dimension of the EU’s

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198 Ibid, point 145.
199 Amended proposal on establishing a framework for interoperability between EU information systems COM(2018)480, 19.
200 Joined Cases C-293/12 and C-594/12, Digital Rights Ireland, EU:C:2014:238.
201 TFEU, art 78(2)(g).
migration policy limited to readmission, making recourse to the CJEU’s doctrine of implied powers for the other aspects. In addition, a series of policy initiatives have framed and developed the external dimensions of migration and asylum policies since 1999 as elaborated in the contributions of Violeta Moreno-Lax and of Paula García Andrade in this Handbook.

2.3.1 The external dimension of the EU’s migration policy
Paula García Andrade substantiates how the EU system of competences conditions the feasibility and efficiency of EU external action on migration, while simultaneously restricting, probably more than expected, the margin of action left to Member States’ migration diplomacy. Competences dictate an intricate legal balance to be struck between the Member States and the EU, between the different EU institutions, as well as between migration and other areas of EU action, such as for example development cooperation. This delicate balance is also aptly portrayed in the EU’s readmission policy thoroughly scrutinised by Tamás Molnar in this Handbook.

Overall, the external limb of the EU’s migration policy has resulted in limited additional mobility opportunities for third country nationals. Labour migrant quotas are a competence exclusively reserved to Member States. Policy initiatives adopted as part of the EU’s external migration policy, however, such as ‘Mobility Partnerships’ provide a framework for Member States to offer such migration possibilities. Few Member States have taken up these possibilities and, even when they have done so, they concern very few individuals. For example, the Mobility Partnership concluded with Morocco in 2013 has apparently not produced results regarding legal migration. Between 2010 and 2016 the number of Moroccan seasonal workers in the EU dropped from 10,416 to 3,781 and the number of persons admitted for other remunerated activities from 43,334 to 6,283.

2.3.2 The external dimension of the EU’s asylum policy
In what concerns the EU’s asylum policy, there are few legal opportunities to access refugee protection without engaging in an illicit, very possibly life-endangering journey. In her contribution to this Handbook, Violeta Moreno-Lax analyses the main such legal access opportunities as part of the external dimension of CEAS: the EU’s refugee resettlement programme and other complementary pathways, such as private sponsorship mechanisms and humanitarian

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202 TFEU, art 79(3).
203 TFEU, art 216(1).
204 See the contribution of Paula García Andrade in this Handbook.
205 See TFEU, art 79(5).
207 Joint declaration establishing a mobility partnership between the kingdom of Morocco and the European Union and its Member States, Council documents 6139/13 ADD 1 REV 3, 3.06.2013.
209 There is no strict legal definition of private sponsorship. It can generally be understood as a public/private partnership between governments, who facilitate legal admission for refugees, and private actors, who provide financial, social and/or emotional support to receive and settle refugees into the community.
admission programmes. All these legal access channels are voluntary for Member States and remain numerically modest. For example, at the height of the Syrian displacement, EU Member States resettled a total of 27,800 persons.\textsuperscript{210} A voluntary scheme initiated by the Commission and running between September 2017–December 2019 was meant to resettle an additional 50,000.\textsuperscript{211} By October 2019 the latter scheme had led to the resettlement of 39,000 persons, while Member States pledged an additional 30,000 places for 2020.\textsuperscript{212} While these numbers are more significant than in the past, they should be compared with the global resettlement needs, which UNHCR projected would be around 1.44 million persons in 2020.\textsuperscript{213} Importantly, the voluntary nature of Member State participation in these schemes has led to divergences within the EU, with 12 Member States not resettling a single individual in 2019.\textsuperscript{214}

\textit{Ad hoc} practices on Member State level exist as well on so-called humanitarian visas, for example in Belgium, Germany and Italy.\textsuperscript{215} It has long been argued that fundamental rights obligations govern the visa policy as it is regulated by EU law in the Visa Code and would require the issuance of a form of ‘humanitarian visa’ if the applicants’ human rights would otherwise be violated.\textsuperscript{216} The argument was litigated before the CJEU which found that the EU Visa Code is not applicable to humanitarian visas requested by asylum seekers who intend to apply for asylum.\textsuperscript{217} In their contribution to this Handbook on the role of supranational courts in protecting and generating rights which includes analysis of this case, Minos Mouzourakis and Cathryn Costello argue that the CJEU has shown reluctance to examine the key facets of refugee containment in this politically salient field.

\subsection*{2.3.3 The imperative of externalisation}

Not only are the possibilities to legally access protection mechanisms meagre, the EU has constantly sought to externalise protection obligations to third states, a trend which is intensifying. Deterrence is not limited to the EU’s territorial borders. Alongside physical border barriers, such as walls and barbed wire fences, new technologies and instruments driven by ‘sophisticated legal innovations’, have led to the emergence of the ‘shifting border’ paradigm, turning the border into an individual moving barrier.\textsuperscript{218} The location of this border is not fixed in time or place – it shifts inwards and outwards of the territory – while simultaneously exhib-
iting features of a static border transformed into ‘the last point of encounter, rather than the first’. When it comes to protection issues, the ‘shifting border’ manifests itself in practices such as placing countries of origin on the EU visa ‘black list’, and privatising migration control through the sanctioning of carriers (such as airlines) that refuse embarkation to passengers without visas in order to avoid sanctions.

