European Solidarity at Crisis? The Case of the Relocation Decisions of 2015

Master of Transnational law

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Key words

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Introduction

In September 2017, the Court of Justice of the European union (CJEU) delivered its judgement in Joined cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*[1] concerning the validity of the Decision 2015/1601 (hereinafter 'contested decision') establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

At the heart of the decision was the principle of solidarity among Member States of the Union. The objective of this dissertation is to understand solidarity in the European Union (EU) legal framework, in primary and secondary law within the Area of Freedom, Security, and Justice (hereinafter 'AFSJ'), and as entrenched in the Common European Asylum System (hereinafter 'CEAS'); and, in the end, the consequences of solidarity in the relocation obligations towards Member States in light with the CJEU's case-law.

The above-mentioned decision was part of several measures taken by the Union to address the 'so-called' migration crisis of 2015, consequently establishing temporary measures in the area of international protection for the benefit of Italy and Greece in accordance with the principle of solidarity and fair sharing of responsibilities among European States. In fact, due to their geographical location, southern countries which have the Union's external borders, such as Italy and Greece, became the main territories affected by the migration inflow because of their proximity to the Mediterranean Sea. Their vulnerable position translated into a massive increase of arrivals of third-country nationals in their territory. Over time, Italy and Greece were not able to address this flow and their asylum systems suffered extreme pressure. The application processes for international protection and the appropriate reception conditions were not being dealt effectively or duly respected. Consequently, their asylum systems collapsed and the entrance of asylum seekers and migrants, through Europe, became impossible to monitor and control.

[1] Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, ECLI:EU:C:2017:631.

The situation that took place in Europe in 2014 and the beginning of 2015 brought an awareness for the need of responses from the EU institutions and Member States, as well international organisations and Non-Governmental Organisations, with Europe calling for internal solidarity and a holistic approach to the migration crisis. [2] In this context, JUNKER, the president of the European Commission stated that *"[w]e need more Europe in our asylum policy. We need more Union in our refugee policy. A true European refugee and asylum policy requires solidarity to be permanently anchored in our policy approach and our rules."*[3] In 2016, JUNKER reiterated that *"[s]olidarity is the glue that keeps our Union together"*.[4]

The truth is that solidarity is one of the Union's cardinal principals and it is stressed throughout its legal framework. However, some Member States – those which are part of the so-called "Visegrad group"[5] – have disregarded this principle, especially due to political reasons whereas other Member States, because of the migration inflow and continuous arrivals of third-country nationals, are asking for more solidarity in the Union. Nonetheless, the latter's claims were neither unanimously nor effectively answered by the EU. The failure of the relocation decisions illustrates the failure to implement solidarity in the European Union.

The decision by the CJEU in *Slovakia and Hungary v Council* is remarkable since it upheld the legal enforceability of solidarity in asylum policies**.** All Member States are bound by EU law obligations, even if those obligations are contrary to their national interests. As a core principle of the Union, solidarity binds its Member States to act in accordance with it. This principle cannot be neglected. On the contrary, it is to be reaffirmed and emphasised by all the Union institutions and its Member States. In fact, without solidarity, the very essence and existence of the EU is at stake.

Taking the above into account, this dissertation is divided into three main chapters. Firstly, I will look at the solidarity principle entrenched in EU primary law, i.e., how the Treaties have established an obligation of solidarity throughout several references and its inter-relation with the principle of sincere cooperation. Secondly, I will address solidarity

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[2] European Parliament, Resolution of 17 December 2014 on the situation in the Mediterranean and the need for a holistic EU approach to migration (OJ C 294, 12.8.2016).

[3] State of the Union 2015: Time for Honesty, Unity and Solidarity, Strasbourg, 9 September 2015, available at http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm.

[4] State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends, available at http://europa.eu/rapid/press-release_IP-16-3042_en.htm.

[5] Check Republic, Hungary, Poland and Slovakia.

within the AFSJ, in particular in light of Articles 67(2) and 80 of the Treaty on the Functioning of the European Union (TFEU). The implementation of solidarity in EU secondary law will be dealt with in the second part. In this scope, and in order to understand how solidarity is realised, it is pivotal to understand the CEAS and its legal framework within which solidarity is operationalised by legislative acts. The following three legislative instruments will be further explained as practical tools of solidarity: *(i)* the Dublin System, *(ii)* the Temporary Protection Directive, and *(iii)* Relocation measures. In the last part of this dissertation, I will deal with the decision by the CJEU in *Slovakia and Hungary v Council* in regards to the establishment of a practical compensatory instrument of solidarity, a relocation mechanism taken in order to address the migration crisis of 2015. It is my intention to better understand the Court's position on solidarity as a guiding principle of the European asylum policies and, more globally, the duties which follow from the aforementioned principle towards the Member States. The judgement of the Court covers several legal issues, however, for the matter of this dissertation, only the substantive pleas relating to the principle of solidarity will be addressed**.**

1. Solidarity as a General Principle of EU Law

1.1 Solidarity in the EU Treaties

The idea of solidarity was an important pillar in the creation of the European project from the very beginning. Robert Schuman, in his speech of 9 May 1950, stated that *"Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a* de facto *solidarity."*[6]

The European integration project was developed on the basis of solidarity as a fundamental value to promote peace and develop integration among European Members. [7]

Solidarity was first stated within the preamble of the Treaty of Paris, which established the European Coal and Steel Community in 1951, *that "Europe can be built only by concrete actions which create a real solidarity"*. In the Treaty of Rome, which established the European Economic Community, the term also appeared in the preamble as *"solidarity which binds Europe and overseas countries, and desiring to ensure the development of their prosperity*". It was further introduced in the preambular part of the Single European Act of 1986 and in the preamble of the Maastricht Treaty (*"to deepen the solidarity between their peoples while respecting their history, their culture and their traditions"*).

The Lisbon Treaty expanded solidarity beyond the references in the preamble, embodying solidarity in several provisions throughout different areas of policies. [8] In this sense, the Treaty of Lisbon transformed solidarity into *"a value binding together Member States and as a value binding together the citizens of each and every Member State"*.[9] As mentioned in Article 2 of the Treaty of the European Union ('TEU'), in which the Union values are upheld, solidarity is placed as one of the Union's foundational values. Article 3 TEU makes several references to solidarity in relation to the Union's objectives and recalls *"solidarity between generations"* and *"solidarity among Member States"*. In the areas of the Union's external action, Common Foreign and Security Policy references to solidarity were emphasised in Articles 21(1), 24(2) and 24(3) TEU. Article 24 (3) TEU recalls the "*spirit of loyalty and mutual solidarity"* and need for the Member States to work *"together*

[6] The Schuman Declaration of 9 May 1959, available at https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.
[7] See A. Sangiovanni, "Solidarity in the European Union", *Oxford Journal of Legal Studies*, 33, 2013.
[8] The reference in the preambular part of the Lisbon Treaty is identical to the one in the Maastricht Treaty.
[9] A. Sangiovanni, "Solidarity in the European Union", *Oxford Journal of Legal Studies*, 33, 2013, p.2.

to enhance and develop their mutual political solidarity." In Article 31 TEU, *"mutual solidarity"* is referred to as the adoption of legislative acts and in Article 32 TEU as the commitment and international actions done by Member States.

In the TFEU, solidarity encompasses all the policies within the AFSJ with Articles 67(2) and 80, and these will be considered below. Solidarity was also placed in economic and energy areas, (cf. Articles 122 and 194 TFEU). More visibly, solidarity was introduced in Title VII of Article 222 TFEU, entitled the *'Solidarity Clause',* which provides that if a Member State is victim of a terrorist attack or natural or man-made disaster, *"[t]he Union and its Member States shall act jointly in a spirit of solidarity'.* Indeed, these references cover *"multidimensional aspects of solidarity".*[10]

Also, the Charter of Fundamental Rights of the European Union (hereinafter, 'The Charter') codified solidarity in its preamble, as "*indivisible, universal values"* and placed the principle in its Chapter IV ('Solidarity'), where several social rights are determined.

Despite all the references mentioned in different constitutional instruments, none of them provide any legal definition of solidarity. In fact, solidarity is a contested concept through its interdisciplinary approaches and there is no single definition for it.

The several references to solidarity in the current Treaties raise several questions of what is meant to be understood by solidarity and its normative force. Furthermore, they are expressed in different policy areas which can be translated into different meanings.

In order to understand what solidarity entails, it is necessary to interpret the normative context in each field of application. Therefore, it is complex to create a single meaning of solidarity, with different approaches leading to conflicting ideas and commitments of solidarity among the Member States and the EU institutions. The truth is that solidarity, as a core, fundamental value of the EU, must be created over time. Similarly, the integration process is one that *"necessarily has to remain unfinished"*.[11] Indeed, *"[t]here is no such thing as solidarity unless it is practiced, regardless of the underlying definition of what it means to act in solidarity"*.[12]

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[10] B. Beutler, "Solidarity in the EU: A Critique of Solidarity and of the EU", in A. Grimmel and S. My Giand (eds.), *Solidarity in the European Union - A Fundamental Value in Crisis*, Cham, Springer International Publishing, 2017, p.30.

[11] A. Grimmel and S. My Giand, "Introduction: Solidarity Lost? The European Union and the Crisis of One of Its Core Values", in A. Grimmel and S. My Giand (eds.), *Solidarity in the European Union - A Fundamental Value in Crisis*, Cham, Springer International Publishing, 2017, p.2.

[12] *Ibid.*

Taking this into account, the intention of this dissertation is not to provide a meaning for solidarity by analysing the historical approaches and the normative concept of solidarity,[13] but to understand solidarity obligations underlying relocation measures, taking into account both EU primary and secondary law within the AFSJ, particularly in light of the case-law of the CJEU. Nonetheless, I will start by explaining the meaning of solidarity as expressed in the Treaties, particularly within the AFSJ; afterwards I will address solidarity as entrenched in the CEAS; and, lastly, the consequences of solidarity in the relocation obligations towards Member States in light with the CJEU's case-law.

