The European Union's response to the refugee movements from Ukraine. The end of the solidarity crisis in EU asylum policy?

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Abstract:

This piece analyses whether triggering the 'Temporary Protection' Directive (TPD) to deal with the refugee movements from Ukraine has been a departure from the European Union's usual modus operandi and heralded the end of the solidarity crisis in its asylum policy. By employing a solidarity framework that determines role, scope, and content of solidarity in the EU and its asylum policy, the article shows how the Dublin system's costs-by-cause principle violates the EU's solidarity principle, creating a continuous solidarity crisis of which events like the 2015/2016 asylum governance crisis are just symptoms. We show how by invoking the TPD, the EU eludes the dysfunctionality of its asylum system, embarking on a path of more national discretion in the area of refugee protection, while at the same time Member State's policy preferences vis-à-vis non-Ukrainian protection seekers have not changed. As a result, we observe continuity in terms of less asylum cooperation and more focus on a border controls approach focussing primarily on externalisation and deflection of unwanted migration. Hence, we contend that the application of the TPD rather reinforces the notion of a continued solidarity crisis in European asylum policy.

European Union, asylum, solidarity, crisis, Ukraine, temporary protection

[150-200 words, 6 keywords]

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Introduction

In its last Global Report, the UNHCR announced that almost 90 million people had been displaced in the year 2021 (UNHCR 2022). The number of people seeking refuge has been steadily increasing for a decade, more than doubling during this period. It is fair to say that the world is facing an exacerbating global refugee crisis that is for the most part shouldered by countries in the Global South. In contrast, there still seems to be a commonly held presumption that the EU faced an extraordinary refugee crisis in 2015/2016. In actual fact, in those years Europe only accounted for about 5 per cent of the global number of displaced people (UNHCR 2018: own calculation). Considering the political impact their movements had, it is important to realise that the then EU-28 only received twelve per cent of all Syrian refugees (Eurostat 2019: own calculation). Against this backdrop, it seems beside the point to frame the crisis of 2015/2016 as a 'European refugee crisis'.[1] In addition, this terminology invokes the notion that the crisis might somehow be the fault of people seeking protection, and not, as will be shown in this paper, the failure of Europe's asylum governance.

When the search for a united European solution to the migratory movements over the Balkan route in 2015/2016 failed, EU cooperation in the field of asylum practically stopped. Some Member States went so far as to openly revolt against the common asylum policy, following a Council decision to relocate asylum seekers from Italy and Greece (Council Decision 2015/1601). This conflict was never resolved, not even after the European Court of Justice (ECJ) had confirmed the lawfulness of the relocation scheme in 2017 and found Poland, Hungary and the Czech Republic guilty of continued breach of Union law (European Court of Justice 2020a). This contentious episode was ultimately a salient example of an apparent solidarity deficit in Europe's asylum policy. Meanwhile, Search and Rescue operations in the Mediterranean have been increasingly criminalised (Vosyliūtė and Conte 2019), pull-backs by the Libyan coastguard have been incentivised by the EU (Riemer 2018), more border fences are being built at the external borders (EURACTIV 2022a; EUObserber 2022; Joly 2021), and illegal pushbacks by EU Member States have become common practice (ECRE 2022a). It seems like in the absence of a joint solution in the field of asylum based on solidarity, the EU has retreated to finding solutions solely in the area of border controls, focussing on an overarching objective of preventing unauthorised migration in order contain asylum applications to a minimum.

Solidarity is invoked even more prominently than usual in times of crisis, be it in 2015/2016, or in the Ukraine crisis following the unprovoked Russian invasion on 24 February 2022. While the former has revealed deep rifts in EU asylum cooperation that are evidently closely connected to the question of solidarity, the latter has launched a departure from the usual modus operandi. Following the refugee influx from Ukraine, in an unprecedented move,

the Council has activated the 'Temporary Protection' Directive (TPD) (Council Directive 2001/55/EC). Devised in 2001 as a measure to manage the refugee movements from the war-torn Balkans, it was never triggered until 4 March 2022. Expecting up to four million refugees from Ukraine after Russia's attack, the Commission quickly proposed to invoke the TPD. The Member States swiftly agreed and implemented the measure only nine days after the invasion. Naturally, questions arise as to why it was activated now and not in 2015. What is difference in the assessment the EU has made in terms of the influx in 2015 and in 2022? Wherein lie the differences in the respective policy solutions employed? And does this mean the end of the solidarity deficit?