Refugee containment has long been recognised. As early as 2001, Noll identified the ‘common market of deflection’, while both Moreno-Lax and Gammeltoft-Hansen have provided insightful accounts on how the EU’s external border control, visa and migration policies impede access to protection and deflect protection obligations to non-EU States. A newer development is that of ‘contactless control’. Instead of merely deflecting spontaneous arrivals of migrants at its borders, the EU tries to hinder the exit of ‘unwanted’ migrants from either their countries of origin or countries of transit by securing strategic partnerships with key transit and origin countries such as Turkey or Libya. These third country partners are persuaded to contain, as well as readmit, potential asylum seekers in exchange for financial and political gains, such as funding, visa facilitation, or accession negotiations. Therefore, instead of pushbacks (i.e. *refoulement*) which is clearly forbidden under international law, we are dealing with a contemporary legal problem, namely pullbacks by countries that asylum seekers transit through. These pullbacks are undertaken upon the request of final destination EU countries. Preventing asylum seekers from departing can be considered as contrary to the right to leave any country recognised by international human rights instruments.

In their contribution to this Handbook, Paul McDonough and Tamara Tubakovic document policy transfers between states in the Global North in externalising protection obligations. They note that externalisation practices, such as offshoring border controls to third countries and maritime interdiction practices, reflect creative attempts by states to overcome the constraints that international refugee law places on the pursuit of unbounded immigration control. At the same time, they argue that states in the Global North do not reject international refugee law altogether because then countries hosting large numbers of refugees could similarly reject the unequal burden placed upon them, potentially triggering refugee flows to wealthier

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219 Ibid, 5. See also the special issue conceptual introduction and the contributions exemplifying the nature of the shifting border in the EU and critically analysing its implications, Evangelia (Lilian) Tsourdi, Andrea Ott and Zvezda Vankova (eds), *The EU’s Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration* (2022) 7(1) European Papers 87.


224 See Giuffré and Moreno-Lax, ‘The Rise of Consensual Containment’ (n 223), 84.

countries. These developments bring to the forefront the disputed limits of Member States’ legal obligations under human rights law when actions with elements of extraterritoriality are concerned. On this point, there are differences between the EU fundamental rights protection framework on the one hand and the international and regional human rights protection frameworks on the other.

Under EU law, human rights obligations bind the EU (that is to the EU institutions, bodies, offices and agencies of the Union) whenever it exercises its competences as conferred under the EU treaties and Member States when they are implementing EU law. Therefore the important element is whether Member States are acting within the realm of EU law, rather than territoriality. If they are acting within the scope of EU law, they must do so in compliance with fundamental rights without the application of any further threshold criterion. As Violeta Moreno-Lax and Cathryn Costello have analysed elsewhere, there are a range of scenarios involving extraterritorial elements where EU law applies. As such, fundamental rights obligations for EU Member States arise, even though the applicability of international and regional human rights norms would be contested, based on the notion of jurisdiction generally used by human rights instruments.

The CJEU has not delved into the legality and compatibility with fundamental rights of instances of externalisation of migration control on the basis of the non-applicability of EU law, rather than on the extraterritorial setting of these actions. One such case was the humanitarian visas case already mentioned above. Therein, the CJEU ruled that the issue of humanitarian visas does not fall within the scope of either the EU Visa Code or of the EU asylum acquis and thus Member States are not ‘implementing EU law’ when they are issuing such visas. Another relevant example is a case concerning the consequences of the EU-Turkey statement. This Statement, or ‘deal’ as it is commonly called, sought to curb irregular arrivals of (in particular Syrian) refugees in Greece, by requesting Turkey to prevent the departure of asylum seekers from its territory and to swiftly readmit those managing to arrive in the Greek islands. In exchange, Turkey was offered greater financial support, and promises of visa free travel to the EU for Turkish nationals, amongst other incentives. When asked to assess the compatibility of this text with EU fundamental rights, the EU’s General Court affirmed that it lacked jurisdiction to examine its legality as it was not authored by the EU, but rather by ‘the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister’ in an intergovernmental framework instead of the EU institutional framework. The CJEU dismissed an appeal against this decision as manifestly inadmissible. The conclusion that the EU did not author the agreement absolved the CJEU from an obligation to scrutinise its compatibility with EU fundamental rights.

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226 See EU Charter, art 51 (1).
227 On this point see CJEU, Case C-617/10, Akerberg Fransson, ECLI:EU:C:2013:280.
229 See X and X (n 88) and for further commentary see the contribution of Minos Mouzourakis and Cathryn Costello in this Handbook.
230 EU-Turkey statement, SN 38/16, 18 March 2016.
Under international and regional human rights instruments – that is, crucially the ECHR – unlike EU law, the central consideration for triggering human rights obligations is generally the notion of jurisdiction. According to the ECtHR, jurisdiction is ‘primarily territorial’, 233 with other bases ‘being exceptional and requiring special justification in the particular circumstances of each case’. 234 This does not entail that all actions with elements of extraterritoriality are beyond the applicability of the ECHR. Human rights obligations extraterritorially may arise typically where States exercise some form of so-called effective control. According to the ECtHR this could refer: first, to control over territory which occurs as a result of lawful or unlawful state military action; 235 or, second, to control over an individual, for example through the acts of diplomatic agents where they are found to exert control, 236 or through the use of force in cases of arrest or abduction. 237 A seminal case is Hirsi where the ECtHR held that migrants that had been rescued in high seas by an Italian navy vessel were under the jurisdiction of Italy while on board the Italian vessel and until the moment they were handed over to Libyan authorities. 238