1.2 Solidarity and the Principle of Sincere Cooperation

KÜÇÜK states that "*the principle of loyalty is one of the most evident expressions of the Member States' commitment to solidarity."*[14] In order to comprehend solidarity in the EU, it is essential to additionally understand the principle of sincere cooperation (also known as loyalty or the loyalty principle), which is intertwined with and strictly related to solidarity. Both have also been crucial for the development of European integration.

The principle of sincere cooperation is placed in Article 4(3) of TEU, which reads:

> *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*."

The principle of loyalty binds the "*Union and the Member States"* to duties of respect, mutual assistance, and cooperation. It creates a positive obligation where the Union and its Member States are to carry out the obligations established in the Treaties. In the second paragraph, it recalls Member States "*to take any appropriate measures"* in order to

[13] For more see: M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union*, Oxford, Oxford University Press, 2010; and A.Grimmel and S. My Giand (eds.), *Solidarity in the European Union - A Fundamental Value in Crisis*, Cham, Springer International Publishing, 2017.

[14] E. Küçük, "Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?", *Maastricht Journal of European and Comparative Law*, 23, 2016, p.974.

fulfil positive obligations "*arising out of the Treaties or resulting from the acts of the institutions of the Union."* In paragraph 3, the principle creates a negative obligation, where Member States *"shall (...) refrain from any measure which could jeopardise the attainment of the Union's objectives*."

Member States must fulfil obligations that arise from their membership to the EU. As Article 4(3) TEU settled, Member States have agreed to comply with primary and secondary obligations. Therefore, a legal obligation to act within solidarity stems from the principle of sincere cooperation since solidarity is placed as a value and objective of the Union. In the earlier case-law of the CJEU, in *Commission v. France,* the principle of loyalty was already interconnected with solidarity.[15] In this case, France adopted unilaterally state aid rules in the exercise of its reserved competences which could not neglect the principle of loyalty. The CJEU affirmed that:

> *"[t]he solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty, is continued for the benefit of the States in the procedure for mutual assistance provided for in Article 108 where a Member State is seriously threatened with difficulties as regards its balance of payments".*[16]

Similarly, in *Commission v Italy*, where Italy failed to adopt a community system concerning the Common Agricultural Policy, the CJEU held that:

> *"[t]his failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order."*

Even if against its *"own conception of national interest",* Member States must act in accordance with EU law.[17]

The principle of sincere cooperation and the principle of solidarity have been confused and there are those who argue that there are no legal differences between them or claim that the former is an expression of the latter.[18] However, the principle of sincere cooperation addresses the vertical relations of the Union and its Member States, as well as the horizontal dimension regarding relations among Member States. Notwithstanding, the principle of loyalty is more observant of the vertical dimension of the Union and its Member

[15] Joined Cases 6/69 and 11/69, *Commission v. France*, EU:C:1969:68.
[16] *Ibid.*, para.16.

[17] Case 39/72, *Commission v. Italy*, EU:C:1973:13, paras. 24 and 25.

[18] See M. Klamert, *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014, p.35-41.

States, therefore, obligations that arise from the EU institutions to the Member States.[19] The principle of sincere cooperation is one of the main principles which guides this vertical relation, whereas solidarity by its references in the Treaty mainly addresses the horizontal relationship between Member States, called "interstate solidarity". There are other dimensions of solidarity, however for the matter of this dissertation, interstate solidarity, also named as state-centred solidarity, is the one in question.[20]

Moreover, solidarity entails political components in contrast with loyalty which *"does not apply to the political decision-making in the Council. It does, however, bind the Union institutions in both procedural and legal basis matters."*[21] As will be shown, solidarity is applied within the decision-making process when developing policies in the EU.

Similarly, the principle of mutual trust is also strictly related to solidarity. For instance, mutual trust was at the heart of the Schengen Agreement when internal boarders were open, as well as throughout the development of the CEAS. Member States also trust each other on the fulfilment of their obligations imposed by EU primary or secondary law.

Even without a clear notion of solidarity, it undoubtedly entails and is complemented by loyalty and mutual trust among its Members, so "*solidarity interlocks, but does not overlap, with the principles of loyalty and mutual trust."*[22]

1.3 Solidarity within the Area of Freedom, Security and Justice: Articles 67(2) and 80 TFEU

Solidarity is mentioned in EU primary law within the field of the AFSJ, particularly Articles 67(2) and 80 TFEU. The ASFJ is established in Title V of Part III of TFEU. It covers policies of visa and border controls, irregular migration, legal migration, asylum, and judicial cooperation in criminal and civil matters and police cooperation.

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[19] "*Union loyalty is less about the (horizontal) bond between individuals or states and more about defining the vertical relationship between the Union and the Member States*.", in M. Klamert, *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014, p.40.

[20] For the different dimensions of solidarity see: M. Knodt and A. Tews, "European Solidarity and Its Limits: Insights from Current Political Challenges", in A. Grimmel and S. My Giand (eds.), *Solidarity in the European Union - A Fundamental Value in Crisis*, Cham, Springer International Publishing, 2017, p.48-55.

[21] M. Klamert, *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014, p.84.

[22] D. Thym and E. Tsourdi, "Searching for solidarity in the EU asylum and border policies: constitutional and operational dimensions", *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p.612.

The AFSJ has been subject to significant policy and institutional developments. These policies belonged to the Member State's sovereignty until 1991, with Member States having exclusive control over these sensitive areas, at the time the area of 'Justice and Home Affairs' (hereinafter 'JHA') which included the policies of asylum, immigration, and third-country nationals.

JHA policies were included in the Union's constitutional framework at the time of the Maastricht Treaty which, based on a pillar structure, placed JHA issues within its third pillar.[23] Afterwards, in Amsterdam, some of the policies included in the JHA competences were moved into the first pillar, that of the European Community. The Lisbon Treaty abolished the pillar structure and, in 2009, the JHA policies were again reunited, this time under the head of the European Union in the AFSJ, now placed in Title V of Part III of TFEU, as previously mentioned.[24] Since then, under Articles 2(2) and 4 (2)(j) TFEU, the ASFJ become a shared competence between the Union and its Member States.

The principle of solidarity has been implied in the construction and evolution of the AFSJ. In fact, solidarity has been present in documents that have developed the AFSJ such as the Tampere conclusions in 1999[25], the Hague Programme in 2004[26], the European Pact on Immigration and Asylum in 2008[27], and the Stockholm Programme in 2009[28].

Solidarity was first mentioned in Article 63(2)(b) of the EC Treaty, which introduced a vague formulation implying the principle of solidarity as: "*promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons"*. Later, in the drafting of the Treaty for a Constitution for Europe, the European Convention working group suggested the inclusion of solidarity within the area of JHA. Despite the Constitutional Treaty not being successful, in 2009 the Lisbon Treaty included the principle of solidarity in Article 67(2) and 80 TFUE.

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[23] The Treaty of Maastricht created the European Union established on three pillars: *i)* the European Communities; *ii)* the Common Foreign and Security Policies; and *iii)* Cooperation in the fields of justice and home affairs.

[24] For the evolution of JHA see: S. Peers, "Mission accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon", *Common Market Law Review,* 48, 2013, p.661-693.

[25] *E.g.*, Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, SN 200/99.

[26] Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005 (OJ C 53/1).

[27] Council of the European Union, European Pact on Immigration and Asylum, EU Doc. 13440/08, 24 Sep. 2008.

[28] Council of the European Union, The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, 2010 (OJ C 115/1).

On the one hand, within the general provisions of AFSJ, Article 67(2) makes a reference to solidarity, stating that:

> "*It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals."*

The provision covers the subfields of the common policy on migration issues: border checks, asylum, and immigration. The Article recalls a common approach of the Union which must be based on solidarity among Member States (the so-called "interstate solidarity"). It makes a general reference to solidarity where the Union shall develop a common policy action in the spirit of solidarity between Member States. As someone has put it, said Article "*plays a programmatic role, offering political directions"*, but it does not create binding legal obligations due to its general character.[29]

On the other hand, Article 80 of TFEU has a much more complex legal structure than the provision of 67(2) TFEU. In order to better understand this Article, we must address its main components. According to Article 80 TFEU, reads as follows:

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

The provision settles the principle of solidarity and fair sharing of responsibility. It applies to policy areas on border checks, immigration, and asylum established in Articles 77 to 79 of TFEU.

Thus, Article 80 creates a positive obligation for the EU Institutions and Member States in agreement with which they must act according to the principle of solidarity and ensure the fair sharing of responsibilities when developing and implementing the common policy on border checks, immigration, and asylum. Furthermore, it creates concrete duties such as the creation of measures that give the appropriate effect to the principle *"whenever*

[29] E. Tsourdi, "Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System", *Maastricht Journal of European and Comparative Law,* 24(5), 2017, p. 672.

necessary". [30] The last sentence of the provision recalls the principle of proportionality and subsidiarity, therefore, solidarity measures must be balanced with other constitutional principles of the Union. [31]

This provision does not bind EU institutions to any specific measure, but they are bound to promote solidarity and fairness in burden sharing. Thus, the European legislator has a large margin of discretion when putting into effect the principle of solidarity through secondary law, since the wording in this Article is generally vague and abstract.[32] In that regard, Article 80 TFEU provides a guideline to the European legislator for the operationalisation of solidarity, depending on the specific circumstances.[33] Solidarity can be operationalised in different ways, although the provision refers to only one of the several expressions of solidarity: financial solidarity. The *"financial implications"* imply the burden sharing of costs of the common policy among Member States, a material element that has always been a constituent part of the notion of solidarity.[34]

Article 80 TFEU applies both to the Union Institutions and its Member States. As MORENO-LAX concluded: "*[t]he article not only provides a general framework for political deliberations and policy decisions, as a programmatic guideline of sorts, but constitutes a central structural imperative requiring the Union to act to guarantee suitable (solidarity-proof) outcomes".*[35] Solidarity measures depend on the implementation and reliance of the Member States, consequently, the Member States acting independently within the framework established by the Union must fulfil their legal obligations of solidarity and fair sharing of responsibilities.[36]

The role played by sincere cooperation and mutual trust among Member States is essential when implementing solidarity. Article 80 TFEU should be read jointly with Article 4(3) TEU of the principle of sincere cooperation since Member States must comply and implement Union law and should not jeopardise its objectives by strengthening solidarity and fair sharing actions. As highlighted in the paper by the European Commission on