I what follows, the case will be made for an understanding of Europe's asylum policy as being characterised by an underlying, continuous solidarity crisis that has been in existence since its very inception (Saracino 2018). The root of the problem lies in its centrepiece that allocates the responsibilities for asylum claims between the Member States: the Dublin system. Its logic of responsibility allocation violates the Union's constitutive solidarity principle, making the emergence of a crisis like in 2015/2016 the bloc's own responsibility. Accordingly, the article will clarify the role, shape, scope, and content of the solidarity principle in the EU in general, as well as its specification in the Common European Asylum System (CEAS). To that end, an analytical framework will be presented to provide an accurate understanding of solidarity in the EU and its specification in its asylum policy that is based on a conceptual history approach and extensive content and document analysis, as well as case studies, combining research from political science, legal studies, sociology, philosophy, history, theology, and linguistics. The paper will continue to explicate why the Common European Asylum System (CEAS) is characterised by a constant solidarity crisis, of which the political crises are just prominently observable symptoms. The article will go on to shed light on the rationale behind the activation of the TPD and discuss the different policy approaches to the mass influxes of 2015/2016 and 2022. The analysis will conclude by providing answers as to why there seem to be discriminatory practices at the border and whether this new course of action is heralding the end of the solidarity crisis and a 'fresh start' to asylum cooperation in the European Union.

Solidarity in the EU

Policy outputs in the European Union are cast into law to ensure the consistency of the common political will. This process ensures both the pursuit of the common individual interests and the repellence of individual interests that violate the Union's objectives (Bieber 2002). This way, political vulnerabilities caused by national egoisms can be contained. Uniform application

of Union law is a prerequisite for the European Union to function as a community based on the rule of law (Zuleeg 2011). As a composite of states and constitutions, without any means of coercion, the EU is even more reliant on the rule of law than nation-states are: lacking other integrational factors like common language or history, it plays an outstanding role for binding the Union together (von Bogdandy 2012). Union law is, hence, neither simply the product of EU policy-making nor just the means to the end of integration. It is both content and expression of European integration itself (Grimmel and Jakobeit 2014). European Union politics and law, therefore, are inextricably linked. That is why a sustained violation of Union law one of its members can amount to a de-facto withdrawal from the scope of the Union's functioning since it implies abandoning the rule of law.

Theoretical framework of solidarity in the EU and its asylum policy

When acknowledging that the common political will of its members is being cast into law so that it can be effective, uniformly applied and adhered to, it is only consequential that solidarity must be anchored in EU law too. Since a definition of solidarity is nowhere to be found in the *acquis communautaire*, it can be assumed that there is an underlying understanding of solidarity in the EU that is embedded in the specific historical context of the concept (Müller 2010).

A conceptual framework to address this desideratum has been provided by Saracino (2019). The methodological approach in this work is based on Reinhart Koselleck's theoretical contribution to conceptual history – typically labelled under the German equivalent *Begriffsgeschichte* – that is further developed and adapted to the epistemic interest of the research question (Ibid.: 15 et seq.). By seeking to incorporate the strands, developments, and trajectories relevant to the concept of solidarity, the conceptualisation draws upon a wide array of scholarship from political science, legal studies, history, sociology, economics, theology, and linguistics. After setting out a general framework for understanding and analysing solidarity, Saracino goes on to examine the concept in the EU context, employing an extensive document analysis, sifting through political and legal documents that have accompanied European integration, its developments in primary law, policy fields, and ECJ case law. Eventually, an analytical framework for understanding solidarity in the European Union as well as its asylum policy is provided.

It turns out that the concept of solidarity comprises a descriptive as well as normative dimension. The former establishes that solidarity is limited to non-universal, particular groups wherein actors commit themselves voluntarily to a bond and create interdependences. The European Union can be determined as such a group.