The ECtHR’s case-law does not allow for the creation of a hard and fast rule on what constitutes ‘effective control’ and this assessment relies on factual elements. This has led to contested grey areas in the case-law. A recent case concerning, once again, humanitarian visas requested by Syrian nationals in order to enter Belgium for the purpose of claiming asylum illustrates this in the framework of the EU’s externalisation practices. The ECtHR held that the fact that Belgian consular authorities abroad decided upon the visa application of a family of Syrian nationals neither brought the applicants under Belgium’s ‘territorial’ jurisdiction, 239 nor constitutes an exceptional circumstance capable of triggering an extraterritorial link with Belgium. 240

The combined effect of these two lines of case-law by the CJEU and the ECtHR is that, in reality, various aspects of the EU’s externalisation practices are not subject to judicial scrutiny. In response to this, Violeta Moreno-Lax has argued elsewhere 241 that a principled understanding around jurisdiction calls for the conceptualisation of functional jurisdiction, which can address the void left by the current conceptualisation of territoriality and extraterritoriality. Moreno-Lax uses functional to denote the governmental ‘functions’ through which the power of the state finds concrete expression in a given case. 242 According to this understanding, effective control over persons or territory are not the only considerations as to the engagement of ECHR obligations. Control over (general) policy areas or (individual) tactical operations, per-

234 Ibid, para 61.
235 See, e.g., ECtHR, Ilaşcu and ors. v. Moldova and the Russian Federation, App No 48787/99 and ECTHR, Cyprus v. Turkey, App No 25781/94.
236 See, e.g., ECtHR, Al Skeini and ors v. the United Kingdom, App No 55721/07, para 134.
237 See, e.g., ECtHR, Ocalan v. Turkey, App No 46221/99; ECTHR, Al-Saadoun and Mufdhi v. United Kingdom, App No 61498/08.
238 ECtHR, Hirsi Jamaa, App No 27765/09, para 81.
239 ECtHR, M.N. v. Belgium, App No 3599/18, para 112.
240 Ibid, paras 121–3.
242 Ibid, 402.
formed or producing effects abroad, matters as well.243 A case before the ECtHR was pending244 at the time of writing where a boat with migrants fleeing Libya was intercepted by the Libyan Coast Guard and persons on board brought back to Libya where they were subjected to human rights violations. The search and rescue operation was coordinated by the Italian Maritime Rescue Coordination Centre (MRCC) that informed all boats near the scene, including a vessel of the Libyan Coast Guard that arrived on the spot. Based on this understanding of jurisdiction, it is argued that Italy’s involvement in elements such as training, funding, and providing material to the Libyan Coast Guard, together with the functional control over a Search and Rescue Area (SAR), exercised by the Italian MRCC under the International Convention on Maritime Search and Rescue,245 created such a jurisdictional link triggering obligations under the ECtHR for Italy regarding alleged violations that had occurred extraterritorially. It remains to be seen whether the ECtHR would adopt such an understanding, evolving its previous case-law. This would certainly help fill part of the gap of judicial scrutiny that has occurred. In the case of EU’s externalisation practices, such an approach would particularly allow practices containing elements of ‘contactless control’ to be scrutinised.

3. PERSPECTIVES

The 2015–16 so-called refugee crisis led the Commission to adopt a policy initiative under the banner of a ‘European Agenda on Migration’ in 2015,246 and thereafter to release in 2016 a barrage of legislative proposals mainly in the area of asylum. The negotiating impasse that followed revealed the depth of the political divisions and legal divergence on how to operationalise EU asylum and migration policies. This led the Commission to relaunch the debate in September 2020 through a new policy vision under ‘a New Pact on Migration and Asylum’ which is a Commission Communication247 accompanied by a series of legislative proposals and soft law instruments248 that have been analysed in depth elsewhere.249

3.1 Missing the Mark of Fair Responsibility Sharing Through Flexible Solidarity?

The lack of fair mechanisms to responsibly share the burden between Member States in EU’s asylum and external border control policies as a matter of legal design and operationalisation is

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243 Ibid, 403.
244 S.S. and Others v. Italy, App No 21660/18, communicated on June 26, 2019.
248 For the relevant legislative proposals see <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN>.
a major deficiency of these policies. The New Pact on Migration and Asylum seeks to amend this reality by embedding a variant of flexible solidarity.

A New Asylum and Migration Management Regulation,\textsuperscript{250} with minor tweaks, retains the allocation criteria of Dublin III, including the ‘first entry criterion’ which is extended to include persons disembarked after Search and Rescue (SAR) at sea operations.\textsuperscript{251} The Pact foresees an extremely complex solidarity mechanism that is activated under three circumstances: (1) following SAR operations,\textsuperscript{252} (2) in situations of ‘pressure’ or ‘risk of pressure’\textsuperscript{253} and (3) in ‘crisis’ situations.\textsuperscript{254}