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[30] *Ibid.*
[31] *Ibid.*, p.675.
[32] E. Küçük, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", *European Law Journal,* 22, 2016, p.454-456.
[33] E. Karageorgiou, "The Law and Practice of Solidarity in the CEAS: Article 80 TFEU and its Added Value", *European Policy Analysis Issue,* 14, 2016, p.10.
[34] J. Bast, "Deepening Supranational Integration: Interstate Solidarity in EU Migration Law", *European Public Law,* 22, 2016, p. 293.
[35] V. Moreno-Lax, "Solidarity's reach: meaning, dimensions and implications for EU (external) asylum policy", *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p.751.
[36] E. Karageorgiou, "The Law and Practice of Solidarity in the CEAS: Article 80 TFEU and its Added Value", *European Policy Analysis Issue,* 14, 2016, p.6.

enhanced intra-EU solidarity in the field of asylum: *"[t]he success of the Union's solidarity measures depends on the engagement and cooperation of all stakeholders."*[37]

As mentioned before, the provision of Article 80 TFEU associated solidarity with fair sharing of responsibilities, despite these being two different concepts. However, the provision mentions one single principle, solidarity and fair sharing of responsibilities. The responsibility emphasised in the Article means that it can be shared by the Member States since *"it relates to the part of the common burden and the joint effort required to obtain a common objective."*[38] As MORENO-LAX affirms, the provision establishes *"the general value-principle of solidarity and fair sharing of responsibility within EU asylum policy"* which means that both concepts are linked, since Article 80 entails the general principle of solidarity as a motivating factor for the fair sharing of responsibility, the latter being the consequence of the former.[39] Therefore, solidarity must be accomplished by fair sharing responsibilities among Member States.

The concept of fair sharing is also contested because it is related to notions of justice and equity which gives the European legislator some margin of discretion.[40] KÜÇÜK argues that the fairness element "*somewhat amplifies the concept of solidarity and defines its nature and limits."* Therefore, the policies taken by the legislator are decided in regards to the specific case, where interests must be balanced in order to prevent inequalities.[41] This element establishes an obligation of result, according to which each Member State has to contribute to the fair share of responsibilities and they must be reasonably shared among the Member States.[42] TSOURDI affirms also that *"the fair-sharing of responsibility makes solidarity in asylum policy a 'solidarity plus'"*.[43]

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[37] COM(2011) 835 final, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, A EU agenda for better responsibility-sharing and more mutual trust, Brussels, 2.12.2011, p.13.

[38] H. Rosenfeld, "The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU" (March 31, 2017), in: Mitsilegas V, Moreno-Lax V and Vavoula N (eds): *Securitising Asylum: Extraterritoriality and Human Rights Challenges*, Brill 2017, Forthcoming. Available at SSRN: https://ssrn.com/abstract=2944116.

[39] V. Moreno-Lax, "Solidarity's reach: meaning, dimensions and implications for EU (external) asylum policy", *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p.751.

[40] P. De Bruycker and E. Tsourdi, "The Bratislava Declaration on migration: European irresponsibility instead of solidarity", available at http://eumigrationlawblog.eu/the-bratislava-declaration-on-migration/ (last accessed on 27 July 2018).

[41] E. Küçük, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", *European Law Journal*, 22, 2016, p.455- 458.

[42] E. Tsourdi, "Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System", *Maastricht Journal of European and Comparative Law,* 24(5), 2017, p.673-674.

[43] *Ibid.*

The CJEU was called to provide some guidance to Article 80 TFEU, in the context of the Dublin System, which will be analysed below. In *Halaf*, an Iraqi national applied for asylum in Bulgaria, but had previously lodged an asylum application in Greece. Therefore, under the Dublin Regulation II, he should have been transferred to the Member State where he first lodged his application. The Bulgarian authorities did not consider his asylum application and returned him back to Greece. The Iraqi national appealed. The Bulgarian National Court referred a preliminary reference asking whether the sovereignty clause of Dublin Regulation II was to be interpreted under the scope of Article 80 TFEU, regardless of the absence of any provision in the Dublin Regulation concerning said Article.[44] The CJEU refrained entirely from mentioning Article 80 TFEU and the principle of solidarity and fair sharing of responsibility by referring to the question that *"the exercise of that option is not subject to any particular condition"* (cf. para. 36). It mentioned the preparatory documents of that regulation where it was established that *"the rule in Article 3(2) of the Regulation was introduced in order to allow each Member State to decide sovereignly, for political, humanitarian or practical considerations, to agree to examine an application for asylum even if it is not responsible under the criteria in the Regulation."* (cf. para. 37). Therefore, the CJEU merely responded whether *"a member state could process an application under the sovereignty clause"*, and not to the question *"whether it should do so under certain conditions",* pursuant to Article 80.[45]

In *N.S*, two applicants were returned to Greece due to the rule of automatic transferences established in Dublin Regulation II, based on the principle of mutual trust among Member States. The CJEU held that:

> *"[a]rticle 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."*[46]

Furthermore, the CJEU concluded that the fundamental rights of asylum seekers might be at risk with the system of automatic returns.[47] In this judgement, the CJEU mentioned Article 80 TFEU as governing EU asylum policies but did not develop it further. Nevertheless, as affirmed by KÜÇÜK, even if the Court has refrained from interpreting the

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[44] Case C-528/11, *Halaf*, ECLI:EU:C:2013:342, para. 25(1).

[45] E. Küçük, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", *European Law Journal,* 22, 2016, p. 464.

[46] Joined Cases C 411/10 and C 493/10, *N.S. and M.E.*, EU:C:2011:865, para.93.

[47] *Ibid.*, see paras. 81,86, 94, 99,100 and 104.

EU asylum law in light of the above provision, the principle must serve as "*a standard of review and as an interpretation tool"*.[48]

The development of Article 80 TFEU as a legal basis for the establishment of solidarity mechanisms will be seen further in Chapter 3, in *Slovakia and Hungary v Council.* However, the implementation of solidarity in the European Asylum Policy will be addressed first.

2. Implementation of Solidarity in the European Asylum Policy

After analysing solidarity expressed in EU primary law, it is now pivotal to understand the CEAS and how solidarity has been realised within this system. Solidarity has been defined as a constitutional value and a guiding principle of the European asylum law. [49] As seen above, in accordance with Article 80 TFEU, the CEAS must implement and realise solidarity through different tools and instruments. However, as will be shown below, some of these instruments do not promote solidarity. Indeed, they create an imbalance of burdens among Member States and, as a result, compensatory measures are required to be taken by the Union. Thus, solidarity has prevailed as an emergency-driven policy instead of one for governing the common area.

2.1 The Common European Asylum System

The CEAS is the Union's legal framework which governs asylum of third-country nationals in the EU. The aim of the CEAS was to harmonise common standards for asylum seekers within the national legislation of Member States, reducing the differences between national legal systems. The EU framework reflects international obligations under International Refugee Law, namely the 1951 Geneva Convention and its 1967 Protocol.

[48] E. Küçük, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", *European Law Journal,* 22, 2016, p. 463-464; see also: V. Mitsilegas, "Solidarity and Trust in the Common European Asylum System", *Comparative Migration Studies,* 2, 2014, p.189.

[49] "*Solidarity is one of the fundamental values of the European Union and has been a guiding principle of the common European asylum policy since the start of its development in 1999."*, in COM(2011) 835 final, p.2.

The asylum jurisdiction within the EU was implemented gradually, with the Schengen Agreement in 1985 introducing some initial rules regarding asylum and migration issues. When the Union decided to create the single market, the freedom of movement of persons (EU citizens) was established among the Union. Meanwhile, the Schengen Area was created where some Member States agreed to the removal of internal border controls and people started to move freely within the territory of the Union. [50] Consequently, there is a link between the asylum and migration policies since the external European borders led to common borders to all the Member States and therefore, third-country nationals entering into the EU and decisions granting asylum or international protection became a common concern to all Member States. Therefore, a common and coordinated response was needed: a European asylum system.

In this ambit, the Dublin Convention adopted in 1990 focused on the responsibility of Member States for asylum claims. Later, in 1999, in the so-called 'Amsterdam era', the Union decided to create a 'Common European Asylum System', at the Tampere European Council. The Union established two phases in order to achieve said common policy. The 'first phase' of commitments through legislation was made between 2003 and 2005, with the adoption of the Directives on reception conditions, procedural rules, the content and qualification of refugees, subsidiary protection status, and the so-called "Temporary Protection Directive".[51] The Dublin Regulation II, a reform of the Dublin System, emerged in 2003 and a complemented regulation was adopted, creating the EURODAC database. In 2004, a second phase was initiated within the Hague Programme with the aim of concluding the establishment of the CEAS by 2010. However, this was postponed until 2012.

Additionally, an asylum policy plan was presented, in 2008, by the European Commission with three main objectives: *(i)* to widen the scope and the harmonisation of the EU legislation, *(ii)* to create an EU agency for practical and effective cooperation, and *(iii)* to increase interstate solidarity and responsibility among the Member States and also non-EU countries.[52]

[50] Therefore, also non-EU citizens can cross internal borders without being subject to border checks.

[51] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7.8.2001).

[52] COM(2008) 360 final, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy plan on asylum, An integrated approach to protection across the EU, Brussels, 17.6.2008.

The Lisbon Treaty introduced the objectives established in Tampere in the EU primary law by means of Article 78 TFEU. This article is the legal basis for the development of the CEAS and reads:

> *"The Union shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement."*

The adoption of the Stockholm Programme in 2009 highlighted the commitment of establishing "*a common area of protection and solidarity based on a common asylum procedure and uniform status for those grated international protection"*.[53] A stronger and harmonised framework was settled with higher standards of protection of human rights and cooperation in order to achieve a fairer system, reducing the differences and treatment among Member States given to asylum seekers by a uniform application of asylum policies and solidarity among Member States. Therefore, the legal framework of the CEAS was revised, and a new Dublin Regulation III adopted in 2013.