Solidarity, moreover, must be understood as instrumental to objectives that the reference group seeks to achieve und whose legitimacy it accepts. These objectives are often connected to the common good, a key source of state legitimacy and arguably the most important duty of state action (Anzenbacher 2011). It has been increasingly problematic for nation-states to satisfy their citizens' expectations to realise the common good in a globalised world without cooperating with international organisations or other nation-states (Pernice 2013). Translated to the topic at hand, EU Member States have voluntarily bound themselves together to ensure their interests pertaining to the common good, like economic prosperity, peace-keeping, or migration management, are being pursued (Wolfrum 2006). They confer the respective competences to the supranational level and therefore, the EU becomes a reference sphere for solidarity. The involved parties act in enlightened self-interest, i.e., the notion that they will be able to achieve their objectives more successfully in cooperation with others (Hollerbach, Kerber and Schwan 1995). In European primary law, the collective Union objectives are codified in Art. 3 TEU and, in connection with the framework of basic principles and values in Art. 2 TEU, amount to the idea of a European common good (Hatje and Müller-Graff 2014). A readiness to act in solidarity between the Member States must necessarily exist as a prerequisite, otherwise an effective and robust pursuance of the European common good is impossible. The Member States become liable for the consequences of their actions within the EU whose obligations they must accept at their voluntary accession (Sangiovanni 2012). A duty to solidarity is created by the joint acknowledgement of the common good that to pursue is the primary goal of the EU (Bieber and Kotzur 2016). It becomes the Member States' responsibility to contribute to the shape and production of solidarity in the integration process in order to safeguard their own interests.

The solidarity principle suggests that the reference groups' participants commit themselves to a mutual dependency, thus creating a specific connectedness, due to the voluntary agreement to pursue the common objectives mandatorily. The normative dimension of EU solidarity establishes mutual obligations that stem from the specific bond between the actors that include the expectation of reciprocity to achieve the collectively agreed objectives. These obligations take form through concrete actions of support and assistance. Hence, solidarity is not merely appellative. Actors try to safeguard the attainment of their common objectives by vouching for each other and creating mutual obligations. The creation and substantiation of obligations as well as the mutual bond of reference groups take place in the political sphere.

As a consequence, solidarity is more than the mere act of solidarising that does not necessarily need reciprocity or duties to support or assist. These acts rather must be subsumed under acts of charity, compassion, or friendship – or just assistance. Not every form

of willingness to help, matching interests, or assistance amount to real solidarity. In this regard, solidarity is often misinterpreted in the public perception, resulting in a notorious dilution of the concept.

There are procedural duties that regulate how to act, assist, and desist, aimed at ensuring the reliability of common good pursuance by all Union members by means of a solidarity principle cast into law. The ECJ has confirmed the existence of a solidarity principle as soon as 1969 (European Court of Justice 1969). In 1973, the Court ascertained in a seminal judgement the role and significance of the solidarity principle for the integration project (European Court of Justice 1973: mn. 24 et seq.). The ECJ codified that the Member States subscribe to a duty to solidarity when entering the Community. The Court made two fundamental determinations: on the one hand, the nation states' readiness to act in mutual solidarity is the necessary condition to be bound together under the rule of law. They shall be aware of this obligation before entering the Community. On the other hand, by violating the solidarity principle, the whole legal order is shaken to its core, which amounts to menacing the whole integration project. Violating the solidarity principle means to actively locate oneself outside of the Union's legal order, hence outside of the Union's purview. This judgement demonstrates the authoritative legal answer to the question as to *why* a solidarity principle exists in the European Union. Other ECJ rulings have substantiated the Member States' duty to solidarity, e.g., by stating that Union interests must be prioritised over national interests, or by establishing the primacy of EU law (Marias 1994).

Since the readiness to act in solidarity can vary, casting obligations into law is all the more important. Politics and law complement each other in a very specific way. Political will to solidarity is needed to create and accept the Union law, whereas the law provides the standardisation of solidarity obligations and ensures adherence. It becomes clear that solidarity is the basis of the European edifice without which it cannot stand. The solidarity principle, hence, is a *sine qua non* of the European Union that permeates its whole scope.

This finding is further corroborated by key documents that accompanied European integration (Saracino 2019: 52 et seq.). In combination with ECJ case law, a progressing European integration was accompanied by a steady upgrading of solidarity in the European Union, both quantitatively and qualitatively. In the current iteration of European primary law, the solidarity principle has been substantially upgraded in the Treaty of Lisbon. A case in point, Article 3 TEU formulates the general objectives of the Union. They are akin to the national objectives of nation-states and are to be achieved by integration. One of those aims is very distinctly the facilitation of solidarity between the Member States: 'It shall promote […] solidarity among Member States' (Art. 3, para. 3). This passage anchors the solidarity principle as a general clause and structural principle of Union law (Ohler 2018; Petrus and Rosenau 2018).