Flexibility is ensured in the following manner: a Member State can voluntarily contribute by relocating individuals or by conducting ‘return sponsorships’, but also through ‘other contributions’, namely capacity building, operational support or cooperation with third States. It is only where offers are not sufficient that the Commission, through an implementing act, establishes concrete relocation targets per Member State. If relocation offers are limited (i.e. fall short 30 per cent of the target indicated by the Commission) then a more ‘mandatory’ element emerges: Member States are obliged to cover at least 50 per cent of the relocation needs set by the Commission through relocations or ‘return sponsorships’ and only the rest with ‘other contributions’. It is only under ‘crisis situations’ that it is obligatory for Member States to contribute to responsibility sharing through people-sharing, i.e. relocations or return sponsorships. Francesco Maiani has branded in his contribution to the Handbook the whole philosophy underpinning the mechanism as ‘half compulsory’ solidarity.\textsuperscript{255}

Endorsing this smorgasbord of solidarity contributions is problematic for several reasons. The first problem is the lack of comparability between relocation or return sponsorships and ‘other contributions’ itself. Let us take a real-life example: Italy is a Member State arguing that it is under extreme migratory pressure due to the numbers of asylum seekers arriving in its territory from Niger compared to its capacities and to what should be its share of an essentially ‘common responsibility’. It is not straightforward why Italy would consider a contribution from Poland in capacity-building activities in Niger an equitable alternative to relocating asylum seekers from its territory. Instead, what the system currently foresees is a heavy reliance on the Commission to decide which contributions are appropriate in case voluntary pledges are not sufficient.

The second problem is the concept of return sponsorship, a concept that the Pact introduces for the first time. Through return sponsorship a Member State (say Hungary) commits to support another Member State which faces ‘migratory pressure’ (say Greece) in carrying out


\textsuperscript{251} AMMR Proposal, art 21.

\textsuperscript{252} Ibid, arts 47–49.

\textsuperscript{253} Ibid, arts 50–53.


the necessary activities to return irregularly staying third-country nationals. While the individuals are present on the territory of Greece, the latter remains responsible for carrying out the return. However, if return has not taken place after eight months (four months in situations of crisis), Hungary becomes responsible for transferring the migrants in an irregular situation and should relocate them to its territory. Such proposal would appear to be even less acceptable for the Visegrad Member States which opposed the relocation of asylum seekers as it leads to the relocation of irregular migrants that can no longer be returned.

Return sponsorship is mired with operational complexities and fundamental rights compliance concerns. It will be implemented through bilateral administrative cooperation. It is unlikely to be efficient as it will not allow for the creation of economies of scale. It will create additional administrative burdens for the ‘benefitting’ Member State that, instead of one interface (e.g. an EU agency), will have to collaborate with several Member State authorities. In addition, operational support under this framework will not be covered by the enhanced fundamental rights protection layer that has been developed by Frontex including, inter alia, a fundamental rights officer, an individual complaints mechanism, and fundamental rights monitors. It is clear that these mechanisms are not flawless, as the most recent allegations regarding the role of Frontex in pushbacks in Greece highlights. However, their complete absence in an environment of transnational administrative cooperation which dilutes accountability and liability could lead to further human rights violations.

3.2 Entrenching Deflection as a Primary Objective?

The New Pact on Migration and Asylum does not contain any significant novelties in terms of legal entry channels to access protection. On the contrary, it consolidates and enhances deflection strategies at the EU’s external territorial borders. It introduces a screening procedure where identification (identity, health and security check), and referral to either an asylum procedure or a return procedure will take place, or will end in entry being refused. Rather
than constituting a novelty, this procedure mainly consolidates the processes which already take place under different instruments (e.g. Schengen Border Code, asylum acquis).264

Those channelled to an asylum procedure may be subjected to either a normal asylum procedure or possibly a border procedure. Such referral to a border procedure is mandatory in cases of misleading the authorities; constituting a danger to national security and public order; or when holding a nationality with an EU-wide ‘recognition rate’ of 20 per cent or lower.265 This border procedure, applicable for a maximum of 12 weeks, is in essence an accelerated asylum determination procedure, and can also be coupled with the deprivation of liberty of asylum seekers.266 The border procedure is not unknown to national asylum systems. However, it is currently not obligatory, nor is it regulated in such detail by EU law. Rather, the possibility exists under EU law for Member States to introduce such a procedure through national law. If the application is rejected at the end of the border procedure, the failed asylum seeker is subjected to a novel return border procedure.267 Therein lies the ‘seamless link’ between asylum and return at the borders that aims to ‘quickly assess abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union’.268

The deflection logic which imbues the operationalisation of the screening procedure is problematic. First, protection needs are reduced to international protection needs and referral to an asylum procedure, whereas they should include broader forms of vulnerability, for example victims of human trafficking and referral to appropriate care structures. Next, it has been observed, that while emphasis is placed on ill-founded asylum claims and the weeding out of ‘abusers’, no efforts are made for the prioritisation of manifestly well-founded claims.269 The ‘means aspect’ (e.g. facilities, personnel) for effectively running such a process is not appropriately accounted for, risking a repetition of the solidarity deficit conundrum and widely defective conditions currently facing applicants at hotspot areas, such as in the islands of the Eastern Aegean in Greece.270 Finally, accelerated border procedures risk undermining procedural rights due to practical circumstances and logistical constraints (e.g. access to infor-
mation, access to counsel) while facing tight deadlines. Additionally, in all three stages of border procedures (i.e., screening, asylum and return) the instruments blur the lines between deprivation of liberty and restrictions to the freedom of movement, and could lead to the propagation of widespread *de facto* detention. The Pact instruments on the border return procedure, however, contain guarantees for a fairer procedure compared to the European Commission’s 2018 proposal to recast the Return Directive, for example in what concerns can act as the basis of decisions and claims for judicial review.