Since then, due to the unprecedented migration crisis of 2015, the European Commission proposed a reform of the CEAS in 2016, *"in order to move towards a fully efficient, fair and humane asylum policy – one which can function effectively both in times of normal and in times of high migratory pressure."*[54]

Lastly, in the most recent European Council meeting, on 28 July 2018, the reform of the CEAS was again discussed among European leaders and the conclusion reached was that "*[a]s regards the reform for a new Common European Asylum System, much progress has been achieved thanks to the tireless efforts of the Bulgarian and previous Presidencies. Several files are close to finalisation. A consensus needs to be found on the Dublin Regulation to reform it based on a balance of responsibility and solidarity, taking into account the persons disembarked following Search And Rescue operations. Further examination is also required on the Asylum Procedures proposal. The European Council*

[53] Council of the European Union, The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, 2010 (OJ C 115/1).

[54] European Commission, Press release, July 2016, Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy, available at http://europa.eu/rapid/press-release_IP-16-2433_en.htm.

underlines the need to find a speedy solution to the whole package and invites the Council to continue work with a view to concluding as soon as possible."[55]

In light of the above, there are currently five main pieces of secondary law composing the CEAS: the revised Asylum Procedures Directive[56], the revised Reception Conditions Directive[57], the revised Qualification Directive[58], the revised Dublin Regulation[59], and the revised EURODAC Regulation[60]. From these, only three legislative instruments which are part of the CEAS and intend to promote and enhance the principle of solidarity will be analysed in the next section.

2.2 Operationalisation of Solidarity

In light of the above, there are several instruments and tools which are intended to promote and enhance solidarity and the burden-sharing of responsibilities.[61] Among them there are legislative mechanisms that are practical tools of solidarity, some of which will be addressed in the next section, specifically: the Dublin System, the Temporary Protection Directive, and relocation mechanisms. As will be shown, the Dublin System, which is the cornerstone of the CEAS, is not a system designed to share the burdens of migration among Member States and does not effectively implement solidarity. In reality, the "rule of State of

[55] European Council Conclusions, 28 June 2018, available at http://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/pdf.

[56] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013).

[57] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29.6.2013).

[58] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011).

[59] 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 (OJ L 180, 29.6.2013).

[60] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 (OJ L 180, 29.6.2013).

[61] As financial solidarity and Institutional building.

first entry" being the default rule creates serious imbalances between Member States. As, the responsibility for asylum seekers is based on a geographical criterion, Southern and Eastern Member States are disproportionally affected by migration inflows since they have the Union's external borders.

The asymmetries that Dublin generates among Member States created the need of establishing compensatory measures. Compensatory measures have at its core content the operationalisation of interstate solidarity. Relocation mechanisms were an example of intra-compensatory measures used to address the migration crisis of 2015, by physical burden-sharing. However, solidarity instruments depend on the political will and cooperation of the Member States to be fully efficient.

2.2.1 The Dublin System

As previously mentioned, the Dublin System is the cornerstone of the CEAS framework, having been established with the Dublin Convention of 1990, succeeded by the Dublin II (2003) and amended by Dublin III (2013).

The Dublin Regulation determines which Member States are responsible for processing an asylum application and it is a political allocation of individual responsibility between Member States. The responsible Member State has the duty to examine and decide the asylum process, with the criterion for jurisdiction based on family links, certain documentation, the place of entry, or where the first application was lodged.[62] The Member State of first entry is the default rule for the allocation of responsibility.[63]

The system aims to guarantee the right to effective access to the asylum procedure and to prevent "forum shopping".[64] Therefore, one asylum seeker can only apply in one territory of the EU and in the event that there is a secondary movement to another Member State, he can be sent back to the country of the first entry. His preference is not an applicable criterion. If the application is rejected under that EU territory, the rejection is valid throughout all Member States.

As mentioned above, the default rule aggravates the asymmetries between the states of the European Union due to geographical differences, and some Member States have

[62] Articles 3, and 7 to 15 of Regulation 604/2013.

[63] Article 13(1) of Regulation 604/2013.

[64] Understanding as multiple applications in the EU territory from the same person.

become responsible for a disproportionate number of applications. The "rule of State of first entry" only intensifies the burden that is taken by the Member States with a favourable position for the entrance of third-country nationals. Thus, the default rule "*allocates responsibilities on the basis of the arbitrary geographical location of a country"* [65], as the key criterion of responsibility.

In this light, the Dublin System is a source of huge controversy. Earlier in 2007, the Green Paper on the Future Common European Asylum System presented by the European Commission, stated that *"the Dublin System may* de facto *result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location."*[66] Many academics have raised several concerns regarding the Dublin System and the principle of solidarity and fair sharing of responsibilities of Article 80 TFEU.

Thus, according to BAST, the Dublin Regulation not only creates a system which is not based on solidarity, but can also be regarded as an infringement to Article 80 TFEU. If the EU institutions continue to not respond to the failure of the system by creating additional solidarity measures to correct and compensate for the failure of Dublin*, "their inaction would thus be illegal",* since "*[i]rrespective of the broad measure of discretion of the EU legislature in its choice of the appropriate means, this infringement of the Treaty would provide a basis for action for failure to act pursuant to Article 265 TFEU."*[67] MAIANI recalls that the Dublin System fails to comply with its objectives and it *"generates adverse effects for both asylum seekers and the operation of the CEAS."*[68] GOLDNER LANG concludes that the Dublin System *"creates a burden-shifting rather than a burden-sharing mechanism."*[69] Nevertheless, the necessity "*to strike a balance between responsibility criteria in a spirit of solidarity"* is emphasised in the preambular part of the Dublin Regulation III, notably in Recital 25.

The truth is that the responsibilities regarding asylum procedures and duties are considered differently by the Member States, thus creating an imbalanced system. Solidarity

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[65] E. Küçük, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", *European Law Journal*, 22, 2016, p.459.
[66] COM(2007) 301 final, European Commission, Green Paper on the future Common European Asylum System, Brussels, 6.6.2007, p.10.
[67] J. Bast, "Deepening Supranational Integration: Interstate Solidarity in EU Migration Law", *European Public Law,* 22, 2016, p.297.
[68] F. Maiani, "The reform of the Dublin-system and the dystopia of ''sharing people''", *Maastricht Journal of European and Comparative Law,* 24(5), 2017, p.625.
[69] See I. Goldner Lang, "Is There Solidarity on Asylum and Migration in the EU", *Croatian Yearbook of European Law and Policy,* 9, 2013, p.13.

and fair sharing of responsibilities are crucial for the efficiency of the CEAS, and the case-law having already emphasised deficiencies of the Dublin System, as well as breaches on the fundamental rights.[70]

As seen in the 2015 migration crisis, compensatory measures had to be taken by the Union institutions due to the failure of Dublin. That fact "*demonstrates a paradoxical dual role the Union institutions are asked to fulfil: on the one hand, they are called on to implement the common policies which cause the need for a correction in the first place, but on the other hand they are also responsible for making those very corrections based on solidarity."*[71] The European Commission has already prepared a reform, the Dublin IV proposal, in order to revise and reform the current system. [72]

The Dublin IV Proposal intends to better regulate the responsibilities of Member States regarding asylum applications by ensuring solidarity and fair sharing of responsibilities. Notwithstanding, the controversial "rule of State of first entry" is still sustained in the proposal, *"[t]he current criteria for the allocation of responsibility are essentially preserved"*, although *"targeted changes are proposed, notably to strengthen family unity under Dublin by extending the family definition"*. [73] Therefore, there are new rules on the allocation of responsibility of Member States regarding family ties.

Moreover, the proposal creates a corrective allocation mechanism that shall complement the criteria set out in Dublin IV. In a situation when a Member State is dealing with a disproportional number of applications, the mechanism would be activated automatically. Therefore, *"[i]t should mitigate any significant disproportionality in the share of asylum applications between Member States resulting from the application of the responsibility criteria"* and *"ensuring an appropriate system of responsibility sharing between Member States."*[74]

This new mechanism is similar to the ones established in the decisions on relocation taken in 2015. The corrective allocation mechanism is also "*based on a reference key,*

[70] See *M.S.S. v Belgium and Greece*, Application no. 30696/09, ECtHR, 21 January 2011; and Joined Cases C 411/10 and C 493/10, *N.S. and M.E.*, EU:C:2011:865.

[71] J. Bast, "Deepening Supranational Integration: Interstate Solidarity in EU Migration Law", *European Public Law,* 22, 2016, p.303.

[72] COM(2016) 270 final, European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Brussels, 4.5.2016.

[73] See Chapter III, Articles 9 to 12 of the new proposal.

[74] See p.18 and 14 of the new proposal.

allowing for adjustments in allocation of applicants in certain circumstances"[75], however, the new scheme is to be permanently considered. [76]

The most recent meeting of the European Council stressed that *"consensus needs to be found on the Dublin Regulation to reform it based on a balance of responsibility and solidarity"*.[77]

2.2.2 The Temporary Protection Directive

The Temporary Protection Directive is part of the CEAS' legal framework. It was an exceptional measure established at the time of the conflicts in the former Yugoslavia, in the Kosovo refugees' crisis of 1999 with the purpose of burden sharing responsibilities.[78]

The provision of Article 25 of the Directive recalls *"a spirit of Community solidarity"*. The principle of solidarity is the rationale behind the directive. Furthermore, as specified in Recital 20 of the Directive, the objective is "*the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons"*, which is in accordance with Article 80 TFEU. In *N.S,* when referring to the relevant EU legislation in the CEAS concerning the principle of solidarity and fair sharing of responsibility among Member States, the CJEU mentioned the Temporary Protection Directive as an example of a solidarity mechanism.[79]

However, the Directive only settles minimum standards for giving temporary protection to third-country nationals who cannot return to their home in the event of a mass influx of displaced persons. Moreover, the Directive merely provides a solidarity mechanism for Member States when facing a situation of a massive inflow of people arriving in their territory. The mechanism consists in the physical relocation of beneficiaries of temporary protection to another Member State. The mechanism is based on the principle of

[75] See Recital 31 to 35; and Chapter VII, Articles 34 to 43 of the new proposal.