Furthermore, the article substantiates solidarity objectives in other policy areas (Saracino 2017). All Member States and Union organs must adhere to the solidarity principle in policy-making and legislation, as well as implementation and application of all Union provisions. By equipping the ECJ with the competence to review all measures pertaining to the overall objectives in Art. 3 TEU with the entry into force of the Lisbon Treaty, the solidarity principle could now be potentially tested as regards its justiciability and interpretation (Ross 2010).

In Art. 4(3) TEU we find the duty to sincere cooperation that is aimed at the adherence to the common objectives (Bieber 2013). It permeates all policy areas of the Union, is aimed at the relationship among the Member States as well as between the Union and the Member States, and, in conjunction with Art. 13(2) TEU, among the institutions (Blanke 2013). It comprises the duty to coherent, unrestricted and uniform application and implementation as well the primacy of Union law, obliges the Member States to actively promote and Union activity, and prohibits the addresses to undermine or even disable the effectiveness of Union provisions (Klamert 2019). The principle of sincere cooperation is the necessary procedural specification of the independent and all-encompassing solidarity principle. They are not equivalent as unmistakably evidenced by the clear distinction Art. 24(3) TEU makes. This finding is corroborated in an ECJ ruling from 10 December 1969, where the Court states: 'The 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' (European Court of Justice 1969). Art. 5 of the ECC Treaty is a predecessor of Art. 4(3) TEU. The wording clearly shows a partitioning of the solidarity principle into obligations mandated, on the one hand, in Art. 5 EEC (loyalty) and, on the other hand, overarching the whole Community system (solidarity). The ECJ has substantiated the loyalty principle in multiple rulings that confirm the notion of a distinct separation of both principles (European Court of Justice 1983; European Court of Justice 2005; European Court of Justice 2021).

These findings confirm the existence of a general solidarity principle in the European Union and explain *why* solidarity must exist necessarily and from the outset. It has found its procedural expression in the principle of sincere cooperation that determines *how* solidarity in EU law is shaped. In a nutshell, it can be ascertained that the European Union cannot exist without its specific solidarity principle. It has been shown why the solidarity is a necessary condition of the EU and how this reality manifests itself in Union law. Every violation of the commonly adopted law that prevents the achievement of the common objectives must be regarded as a violation of the solidarity principle. Sustained refusal to adhere to Union law deprives the integration project of its effectiveness and raison d'être since the EU can only function on the basis of the rule of law.

The solidarity principle in the asylum policy of the EU

We find a specification of the solidarity principle within EU asylum policy. First, in Art. 67 TFEU the objectives of the EU's Justice and Home Affairs policy are laid down. Pertaining to asylum policy, it states in paragraph 2 that it should be 'based on solidarity between Member States'. This passage takes up the solidarity principle to highlight its bearing on the Member State component. It points out that solidarity between the Member States has salient significance in the area of asylum policy. This observation is undergirded by the addition of a specific solidarity clause for the areas of asylum, border controls and immigration in Art. 80 TFEU:

> The policies of the Union set out in this Chapter [asylum, border controls, immigration; D.S.] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

This solidarity clause is extraordinarily positioned within the Union Treaties. It acknowledges and addresses the fact that in the area of asylum there apparently is an outstanding necessity for solidarity that all signatories are aware of. As will be demonstrated later, this awareness is the result of a fundamental lack of fair sharing of responsibility that is brought about by the specific responsibility allocation mechanism in the Dublin system and therefore demands compensatory measures. Hence, Art. 80 TFEU explicitly reiterates the validity of the solidarity principle and connects it with fair sharing of responsibility between the Member States. Subsumable in terms of asylum policy are compensatory policy measures that include assistance and support provisions that must be put in place for the CEAS to adhere to the solidarity principle. Only financial assistance is explicitly stated, but information exchange, technical assistance and training measures also fall under the scope of the article (Rossi 2016).

Art. 80 TFEU confirms the duty of all actors to adhere to the solidarity principle in all asylum policy measures, and adds to it the specification of fair sharing of responsibility between the Member States. The caveat 'whenever necessary' seems to be connected to the subsidiarity principle, meaning that necessity arises when Member States cannot achieve the common objectives by acting alone (McDonough and Tsourdi 2012).

What has been shown is that the solidarity principle is not merely demanded but standardised in EU context and receives its specific expression in asylum policy by fair sharing of responsibility between the Member States and must be applied in all measures. Hence, the common objectives within this policy area cannot be achieved without fair sharing of responsibility.