### 3.3 Legislative Harmonisation as a Vehicle to Water Down Guarantees

Previous legislative rounds in the EU’s asylum and migration policies had mainly aimed at increasing harmonisation levels. However, the third iteration of asylum legislation and the return policy reform seem to have other instrumental goals and, if adopted, will end up watering down a number of procedural guarantees, while also eroding the previous level of harmonisation.

In what concerns the EU’s asylum policy, as Lieneke Slingenberg develops in her contribution to this Handbook, the 2016 Commission proposal for a Reception Conditions Directive, uses the reception of asylum seekers to also coerce asylum seekers to stay in or return to the Member State that is responsible for dealing with their asylum application, a way that is unlikely to yield results as it is questionable whether denying benefits actually serves as an incentive for returning to another country. Legislative instruments connected with the Pact, rather than alleviating the use of exceptional asylum procedures, enhance them such as the border procedures analysed above. Moreover, as aptly elaborated by Jens Vedsted-Hansen in his contribution to this Handbook, newly envisaged border procedures, that is, the *asylum border procedure* linked to a proposed *return border procedure*, are likely to challenge the balance between state interests in expediency and ensuring legal guarantees to correctly identify those persons in need of protection.

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275 See analysis in the contribution of Lieneke Slingenberg in this Handbook.

276 Ibid, as well as Jens Vedsted-Hansen, ‘Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?’ in Daniel Thym and Odysseus Academic Network
With regard to the EU’s return policy, the New Pact on Migration and Asylum diffuses its reform in several instruments. First, as already analysed, it seeks to create a seamless link between the asylum and return policies by introducing a continuum of procedures at the borders whose problematic implications were previously analysed. Next, it retains the model of a single administrative decision for the rejection of an asylum claim and the issuance of a return decision, albeit with slightly enhanced procedural guarantees. This is problematic as it is likely to lead in practice to ‘the reduction of safeguards which are necessary to ensure that Articles 18 and 19 of the EU Charter are not circumvented’. Moreover, in an effort to co-opt Member States reluctant to participate in solidarity, it introduces the concept of ‘return sponsorship’ which we examined previously. As analysed above, this is unlikely to be effective in terms of intra-EU responsibility-sharing, which is compounded by the promise to be problematic in terms of fundamental rights compliance and administrative implementation. In contradiction to the 2018 proposal, the Pact promotes assisted voluntary return as the preferred mode of return and as the object of a European strategy to be presented by the Commission. Overall, as Madalina Moraru concludes in her contribution to this Handbook, while the Pact remedies to a certain extent the fundamental rights shortcomings of the 2018 Commission proposal, it expands the scope of application of return in detriment to asylum rights, for example through the introduction of border return procedures.

3.4 Inadequate Steps to Enhance Labour Migration Management

The proposals in the New Pact on legal migration and enhancing access to the EU’s labour markets leave a lot to be desired. This is despite the fact that the Commission lamented that ‘the EU is currently losing the global race for talent’. The conclusions that the European Commission drew from the large-scale assessment effort of the fitness check are quite limited. Apart from requesting the adoption of the Blue Card proposal which was realised in December 2021, the Commission announced that it will launch a public consultation on the

(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).


281 Commission Communication on a New Pact on Migration and Asylum (n 247), 25.

282 Fitness check on EU legislation on legal migration (n 63).

283 See analysis above in Subsection 2.1.2.2.
The evolving EU asylum and migration law 49

next steps for legal migration.\textsuperscript{284} The only concrete idea related to labour migration is a review of the Single Permit Directive, deeming that it ‘has not fully achieved its objective to simplify the admission procedures for all third-country workers’.\textsuperscript{285} This revision would aim to simplify and clarify the scope of the legislation, including admission and residence conditions for low and medium skilled workers. This clumsy idea to include such provisions in a horizontal instrument such as the SPD which does not establish norms relative to specific categories of workers will provide Member States with an easy argument to oppose such a proposal if the Commission ever presented it. No measures are proposed with regards to the admission of some interesting categories, such as self-employed or entrepreneur migrants, nor is the facilitation of intra-EU mobility touched upon.

On the contrary, the European Parliament adopted in 2021 a resolution and a report on legal migration. It stated in the resolution that it ‘believes that in the medium term, the EU must move away from a sectoral approach and adopt an immigration code setting out broad rules governing entry and residence for all TCNs seeking employment in the Union’.\textsuperscript{286} The EP also pointed out ‘that such an overarching legislative instrument would address the current patchwork of procedures, remove the different requirements laid down across the Member States and provide the needed simplification and harmonisation of rules’, as well as ‘facilitate cooperation between Member States and between the EU and third countries’.\textsuperscript{287} The report is more demanding as the EP uses its right of initiative based on Article 225 TFEU to request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties.\textsuperscript{288} The EP requests ‘the Commission to submit by 31 January 2022 … a proposal for an act that would serve as a package of proposals to facilitate and promote entry into and mobility within the Union for legally migrating third-country nationals applying for work’\textsuperscript{289} and called ‘on the Commission to include, within the legislative act to be adopted, provisions setting up an admission scheme with conditions of entry and residence for low and medium-skilled third-country workers’.\textsuperscript{290}

The interesting policy debate opened by the European Parliament relates to the principle of subsidiarity. There is an absence of a unified EU-wide labour market (evidenced by the limited use that EU citizens make of the freedom of movement of workers) and of a strong EU employment policy that an economic migration policy could complement. These are, on the one hand, strong arguments for leaving the policy in the hands of Member States, while there are, on the other hand, similar arguments to support the mobility of workers inside the EU and increasing its attractiveness by enlarging the labour market beyond the territory of each Member State.