[76] For more see F. Maiani, "The reform of the Dublin-system and the dystopia of ''sharing people''", *Maastricht Journal of European and Comparative Law*, 24(5), 2017.

[77] European Council Conclusions, 28 June 2018, available at http://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/pdf.

[78] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7.8.2001).

[79] Joined Cases C 411/10 and C 493/10, *N.S. and M.E.*, EU:C:2011:865, paras. 12 and 93.

volunteerism, which allows Member States to establish their quotas in accordance with their capacity to receive those persons, and the person to be transferred must also consent it.[80]

Despite the migration crisis of 2015, the Directive which is based on solidarity was not applied. As a consequence, the European institutions, under their discretionary power, have decided to establish different solidarity mechanisms. In their view, a voluntary mechanism would have not been enough to address the crisis, as will be seen below in *Slovakia and Hungary v Council.*

2.2.3 The Relocation Measures

Relocation measures are considered to be the resettlement of beneficiaries or applicants for international protection in a different Member State from the one that was previously responsible for handling his application, under the Dublin System. The Member State of relocation is responsible for the beneficiary or applicant by taking integration measures or by examining the application procedure.

Relocation schemes have been established as *ad hoc* measures of limited duration, being used in emergency situations where Member States' capacities are exhausted due to the disproportionate burdens that have been imposed on them. Therefore, these measures have a compensatory logic inherent to the solidarity principle, mostly due to the impacts of the Dublin System and geographical location. However, relocation measures have in practice a limited scope due to political factors and the willingness of the Member States.

In 2009, the EUREMA project was implemented in Malta as a Pilot Project for intra-EU Relocation.[81] The objective of the project was to assist Malta in preparing and implementing the relocation of recognised beneficiaries of international protection to other Member States. It was based on the principle of "double voluntariness" – from the participating countries and the beneficiaries. The EASO fact finding report on intra-EU relocation activities from Malta, concluded that "*most respondents maintained that participation in relocation should remain voluntary, based on a political decision."* [82]

[80] Article 25 and 26 of the Directive 2001/55.

[81] For more see: European Asylum Support Office, "EASO fact finding report on intra-EU relocation activities from Malta", July 2012, available at http://www.refworld.org/docid/52aef8094.html (last accessed on 27 July 2018).

[82] *Ibid.*, p. 17.

In 2015, during the migration crisis, **t**he Council adopted two relocation decisions in for the benefit of Greece and Italy. These decisions aimed to reinforce internal solidarity between the EU Member States and the commitment of the Member States to share the migration burden.

The first relocation decision was drafted on a voluntary basis providing for relocation mechanisms of 40 000 persons from Italy and Greece.[83] In addition, another decision for a relocation mechanism was taken by the Council, creating a binding system based on fixed quotas to relocate a number of 120 000 persons. [84] The relocation decisions were adopted under the provision of Article 78(3), which reads:

> *"In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."*

Article 78(3) TFEU, a specific provision to deal with emergency conditions caused by a sudden inflow of third-country nationals, is an exceptional provision by nature, triggered by the EU institutions due to the Mediterranean crisis and establishing a relocation mechanism in light of Article 80 TFEU. The measures taken under Article 78(3) TFEU were of a temporary nature, having established a provisional period of 24 months from their entry into force.

The emergency relocation mechanisms were based on a distribution scheme which allocates binding quotas to Member States. Indeed, applicants were distributed in a proportional manner, with the distribution key of these numbers in the Member States of relocation being based on the size of their population, the total GDP, the average number of asylum applications per one million inhabitants in their territory over the period 2010-2014, and their unemployment rate. Despite the scheme derogating from the Dublin System, this was only partially so, as it was more precisely a derogation from the default rule, the "rule of State of first entry" and its procedural steps.[85]

The Decisions provided a payment of a lump sum of 6000 Euros for each applicant relocated to the Member States of relocation. Italy and Greece, regarding costs of transfer,

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[83] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ L 239, 15.9.2015).

[84] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, 24.9.2015).

[85] See Recital 23 of the Decision 2015/1601.

received a lump sum of at least 500 euros for each relocated person, as provided in Article 10 of the contested decision. This solution reflected the financial solidarity also involved in the process.

The second decision was the one contested in *Slovakia and Hungary v Council*, which provided a binding allocation mechanism, and entered into force on 25 September 2015 and was to be applied until 26 September 2017.

3. Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*

3.1 The Facts

As previously mentioned, in September 2015 the Council adopted two decisions on the relocation of migrants in the EU. While the first relocation decision was adopted unanimously, the second, which was latter contested in the CJEU, was adopted by a qualified majority, with the Czech Republic, Hungary, Romania, and Slovakia voting against its adoption and Finland abstaining.

The so-called "Visegrad group", composed of the Czech Republic, Hungary, Poland, and Slovakia not only opposed but also refused to comply with the decisions. Consequently, Slovakia and Hungary, supported by Poland, brought actions seeking the annulment of the decision to the CJEU. Belgium, Germany, Greece, France, Italy, Luxembourg, Sweden, and the European Commission intervened in the case in support of the Council.

3.2 The Pleas

Slovakia and Hungary, supported by Poland, raised several pleas in law which were based on three main concerns: *(i)* the legal basis related to the institutional power to adopt it, claiming that Article 78(3) TFEU was not the appropriate legal basis for the contested decision; *(ii)* the procedure taken after adopting the decision, associated with the lawfulness of the procedure leading to the adoption of the contested decision and alleging breach of essential procedural requirements; and lastly, *(iii)* substantive pleas regarding the principle of proportionality of the decision, where the CJEU addressed solidarity complaints. For the

purpose of this dissertation, only the substantive pleas related to the principle of solidarity within the asylum policy of the Union will be analysed further.

3.3 Arguments of the Parties

In Slovakia's 6th plea and Hungary's 9th and 10th pleas, the parties claimed that the contested decision breached the principle of proportionality.

Slovakia argued that the contested decision was not appropriate to attain its objective since the mechanism could not address structural defects of the Italian and Greek asylum systems. The small number of relocations also reinforced the notion that the measure was inappropriate. In addition, the contested decision was unnecessary, since the objective of that decision could have been achieved by other measures. Slovakia suggested several measures, such as the implementation of the Temporary Protection Directive since the objective of that directive was in essence the same as the contested decision. The Temporary Protection Directive would not affect the sovereignty of the Member States as the contested decision, since it is a voluntary-based mechanism. Moreover, it was not necessary to impose an additional measure since the contested decision had been taken "*only eight days after"*[86] the first relocation decision, which was also taken in a spirit of solidarity.

Due to the migration route, the European Commission put forward a proposal in September 2009 where Hungary was classified as a frontline Member State, beneficiary of the relocation mechanisms. [87] However, Hungary rejected that classification and, therefore, the proposal was amended with Hungary being considered as a Member State of relocation. Consequently, Hungary claimed that since it was no longer a beneficiary Member State of relocation, the number of 120 000 persons to be relocated was contrary to the principle of necessity and proportionality. That number both exceeded the necessary amount and was inconsistent with the principle of proportionality. The failure to reduce 54 000 persons that were initially to be relocated from Hungary was not justified. Subsequently, Hungary claimed the partial annulment of the decision as an alternative, "*insofar as it concerns Hungary"*.[88] The decision would be unlawful to that Member State because Hungary was in

[86] Para. 249 of the Opinion.

[87] See COM(2015) 451 final, European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, Brussels, 9.9.2015.

[88] Para.291 of the Opinion.

a similar emergency situation as Italy and Greece. Therefore, Hungary affirmed that the mandatory quotas infringed the objective of Article 78(3) TFEU and the principle of proportionality, since it had imposed additional and disproportional burdens on Hungary. However, Hungary affirmed "*its share of the common burden"*[89] by supporting the beneficiary Member States, thus not violating the principle of solidarity.

Lastly, Poland presented an argument based on ethnic and security concerns. Some Member States would have to bear heavier and disproportional burdens due to their "*virtually ethnically homogeneous"* [90] population, with a different cultural and linguistic background in comparison to the persons to be relocated. Furthermore, the contested decision interfered with the right and responsibility to maintain law and order, as well as internal security of Member States as provided in Article 72 TFEU.

In response to Slovakia, the Council stated that the contested decision was considered appropriate to attain the objective of the measure, which aimed to relieve the pressure on the Italian and Greek asylum systems. The Council affirmed that even an asylum system *"with no structural weaknesses"*[91] would have probably been affected by such a massive inflow of persons. Furthermore, at the time of the adoption, the Council held that there were no other substitute measures that would permit efficient pursuit of the objective while simultaneously affecting the sovereignty of Member States as little as possible. The Temporary Protection Directive was not a solution in regards to this case, since the system entailed in the directive is to provide temporary protection to persons who are already entitled to that protection in the Member States where they are present. This was not the case since the reception facilities in Italy and Greece were saturated with people that could not be entitled to that protection.

In its reply to Hungary, the Council stated that in light of the statistics available at the time of the adoption of the decision, it could properly take the view that it was necessary to relocate 120 000 persons, even after Hungary withdrew from the status of beneficiary Member State. The number of 54 000 persons that were initially to be relocated from Hungary was to be adapted to the migration circumstances *"in the desire for solidarity, effectiveness and proportionality."*[92] Lastly, the Council stated that the last Hungarian plea was not admissible since the decision was an indivisible one. Moreover, at the time of the

[89] Para. 290 of the Opinion.
[90] Para. 302 of the Judgement.
[91] Para. 232 of the Opinion.
[92] Para. 283 of the Opinion.

adoption of the decision, Hungary was no longer in a situation as established by Article 78(3) TFEU, so its inclusion as a relocation Member State was justifiable. Furthermore, the contested decision provided that the mechanism could be suspended by the request of a Member State.

3.4 The Opinion of the Advocate General BOT

In his first observations, Advocate General (hereinafter 'AG') BOT makes an explicit reference to the principle of solidarity and further development of the background of the principle. He affirms that *"[t]he contested decision is an expression of the solidarity which the Treaty envisages between Member States."*[93] Furthermore, "*solidarity is among the carinal values of the Union and is even among the foundations of the Union"* and addressing solidarity as the *"*raison d´être *and the objective of the European project"*.[94] He states that the solidarity principle is a founding value, a "*pillar and at the same time a guiding principle of the European Union's policies on border checks, asylum and immigration"*. [95]

In the Opinion, it is stated that, in light of Article 80 TFEU, the measures established in the contested decision translate into the practical content of the principle of solidarity and fair sharing of responsibility between Member States. Therefore, *"[w]ith that decision, solidarity between Member States has a specific content and a binding nature*."[96]

In a strong statement, the AG affirmed that:

> *"[t]hat opposition, together with the finding of a very incomplete application of the contested decision, to which I shall return below, may give the impression that, behind what is by common consent called the '2015 migration crisis', another crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project."*[97]

Consequently, a strong point was made regarding the importance of the solidarity principle and its legal and valid enforceable nature in the initial part of the AG Opinion.

[93] Para. 16.
[94] Para. 17.
[95] Para. 20.
[96] Para. 23.
[97] Para. 24.

In accordance with the alleged breach of the principle of proportionality on Slovakia's 6th plea and Hungary's 9th and 10th pleas, the AG addressed firstly the appropriateness of the decision for attaining the objective it pursues.

To begin with, AG BOT stated that the decision could considerably relieve the pressure of the Italian and Greek asylum systems, and that the main objective of the decision was not to fix structural defects. The AG shared the vision of the Council that, even any asylum system without any structural defect would have been seriously disrupted and, therefore, the contested decision effectively contributed to its real objective, which was relieving the pressure of those asylum systems.

Regarding the argument on the small number of relocations carried out, the AG considered that the Council relied on detailed data and analysed the causes and effects of the crisis that was available at the time of the adoption of the contested decision. The low number of compliances with the contested decision may be due to several factors that were not foreseen at the time of the adoption. AG BOT used this argument to call back on the "'laisser passer*' policy"* of some Member States "*and the insufficient cooperation of certain Member States in the implementation of the contested decision."*.[98] Here, AG BOT directly addressed the Member States who brought the action, further stressing *"that the applicants' argument amounts, all in all, to an attempt to take advantage of their failure to implement the contested decision. I would point out that, by failing to comply with their relocation obligations, the Slovak Republic and Hungary have contributed to the fact that the objective (...) is to date still far from being attained."*[99] Moreover, the AG claimed that the emergency mechanism could have been successfully applicable but *"only on condition that all the Member States, in the same spirit of solidarity as that which constitutes its* raison d'être*, make an effort to implement it."*[100]

Therefore, he clearly stated the legal enforceability of Article 80 TFEU and the failure of the duty to act in solidarity:

> *"[i]t should be borne in mind, in that regard, that the non-application of the contested decision also constitutes a breach of the obligation concerning solidarity and the fair sharing of burdens expressed in Article 80 TFEU. (...) in an action for*

[98] Para. 238.
[99] Para. 239.
[100] Para. 241.

failure to fulfil obligations on this matter, the Court would be entitled to remind the offending Member States of their obligations".[101]

Thus, the CJEU is entitled to recall this obligation to the Member States which are legally bound by it.

Regarding necessity, AG BOT considered that *"although at least some of the alternative solutions suggested by the Slovak Republic could contribute to the attainment of the objective pursued by the contested decision, that finding, having regard to the broad margin of discretion that must be afforded to the Council, cannot suffice to establish that that decision is manifestly disproportionate and to call its legality into question."*[102] At the time of the adoption, in his view, the Council was entitled to decide that no alternative measures would be as effective, even if they would impose less on the sovereignty of the Member States. The AG agreed with the view put forward by Germany claiming that the principle of solidarity and fair sharing of responsibility of Article 80 TFEU, *"plays a major role in the interpretation of Article 78(3)"* and *"the provisional measure such as the contested decision should allocate between the Member States, in a binding fashion, the burdens which it imposes."*[103]

In regards to the alternative of the Temporary Protection Directive, the AG mentioned that even though they seem similar, the voluntary consent differentiates them. The argument taken on the basis that the objective of the contested decision could be pursued under voluntary commitments, for the AG *"does not bear scrutiny"*[104], since the very genesis of implementing a binding mechanism was because of that lack of consensus between Member States. Therefore, the contested decision was the result of the Council's political choice and could not be qualified as manifestly inappropriate or incorrect. Regarding the adoption of a previous relocation mechanism, notably Decision 2015/1523, the AG argued that as forwarded by the European Commission, the migration situation had deteriorated, resulting in the need for an additional measure.

To respond to the arguments put forward by Hungary, AG BOT referred that the Council adjusted the number of migrants to be relocated in a reasonable way concerning the data available at the time. The Council took into account the need to reduce the pressure on the asylum systems and that the number established would not place an extreme burden on

[101] Para. 242.
[102] Para. 253.
[103] Para. 254.
[104] Para. 259.

Member States of relocation. Accordingly, AG BOT considered that the Council did not exceed its margin of discretion.

Considering the number of 54 000 persons to be relocated initially from Hungary, a number was established that considered the evolution of the migration situation, adjustable and flexible to new data. Consequently, the Council did not act in a disproportionate manner or go beyond what was necessary to achieve the objective.

Responding to Hungary's claim of partial annulment in so far as it affected Hungary, AG set forth that said solution would affect the essential element of the contested decision, the very principle of solidarity. In fact:

> *"[t]hat would affect an essential element of the contested decision, namely the mandatory determination of the allocations per Member State which gives real scope to the principle of solidarity and fair sharing of responsibility between Member States laid down in Article 80 TFEU."*[105], and "*the idea of a distribution of the applicants for international protection who have arrived in Italy and Greece among all the other Member States is a fundamental element of the contested decision. The limitation of the scope* ratione territoriae *of the contested decision that would result from the partial annulment of that decision would thus strike at the very heart of the decision."*[106]

Indeed, due to Hungary's refusal as beneficiary of the mechanism, and in accordance with the principle of solidarity, it had to be considered as a Member State of relocation. AG BOT concluded that "*the burdens (...) in favour of one or more Member States in an emergency migratory situation must be shared among all the other Member States."*[107] Moreover, Article 4(5) and 9 of the contested decision gave the right to Member States of relocation to request the suspension of their obligations.[108] Therefore, the Council *"has succeeded in reconciling the principle of solidarity with the taking into account of the particular needs that some Member States may have owing to the evolution of migratory flows. Such a reconciliation seems to me, moreover, to be perfectly consistent with Article*

[105] Para. 295.
[106] Para. 296.
[107] Para. 303.
[108] See Council Implementing Decision (EU) 2016/408 of 10 March 2016 on the temporary suspension of the relocation of 30 % of applicants allocated to Austria under Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 74, 19.3.2016); and Council Decision (EU) 2016/946 of 9 June 2016 establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Decision (EU) 2015/1523 and Article 9 of Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 157, 15.6.2016).

80 TFEU, which, as will be seen on a careful reading, provides for the 'fair sharing of responsibility' … between Member States."[109]

Regarding the security claim made by Poland, AG BOT considered that the contested decision fully takes into consideration the national security and public order of the Member States.[110]

In conclusion, AG BOT did not uphold any of the pleas raised by the Slovakia, Hungary, and Poland, and considered that the actions should be dismissed.

3.5 The Decision of the CJEU

The CJEU judgement was in line with the AG BOT Opinion, the former also underlining the principle of solidarity in its judgement, despite not emphasising the principle as strongly as the Opinion.

The CJEU started by referring that measures taken under Article 78(3) TFEU entailed a political choice and complex assessments where the EU institutions enjoy a broad discretion.

It stated that the measure could not be considered as manifestly inappropriate for working towards the objective of relieving the pressure of those asylum systems. It was *"hard to deny"*[111] that any asylum system would have been seriously affected in a similar situation, as the AG had highlighted. It mentioned that the relocation mechanism supplements other measures with the same objective: for instance, the case of the European programme of resettlement; the first relocation decision, Decision 2015/153; and the establishment of hotspots. Considering the low number of relocated people, the CJEU held that the numbers could be explained, for instance, by "*the lack of cooperation on the part of certain Member States."*[112] Therefore, the decision was not manifestly incorrect nor inappropriate for attaining the objective pursued.

The arguments raised by Slovakia regarding the necessity of the contested decision and possible alternative measures were rejected. The CJEU recalled that the Council tried to implement a less restrictive measure: the first voluntary relocation mechanism. The Council

[109] Para. 311.
[110] See Recital 32 and Article 5 of the contested decision.
[111] Para. 214 of the Judgement.
[112] Para. 223.

was entitled, within the scope of its discretion, to opt for a binding mechanism in accordance with the statistical data provided at the time, as "*the Council considered it vital to show solidarity towards those two Member States*"[113] Moreover, the Council was even bound to take a suitable measure in order to give an appropriate response to the emergency crises.

By adopting the contested decision, it "*was in fact required (...) to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented."*[114]

In response to the alternative solutions of the Temporary Protection Directive, the CJEU agreed with the arguments put forward by the Council and stated that the Directive did not provide a proper solution to the problem or a satisfactory response to the need of relieving the significant pressure on the Italian and Greek asylum systems.

Regarding Hungarian pleas, the CJEU reaffirmed that the Council concluded that only a significant number of applicants could actually reduce the pressure of the Italian and Greek asylum systems and therefore it did not commit a manifest error of assessment.

Additionally, the CJEU did not deny that the binding relocation mechanism created consequences for the relocation Member States in response to the claim for partial annulment of the Decision. The need to achieve a balance *"between the different interests involved"*[115], taking into consideration the objective of the contested decision, was emphasized by the CJEU. Moreover, *"the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all Member States, cannot be regarded as being contrary to the principle of proportionality."*[116] The CJEU stated that:

> "*[w]hen one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy."*[117]

[113] Para. 251.
[114] Para. 252. See also para.329.
[115] Para. 290.
[116] *Ibid.*
[117] Para. 291.