With respect to third-country partnerships and labour market access, the New Pact launches the idea of ‘Talent Partnerships’ which are meant to advance cooperation with partner coun-

\textsuperscript{284} Commission Communication on a New Pact on Migration and Asylum (n 247), 26.
\textsuperscript{285} Ibid.
\textsuperscript{286} European Parliament resolution of 20 May 2021 on new avenues for legal labour migration (2020/2010(INI), point 32.
\textsuperscript{287} Ibid, point 33.
\textsuperscript{288} Report with recommendations to the Commission on legal migration policy and law (2020/2255(INL)), 4 November 2021.
\textsuperscript{289} Ibid, point 2.
\textsuperscript{290} Ibid, Recommendation 2, 15.
tries on mobility and legal migration.\textsuperscript{291} These policy instruments would also create training opportunities in countries of origin, including possibilities of training of non-migrants. As Paula García Andrade cautions elsewhere though, due to the way competences are organised the EU’s intervention will be limited to funding and coordination so that the impact of these schemes will rely on Member States’ readiness to foresee more opportunities for migrants to enter their labour market.\textsuperscript{292} Currently, there seems to be limited political will to move towards such a framework. Instead, cooperation under the external dimension of migration is increasingly instrumentalised to achieve migration management objectives like curbing the movement of asylum seekers to the EU.

The New Pact does not mention the Family Reunification Directive at all, which was adopted almost 20 years ago in 2003. The Commission, in all probability, assessed the political climate and considered that it was not favourable to a recast process aiming at higher standards. If this is understandable due to the current political situation, it weakens the concept of family reunification as an individual right as it remains subject to considerable variations between the EU Member States. The policy dynamic will therefore rely on the case-law of the CJEU, which has been cautious in this sensitive area, as well as on possible infringement procedures that the Commission may eventually launch.

Finally, regarding legal migrants’ rights, the Commission announced in the Pact a ‘revision’ of the LTR Directive ‘in order to create a genuine European LTR status, in particular by strengthening the right of long-term residents to work in other Member States’.\textsuperscript{293} This would be a very welcome development if this revision was adopted by the EU legislator which may not be easy regarding the Council. This added value would boost the number of third-country migrants holding the long-term resident status that has until now been limited because the Member States continue to operate national permit schemes which have substantially the same remit. Instead of the radical solution of prohibiting parallel schemes at the national level which would deprive Member States of the flexibility of their domestic rules, an alternative would be to require them to issue EU LTR permits on top of national permits when applicants fulfil the required conditions for both statuses. This solution entails a certain degree of complexity, but the combination of both statuses into a single administrative act would relieve TCNs from having to acquire two different cards.

3.5 Failing to Acknowledge the Realities of an Integrated Administration?

As analysed above, the emergence of integrated administration as a way to overcome the implementation and solidarity deficits is among the most significant developments in the EU migration and asylum policies since their inception. Therefore, one would have expected a forward-looking policy initiative, like the New Pact, to fully recognise this development as well as move the debate forward. Disappointingly however, there is little innovative thinking

\textsuperscript{291} Commission Communication on a New Pact on Migration and Asylum (n 247), 23.
\textsuperscript{293} Commission Communication on a New Pact on Migration and Asylum (n 247).
in the role of EU agencies and opportunities presented by administrative integration in the framework of the New Pact on Migration and Asylum.

The Commission proclaims, in its communication about the New Pact, the importance of EU agencies in administrative cooperation.\(^{294}\) The Pact legal instruments, however, do not fully embed, or regulate, existing *de jure* and *de facto* developments.\(^{295}\) For example, the proposed amended Asylum Procedures Regulation establishing a border procedure whose workings we analysed above\(^{296}\) is surprisingly silent on the role of EU agencies in general and of the EU Asylum Agency specifically, despite the pivotal role played by this agency in existing national variants of border procedures, such as those implemented in Greece.\(^{297}\)

Instead the Pact’s so-called ‘fresh’ approach is to provide renewed attention to the bilateral or multilateral administrative cooperation between Member States.\(^{298}\) This is illustrated, for example, by the concept of return sponsorship whose workings and challenges we analysed previously.\(^{299}\) Transnational administrative cooperation between the Member States is not inherently negative. However, it is unlikely to prove efficient in policies which essentially seek to provide regional public goods, such as asylum provision, or safeguarding the EU’s external borders, while having respect of fundamental rights. It also seems capable of jeopardising migrants’ fundamental rights even further as illustrated by our analysis on the return sponsorship above.