Therefore "*the Commission and the Council rightly considered (….), that the distribution of the relocated applicants among all the Member States, in keeping with the principle laid down in Article 80 TFEU, was a fundamental element of the contested decision."*[118]

Thus, Hungary must be considered in the same manner as all the other Member States, having the duty to share the burden with the other Member States by the allocation of quotas, and *"the Council cannot be criticised (...) for having concluded on the basis of the principle of solidarity and fair sharing of responsibility laid down in Article 80 TFEU that Hungary had to be allocated relocation quotas in the same way as all the other Member States that were not beneficiaries of the relocation mechanism."*[119]

Lastly, the ethnical argument put forward by Poland was considered inadmissible. The CJEU expressed that if the relocation mechanism was to be conditioned on cultural or linguistic ties between the applicants and the Member State of relocation, it would be impossible to adopt the mechanism and thus respect the principle of solidarity laid down in Article 80 TFEU. A mention to the ethnical origin of the applicants was clearly contrary to the Union law, more precisely to Article 21 of the Charter. Lastly, on the issues of maintenance of law and order and the safeguarding of internal security, the CJEU stated that these issues were taken into consideration within the relocation process. Member States should administratively work together within the *"spirit of cooperation and mutual trust must prevail"*.[120]

As such, the CJEU did not accept any pleas in law put forward by Slovakia, Hungary, or Poland, and the actions were fully dismissed.

3.6 Critical Remarks

In *Slovakia and Hungary v Council*, the principle of solidarity and fair sharing of responsibilities was emphasised throughout the substantive pleas of the judgement when addressing the principle of proportionality.

AG BOT, in his Opinion, addressed the principle remarkably, more so than the CJEU. When reading his first observations, the AG had an outstanding interpretation of the

[118] Para. 292.
[119] Para. 293.
[120] Para. 309.

principle of solidarity, affirming it as a founding and "*cardinal value"* of the Union.[121] Furthermore, AG BOT affirmed solidarity as the *"the raison d'être and the objective of the European project"*[122] whereas the CJEU did not pronounce on the nature of solidarity as a founding value of the Union. Contrastingly, the CJEU addressed solidarity as a principle of EU asylum law.[123] I think that a stronger approach could have been held, placing solidarity as a founding value of the Union and one of its objectives.

The CJEU noticed how the solidarity principle plays a crucial role when adopting secondary legislation, due to the contested decision being a legislative measure which operationalised solidarity. Thus, by adopting the relocation decision, the Council gave "*effect to the principle of solidarity and fair sharing of responsibility, (...), between the Member States*."[124] The CJEU widened the practical content of the principle of solidarity and fair sharing of responsibilities, as has been expressed by the AG in paras.16 and 22 of his Opinion.

The CJEU pointed out that the principle of solidarity and fair sharing of responsibilities governs EU asylum law, recognising and reinforcing the important role of Article 80 TFEU, particularly in paras. 252, 291 to 293, and in para. 329 of the judgement. Therefore, Article 80 TFEU and the principle therein were reinforced as a clear guidance to asylum policies taken by the Union.

Moreover, whereas AG BOT, clearly states that "*solidarity between Member States has a specific content and a binding nature"*[125] and "*that the non-application of the contested decision also constitutes a breach of the obligation concerning solidarity and the fair sharing of burdens expressed in Article 80 TFEU"*[126]*,* the CJEU did not elaborate further on the legal enforceability of the principle.

However, I believe that by upholding the legality of the measure, the CJEU declared that solidarity can be imposed by legally binding measures. Therefore, solidarity has a compulsory nature and should not be regarded as a voluntary commitment between Member States, as claimed. What is more, the CJEU acknowledge the existence of legal duties

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[121] Para. 17 of the Opinion.
[122] *Ibid.*

[123] See H. Labayle, "La solidarité n'est pas une valeur: la validation de la relocalisation temporaire des demandeurs d'asile par la Cour de justice (CJUE, 6 septembre 2017, Slovaquie et Hongrie c. Conseil, C-643/15 et C-647/15)", available at http://www.gdr-elsj.eu/2017/09/07/asile/solidarite-nest-valeur-validation-de-relocalisation-temporaire-demandeurs-dasile-cour-de-justice-cjue-6-septembre-2017-slovaquie-hongrie-c-consei/ (last accessed on 27 July 2018).

[124] Para. 252 of the Judgement.
[125] Para. 23 of the Opinion.
[126] Para. 242 of the Opinion.

flowing from the principle of solidarity. Thus, Member States are bound to effectively implement the compulsory relocation decision, despite the cultural and ethnical background of the applicants.

Regarding the meaning and conceptualisation of solidarity, the Court again failed to clarify the concept. Notwithstanding, the CJEU provided some characteristics of its content through its judgement. For instance, in the claims regarding the non-application of the decision in so far as it concerned Hungary, the CJEU identified that solidarity measures could not be framed for the interests of some Member States. It is to be shared among all the Member States and a balance must be achieved regarding the fair distribution of burdens and proportionality. The very fundamental essence of the decision is indeed the principle of solidarity and fair sharing of responsibility, which cannot be divided. Hungary must be considered in the same manner as all the other Member States, having the duty to share the burden as the others, through the allocation of quotas.[127] Notwithstanding, the CJEU acknowledged that when applying the principle of solidarity, there are Member States beneficiaries of solidarity. [128] In fact, this is part of the essence of solidarity.

I believe that the political force of the judgement can be as important as its legal dimension. Even if there are doubts about the legal enforceability of the principle of solidarity and fair sharing of responsibilities of Article 80 TFEU, the Court provided a clear and strong message to Member States: solidarity governs EU asylum law and Member States have to fulfil their duties of solidarity by effectively implementing the binding relocation mechanism. Member States must share the burden of migration in fair terms, even if it is contrary to their national interests yet in accordance with the principle of proportionality. Although it is clear that solidarity mechanisms are highly dependent on the political will of national governments, the CJEU reinforced the legal value of the principle and the scope of the obligations it imposes on Member States.

[127] Paras. 291 to 293 of the Judgement.

[128] See D. Obradovic, "Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy", available at https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/ (last accessed on 27 July 2018).

Conclusion

Solidarity has been a fundamental basis of integration and promotion of peace since the creation of the Union. The Lisbon Treaty strengthened and accomplished solidarity as a founding value of the Union and a fundamental principle of EU law. Therefore, Member States are to fulfil and effectively implement legal obligations stemming from solidarity measures created by the Union.

The AFSJ, in particular the European migration policies, have always been influenced by the political concerns of Member States. Their national concerns are often connected with moral and security issues. The inclusion of solidarity provisions in the AFSJ and the creation and development of the CEAS were a great achievement for the cohesion of the Union. Interstate solidarity is pivotal for the functioning of both the CEAS and the Union.

However, the truth is that the migration crisis of 2015 exposed the deficiencies of the CEAS' legal framework, putting at a crisis a fundamental European value. The Dublin System reinforced inequalities among Member States through its "rule of State of first entry". Consequently, compensatory measures had to be taken, having the Union introduced the relocation decisions as a burden-share system based on intra-EU solidarity. The decisions fundamentally upheld the solidarity principle among Member States.

Notwithstanding, nationalists and right-wing movements have emerged as political forces all over Europe, basing their policies on national interests. Arguments for homogeneity and the calling to terrorism threats have been emphasised. Borders and fences have been built. The "Visegrad group" has been approaching and defending obligations towards solidarity as discretionary, as a "flexible solidarity" concept.[129] Many have tried to justify the non-compliance with solidarity obligations from these Member States as a political situation, a lack of understanding of EU solidarity and values, as well a lack of integration of these Member States.

In *Slovakia and Hungary v Council*, the CJEU upheld the legal enforceability of the principle of solidarity and fair sharing of responsibilities, in a very politicised case. Despite the indirect approach to the legal enforceability of solidarity throughout the judgement, the

[129] See Joint statement of the heads of governments of the v4 countries, Bratislava, 16 September 2016, in https://www.euractiv.com/wp-content/uploads/sites/2/2016/09/Bratislava-V4-Joint-Statement-final.docx.pdf, (last accessed on 27 July 2018).

duty to act in solidarity was reinforced within the decision. A clear message was left to the Member States.

In spite of the CJEU judgement, the "Visegrad group" continues not to comply with their duties of solidarity by denying participation in the scheme. Until March 2018, Hungary and Poland had not relocated a single person, the Czech Republic relocated 12, and Slovakia 16 people. [130] The remaining Member States are still applying the relocation quotas, albeit in a slow and ineffective manner. Indeed, the attitude of European States towards solidarity was feeble to say the least. The failure of intra-EU solidarity was due to its own Members, which also demonstrates the lack of mutual trust and sincere cooperation in the EU.

The compulsory relocation decision is a concrete example that solidarity in the EU is strictly dependent on national governments and their political willingness. In fact, the compliance with solidarity duties should be firmly monitored by the EU and enforcement mechanisms be taken. Indeed, the European Commission has already introduced infringement procedures against Hungary, the Czech Republic, and Poland for the failure to correctly implement the relocation decisions. In that regard, the European Commission, in December 2017, decided to refer these Member States to the CJEU for the non-compliance with their obligations regarding relocation decisions.[131]

Meanwhile, Europe remains divided in regards to its asylum policies. In reality, 2018 continues to see the European institutions and its Member States still trying to effectively and responsibly respond to the migration situation. Migration was discussed among European leaders in the most recent European Council meeting, where commitments to a comprehensive approach towards migration were reaffirmed. Even so, the Union and its leaders remain divided by politics, ideas, and concerns. The focus now is to increase an effective control of Union external borders and stop illegal migration deviating the focus from solidarity.

The reform of the Dublin regulation has yet to be approved since 2016. It seems that any agreement on the long-term, and any responsible solution for migration is still in the distant future. It is curious that a new corrective allocation mechanism is proposed in the European Commission's proposal which in essence is another relocation scheme, similar to

[130] COM(2018) 250 final, ANNEX 4, Annex to the Communication from the Commission to the European Parliament, the European Council and the council Progress report on the Implementation of the European Agenda on Migration, Brussels, 14.3.2018.

[131] Case C-715/17, *European Commission v Republic of Poland*; Case C-718/17, *European Commission v Hungary*; Case C-719/17, *European Commission v Czech Republic*.

the previously adopted ones. Due to the feeble level of implementation of the relocation decisions, I believe that this type of burden-sharing instruments is not effective in a divided EU in matters of its asylum policies.