Other than the workings of EU agencies, another element pointing towards greater administrative integration is the deployment of EU funding for the implementation of the EU’s asylum and migration policies. In this respect too, the New Pact, that is silent about funding, falls short of grasping the administrative realities and implications of the policy proposals put forward. Notably, as analysed by Iris Goldner Lang in detail elsewhere,\(^{300}\) the operationalisation of the instruments of the New Pact as currently designed will entail additional and far reaching financial implications. This is the case especially for Member States at the external borders who will be called to implement the envisaged screening as well as border asylum and return procedures, analysed above.\(^{301}\) The financial framework instruments of the current funding period, that is, 2021–27, are meant to support these additional activities, including through their thematic facility components. It is doubtful whether these instruments will suffice. In this sense, it is likely that the proposed initiatives will be plagued by some of the same problems currently facing the operationalisation of the hotspot approach to migration management in border areas.
3.6 A Way Forward?

A little more than 20 years have passed since the launch of the EU migration and asylum policies born out of the Treaty of Amsterdam. The time has come for a retrospective view starting from a comparison between the Tampere conclusions of 1999 and the New Pact proposed by the Commission in 2020. Since then, migration and asylum issues have almost constantly been at the forefront of the political agenda to the point that one can say that they have become obsessions in a climate of ‘crisis’. This climate peaked in 2015–16, persisted with the rescue or drowning of migrants in the Mediterranean, and extended until the latest crisis of 2021–22 with the instrumentalisation by Belarus of migrants and asylum seekers sent to the borders of Poland and Lithuania as a means to put political pressure on EU Member States.302 Migration and asylum policies are among the first priorities identified by the European Council in its strategic agenda for the period 2019–2024 where one can read that ‘[w]e must ensure the integrity of our territory. We need to know and be the ones to decide who enters the EU. Effective control of the external borders is an absolute prerequisite for guaranteeing security, upholding law and order, and ensuring properly functioning EU policies’.303 One may wonder if it is reasonable to prioritise through this combative language migration and asylum policies over the three other strategic priorities, namely the economy, the climate and European interests and values.

First, it appears when looking back that the issue of solidarity, curiously almost absent in the Tampere conclusions, is finally at the forefront of the European agenda. The mantra that the Dublin system of responsibility determination is the ‘cornerstone’ of the asylum policy that was endlessly repeated during fifteen years has finally been abandoned with the launch of the emergency relocation of asylum seekers between Member States during the 2015–16 crisis. The prominence of solidarity is welcome as there is a need to remedy the unbalanced system created with the Schengen and Dublin conventions, and still in force through the Dublin Regulation, according to which Member States who are unlucky to be located at the borders of the EU bear – at least from a legal point of view – the responsibility of external border control and of the examination of the bulk of the asylum claims introduced in the EU.

It is surprising that it took so long for the EU to decide to address these congenital deficiencies. Even if the Commission proposal regarding return sponsorship seems clumsy, the breakthrough is that solidarity is finally at the top of the political agenda with a quest to implement it in one way or another. It is likely that a combination of different forms of solidarity would yield results. For instance, even without relocation, legislation could establish concrete financial contributions to the asylum and return systems of other Member States, for example to improve reception conditions of asylum seekers in frontline Member States.304 Financial sharing is easier to implement but it would have to be coupled with some variant of relocating people. This could take the form of mutual recognition of positive asylum decisions, coupled

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with variants of free movement rights for recognised beneficiaries, mirroring those pertaining to EU citizens.\textsuperscript{305}

What is clear is that the choice made by the Commission to keep a hierarchy of criteria, including that of the Member State of first irregular entry, as the basis of the new responsibility allocation system under the New Pact,\textsuperscript{306} requires intense solidarity measures to reach a fair sharing of responsibility between Member States as foreseen by Article 80 TFEU. It is important for the EU and its Member States to solve the lack of fair sharing internally and build sustainably common policies on migration and asylum. Not being able to do so would damage their credibility in the international scene. The fact that the Commission did not address the communication on the New Pact to the European Council for endorsement is a sign of the enormous difficulty to reach a consensus between Member States. Normally, the European Council could have facilitated negotiations.

Second, the top priority of the EU in the area has clearly become the fight against irregular migration. This priority was already present in the Tampere conclusions, but it now dominates the policy agenda. The EU’s cooperation with third countries has been reduced to curbing irregular migration and containing the flows of asylum seekers, instead of taking the form of a true partnership that takes into consideration the interests of both sides. One of the pillars of this approach is the new ‘pullback’ model which incentivises transit countries such as Turkey or Libya to contain migrants and refugees on their territory and prevent them from arriving in the EU in exchange for the EU’s financial support. This happens at the detriment of the right to leave a country recognised by international and European human rights instruments. The New Pact’s approach in which fighting irregular migration is a centrepiece of the Commission’s communication is anything but fresh in this regard. When remembering the Tampere conclusions where the ‘European Council reaffirmed the importance the Union and Member States attach to absolute respect for the right to seek asylum’,\textsuperscript{307} one realises how much the policy has evolved. The blatant violations of the principle of non-refoulement currently occurring at Member States’ borders would have been hard to imagine two decades ago.

More broadly, the European asylum policy is vitiated by a profound contradiction. On the one hand, there is a Common European Asylum System underpinned by sophisticated protection standards in line with the high ambition set by the Tampere conclusions. On the other hand, the EU seeks to deflect protection obligations, in particular through its visa policy, by preventing migrants arriving at its territory where they can apply for asylum. The solution of ‘humanitarian visas’ that would allow asylum seekers to travel legally to the EU to seek protection has been promoted by the European Parliament,\textsuperscript{308} but is unacceptable for the other EU institutions. One way forward is the provision of a meaningful number of resettlement places, even if it is not entirely satisfactory as resettlement is a discretionary state act, in contradiction to the individual right to asylum.

The proposals to implement asylum and return procedures at the border are a step further in this logic of containment. They could lead to more notorious hotspots such as Greece’s Moria...
in Lesbos that has become a symbol for the failure of the European policy. The financial and human resources necessary to implement these border procedures are not identified within the New Pact, despite the fact that a shortage could lead to more violations of human rights due to the consequence that Member States would need to detain migrants during long periods, not in line with the length foreseen by the return and reception conditions directives. Despite the EU financial contributions from the instruments under the new financial period 2021–27 already envisaged in the New Pact, more structural forms of EU funding might be necessary. This would require an overhaul of the current system mainly funded by Member States in line with the principle of indirect administration, that is for the moment not envisaged but will become more and more necessary.

Third, there seems to be a decisive turn in what concerns legislative harmonisation, the main component used to build common policies on migration and asylum. Despite initial fears, common legislation has led in many cases to high protection standards for migrants and refugees. Member States have not opted for the lowest common denominator or used common legislation as a vehicle for spreading worst practice. However, some of the Commission’s latest proposals point to the other direction. An illustrative example is the 2018 proposal for a recast Return Directive,\textsuperscript{309} that would represent a step backwards for the rights of returnees if it were to be adopted. The emergence of this ‘backwards harmonisation’ will raise interesting debates with the European Parliament that tends to oppose controversial points of Commission proposals, in particular when they are not accompanied by an impact assessment that the assembly undertakes itself through its research service.\textsuperscript{310} It remains to be seen if the European Parliament would be willing to compromise in this regard under the co-decision procedure.

Fourth, legal migration is the weakest component of the common policy on migration. There is currently no plan to amend the 2003 Directive on Family Reunification that achieved, only, a minimal level of harmonisation which nevertheless prevents Member States to adopt more restrictive rules. Legislation on labour migration at EU level is made of bits and pieces adopted based on an old 2005 policy plan.\textsuperscript{311} Building upon the work by the European Parliament, to support its initiative to request the Commission to present a legislative proposal including provisions on low and medium-skilled workers, by January 2022,\textsuperscript{312} the time has come to open a general debate about labour migration in the European Union.\textsuperscript{313}

Even if it seems logical that, in the absence of a unified European labour market, the legal migration policy largely remains in the hands of Member States, a reflection must be made about how to manage labour migration between the EU and national levels, as well as the type of migrant workers that the EU needs. It is time to end the ‘religious war’ between the positions of the Member States that consider that the EU only needs highly skilled workers and the European Parliament that requests a European global policy for labour migration encompassing all types of medium and non-skilled workers. This should come to an end with a sound

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\textsuperscript{311} Policy Plan on Legal Migration (n 51).

\textsuperscript{312} Report with recommendations to the Commission on legal migration policy and law (n 288).

\textsuperscript{313} OECD, Recruiting Immigrant Workers: Europe, 2016.
debate based on an in-depth study evaluating the real needs of labour markets and the potential role that the EU can play in this area on the basis of the principle of subsidiarity, keeping in mind that the Commission considers, in the context of the New Pact, that, ‘the EU is currently losing the global race for talent’. 314

One element that appears clear in that debate is that progress must be made at EU level to enhance the mobility rights of third-country nationals that are for the moment extremely limited. The adoption of the new 2021 Blue Card Directive for highly skilled workers falls short as it still allows Member States to impose labour market tests to Blue Card holders willing to work in another Member State. The debate that will take place in relation to the Commission proposal announced in the new pact amending the Long-Term Residence Directive aiming at the creation of a genuine European status allowing permanent migrants to benefit from freedom of residence within the EU will test whether it is possible to progress in that direction. One should not forget that this is legally required by the TFEU, even if the relevant provision does not have direct effect. 315

Fifth, there is an open debate on the organisation of executive power between the EU and national levels. The 2015–16 migration ‘crisis’ revealed that Member States are not capable to manage migration flows alone, while the EU is not yet in charge of the execution of EU legislation. This implementation gap is one dimension of the institutional tension that must be addressed. The EU has the tools to do this with agencies such as Frontex and the EU asylum Agency. As previously analysed the New Pact is, unfortunately, not a forward-looking document on the role of EU agencies, that currently jointly implement policy alongside Member States, 316 but could in the future become federal agencies to an extent replacing national implementation.

Overall, we can reflect on a potential paradigm shift in the EU’s migration and asylum policies. The current political priority, the fight against irregular migration, could be progressively replaced by the priority of attracting legal migrants due to the ageing and diminishing demography of EU Member States. 317 Through the Long-Term Residence Directive the EU has already decided that its policy is not based on temporary migration. In the future, it might have to activate its legal migration policy with the aim of attracting migrants to be considered as future European citizens. Even if the EU institutions and agencies are probably not the best suited to manage legal migration and Member States will remain in charge of most aspects of such a migration policy, a European model combining both EU and national levels will need to be reinvented to address the future demographic challenge.

314 Commission Communication on a New Pact on Migration and Asylum (n 247), 25.
315 See TFEU, art 79(2)(b).
316 See analysis above in Sections 2.2.2. and 3.5.