In sum, despite of its axiological centrality in the construction of Europe, the principle of solidarity is at a crisis within the EU. Intra-physical measures of burden sharing have not been an effective way to tackle the migration crisis since they are strictly dependent on the political level of implementation and contribution of Member States. As GOLDNER LANG concludes *"EU Solidarity coincides with national border."*[132]

As Europe stands today, it can be concluded that interstate solidarity is in the midst of a crisis, as is the EU itself, (at least the EU as we now know it to be). Political unwillingness regarding solidarity in asylum policies prevails. However, the European Union still has in its hands a powerful option of triggering Article 7 TEU, which intends to safeguard and promote European values. Solidarity, as entrenched in Article 2 TEU, is a founding and guiding value of the Union, together with the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. European institutions may activate the provision of Article 7(1) TEU when "*there is a clear risk of a serious breach by a Member State of the values referred to in Article 2"*, as a preventive mechanism. Article 7(2) TEU states that if the breach of EU fundamental values is serious and persists, the Union can activate this provision, as a sanction mechanism, where certain rights may be suspended such as *"voting rights of the representative of the government of that Member State in the Council."* Thus, the triggering of Article 7 may be an additional option to foster political willingness to encourage Member States towards more solidarity and cooperation in the Union.

[132] I. Goldner Lang, "The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity", 2018, in Biondi, A., Dagilyte, E., and Küçük, E., (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar Publishing, 2018, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3110544

Bibliography

Books and Articles

BARNARD, C., and Peers, S., (eds.), *European Union Law*, 4rd Edition, Oxford, Oxford University Press, 2014.

BAST, J., "Deepening Supranational Integration: Interstate Solidarity in EU Migration Law", in *European Public Law*, 22, No. 2, 2016, p. 289–304.

BIEBER, R., and Maiani, F., "Sans solidarité point d'Union européenne: Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile", in *Revue Trimestrielle de Droit Européen*, 48(2), 2012, p. 295-327.

BRUYCKER, P. De, and Tsourdi, E., "In search of fairness in responsibility sharing", in *Forced Migration Review*, 51, 2016, p.64-65.

CRAIG, P., and De Búrka, G., (eds.), *EU Law, Text, Cases and Materials*, 6th Edition, Oxford, Oxford University Press, 2015.

CRAIG, P., and De Búrka, G., (eds.), *The Evolution of EU Law*, 2nd Edition, Oxford, Oxford University Press, 2011.

GRIMMEL, A., and My Giand, S., (eds.), *Solidarity in the European Union, A Fundamental Value in Crisis*, Cham, Springer International Publishing, 2017.

HAILBRONNER, K., and Thym, D. (eds.), "EU Immigration and Asylum Law, A Commentary", 2nd Edition, München, C.H. Beck/Hart/Nomos, 2016, p. 1023-1053.

KARAGEORGIOU, E., "The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value", in *European Policy Analysis Issue*, 14, 2016, p. 1-12.

KAUNERT, C., and Léonard, S., "The European Union Asylum Policy after the Treaty Of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?", in *Refugee Survey Quarterly*, 31, No. 4, 2012, p. 1-20.

KLAMERT, M., *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014.

KOSTAKOPOULOU, D., "The Area of Freedom, Security and Justice an the European Union's Constitutional Dialogue", in Barnard, C., *The Fundamentals of EU Law Revisited, Assessing the Impact of the Constitutional Debate*, Oxford, Oxford University Press, 2007, p.153-191.

KÜÇÜK, E., "Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?", in *Maastricht Journal of European and Comparative Law*, 23(6), 2016, p. 965-983.

KÜÇÜK, E., "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", in *European Law Journal*, 22, 2016, p. 448-469.

LANG, I. Goldner, "Is There Solidarity on Asylum and Migration in the EU", in *Croatian Yearbook of European Law and Policy*, 9, 2013, p. 1-14.

LANG, I. Goldner, "The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity", 2018 in Biondi, A., Dagilyte, E., and Küçük, E., (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar Publishing, 2018, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3110544.

MAIANI, F., "The reform of the Dublin-system and the dystopia of 'sharing people'" in *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p. 622–645.

MARTINS, P. Fragoso, *"O princípio da cooperação leal: breves reflexões a propósito do artigo 19.º do CPA"*, Comentários ao Novo Código do Procedimento Administrativo, 4ª Edição, Lisboa, AAFDL Editora, 2018, p. 367-380.

MITSILEGAS, V., “Solidarity and Trust in the Common European Asylum System”, in *Comparative Migration Studies*, 2, No.2, 2014, p. 181-202.

MORENO-LAX, V., “Solidarity’s reach: meaning, dimensions and implications for EU (external) asylum policy”, in *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p. 740–762.

MORGESE, G., “Solidarietà e ripartizione degli oneri in materia di asilo nell’Unione europea”, in Caggiano, G., *I PERCORSI GIURIDICI PER L’INTEGRAZIONE, Migranti e titolari di protezione internazionale tra diritto dell’Unione e ordinamento italiano*, Torino, G. Giappichelli Editore, 2014, p.365-405.

PEERS, S., “Mission accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon”, in *Common Market Law Review*, 48, 2013, p. 661-693.

ROSENFELD, H., “The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU”, 2017, in Mitsilegas V., Moreno-Lax V., and Vavoula N. (eds): *Securitising Asylum: Extraterritoriality and Human Rights Challenges*, Brill, 2017 Forthcoming. Available at SSRN: https://ssrn.com/abstract=2944116.

ROSS, M., and Borgmann-Prebil, Y., (eds.), *Promoting Solidarity in the European Union,* Oxford, Oxford University Press, 2010.

ŠALAMON, N. Kogovšek, “The principle of solidarity in asylum and migration within the context of the European Union accession process”, in *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p. 687–702.

SANGIOVANNI, A. “Solidarity in the European Union”, in *Oxford Journal of Legal Studies*, 33, 2013, p. 1-29.

TACKLE, M., “Is the migration crisis a solidarity crisis?” in Grimmel, A., *The Crisis of the European Union: Challenges, Analyses, Solutions*, Abingdon, Oxon, NY, Routledge, 2018, p. 116-129.

THIELEMANN, E., “Between Interests and Norms: Explaining Burden-Sharing in the European Union”, in *Journal of Refugee Studies*, 16, No. 3, 2003, p. 253-273.

THIELEMANN, E., “Why asylum policy harmonisation undermines refugee burden-sharing”, in *European Journal of Migration and Law*, 6, 2004, p. 47-65.

THYM, D., and Tsourdi, E., “Searching for solidarity in the EU asylum and border policies: constitutional and operational dimensions”, in *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p. 605–621.

TSOURDI, E., “Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System”, in *Maastricht Journal of European and Comparative Law*, 24(5), 2017, p. 667–686.

Other Documents

BRUYCKER, P. De, and Tsourdi, E., “The Bratislava Declaration on migration: European irresponsibility instead of solidarity”, available at http://eumigrationlawblog.eu/the-bratislava-declaration-on-migration/ (last accessed on 27 July 2018).

EASO, European Asylum Support Office*, “EASO fact finding report on intra-EU relocation activities from Malta”*, 2012, available at http://www.refworld.org/docid/52aef8094.html (last accessed on 27 July 2018).

FARCY, J., O’Neill, E., and Watt, D., *“Cherche désespérément solidarité : quand la saga de l’asile dans l’Union européenne continue”*, available at http://www.gdr-elsj.eu/2016/04/05/asile/4790/ (last accessed on 27 July 2018).

GUILD, E., et al., *"Enhancing the Common European Asylum System and alternatives to Dublin",* European Parliament, 2015, available at http://www.epgencms.europarl.europa.eu/cmsdata/upload/983a50a5-69d6-48b1-a0bd-2b34cced9e36/Sessions_1_and_2_-_Study_European_Asylum_System_and_Alternatives_to_Dublin.pdf.

GUILD, E., et al., *"Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece"*, European Parliament, 2017, available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583132.

JURADO E., et al., *"Evaluation of the Implementation of the Dublin III Regulation – Final Report"*, European Commission, 2016, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf.

LABAYLE, H., *"La solidarité n'est pas une valeur : la validation de la relocalisation temporaire des demandeurs d'asile par la Cour de justice (CJUE, 6 septembre 2017, Slovaquie et Hongrie c. Conseil, C-643/15 et C-647/15)"*, available at http://www.gdr-elsj.eu/2017/09/07/asile/solidarite-nest-valeur-validation-de-relocalisation-temporaire-demandeurs-dasile-cour-de-justice-cjue-6-septembre-2017-slovaquie-hongrie-c-consei/ (last accessed on 27 July 2018).

LABAYLE, S., and Cedric, O., *"Crise des réfugiés et valeurs de l'Union : illusions perdues?"*, available at http://www.gdr-elsj.eu/2017/04/25/informations-generales/crise-des-refugies-et-valeurs-de-lunion-illusions-perdues/ (last accessed on 27 July 2018).

OBRADOVIC, D., *"Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy",* available at https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/ (last accessed on 27 July 2018).

OVÁDEK, M., *"Legal basis and solidarity of provisional measures in Slovakia and Hungary v Council"*, available at http://www.asylumlawdatabase.eu/en/journal/legal-basis-and-solidarity-provisional-measures-slovakia-and-hungary-v-council (last accessed on 27 July 2018).

PEERS, S., *"A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers"*, available at http://eulawanalysis.blogspot.pt/2017/09/a-pyrrhic-victory-ecj-upholds-eu-law-on.html?m=1 (last accessed on 27 July 2018).

VANHEULE, D., et al., *"The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration",* European Parliament, 2011, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET(2011)453167_EN.pdf.

Table of Cases

Joined Cases 6/69 and 11/69, *Commission v France*, EU:C:1969:68

Case 39/72, *Commission v Italy*, EU:C:1973:13.

Joined Cases C 411/10 and C 493/10, *N.S. and M.E.*, EU:C:2011:865.

Case C-528/11, *Halaf*, ECLI:EU:C:2013:342.

Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, ECLI:EU:C:2017:631.

M.S.S. v Belgium and Greece, Application no. 30696/09, ECtHR, 21 January 2011.