In summary, the EU is a specific reference group to which the concepts of solidarity and its particular, non-universal nature can be applied to. Solidarity is an instrument to achieve the common objectives of the EU. The EU's common goal is to achieve these objectives, understood as the European common good, which the Member States agree on. In order to achieve this goal, solidarity is needed both as a prerequisite and a vehicle. The Member States commit themselves into a community or union of law with regard to the objectives that they agreed upon voluntarily in the political sphere. Solidarity creates a mutual connectedness and demands a reciprocal commitment. Only through the rule of law they can be reassured that all measures aimed at attaining the common good will be adhered to. They act in enlightened self-interest. The solidarity principle, on the one hand, ensures that all involved actors fulfil their duties; on the other hand, through the principle of sincere cooperation, it brings to bear how the procedures of achieving the common objectives must be shaped. Furthermore, solidarity manifest itself by the members of the reference group vouching for each other in terms of the common objectives. This mutual responsibility is expressed by concrete measures of support and assistance that can vary among the policy fields.

Ultimately, there is a universal solidarity principle in the EU, pervading its whole scope, that can be specified in form and content. It is inherent to the system of the EU and the necessary condition for achieving its objectives. In the CEAS, solidarity is expressed not only through correct implementation of measures but also in supporting each other to develop asylum systems that work for the good of the whole Union (Boswell, Vanheule and Selm 2011). All asylum policy measures, their formulation, implementation and realisation must be compatible with the solidarity principle specified by Art. 80 TFEU. However, as will be demonstrated in the next section, an adherence to the solidarity principle in the field of asylum is foiled by the Dublin system.

How the Dublin system evokes a continuous solidarity crisis

The Dublin regulation allocates the responsibilities for asylum claims in the Common European Asylum System (CEAS). It serves two main objectives: to determine which Member State is responsible for an asylum claim; and to guarantee an asylum procedure to all claimants (Regulation 604/2013: Art. 3). Undergirding these main objectives is the attempt to excluding so-called 'forum-shopping', i.e., keeping asylum seekers them from choosing the Member State where they lodge an application, and thus, trying to prevent secondary movements. In addition, 'refugee in orbit' situations wherein no Member State assumes responsibility for the claim and asylum seekers are left in a legal limbo, are to be averted (Hruschka and Maiani 2022). The 'Dublin system' consists of this responsibility allocation mechanism in conjunction

with the Eurodac database that records fingerprints and personal data of asylum seekers (Regulation 603/2013).

As such, 'Dublin' was not devised as a burden-sharing instrument (European Commission 2007). There is no reference to a fair sharing of responsibilities, or to solidarity, in the original Dublin Convention (Dublin Convention 1990). The Dublin Convention and its logic were devised against the backdrop of global disruptions around 1990 that tore down the Iron Curtain in Europe, led to military conflicts on the Balkans, and accelerated migratory movements globally. The criteria for determining responsibility for asylum claims were developed in the Schengen Convention (1990: Art. 28-38) that was readily negotiated before the Berlin Wall fell (Pudlat 2011). The criteria were then just carried over into the Dublin Convention. That resulted in a policy objective of preventing unauthorised immigration in the EU's asylum governance which became its unmistakable hallmark (Lavenex 1999). As soon as the Dublin Convention was adopted, and long before it was implemented in 1997, it became apparent that the lack of a fair responsibility allocation was highly problematic. Especially the German government, hence, tried to add corresponding provisions to the Dublin Convention to correct this flaw (Hailbronner 2000). After this endeavour failed due to opposition of other member states, Germany and other main destination countries for asylum seekers tried to disincentivise unauthorised entry even more, a policy objective that was copied by almost all other partners (Noll 2000).

The Dublin system's allocation mechanism is governed by the costs-by-cause principle. A Member State who is not able to prevent entry into the EU must in turn admit the asylum seekers to the claim in their national asylum system. The rationale behind that policy measure that is still very much active today was to prevent unauthorised entry and punish Member States that do not comply with this objective by placing the responsibility and thus, the cost or 'burden', for the claim onto them: 'The main criteria for allocating responsibility […], reflect this general approach by placing the burden of responsibility on the Member State which, by […] being negligent in border control or admitting him without a visa, played the greatest part in the applicant's entry into or residence on the territories of the Member States' (European Commission 2001: 3). Furthermore:

> A second group of criteria is designed to deal with the consequences of a Member State *failing to meet its obligations in the fight against illegal immigration* [emphasis added]. […] a Member State which does not take effective action against the illegal presence of third-country nationals on its territory has an equivalent responsibility vis-à-vis its partners to that of a *Member State which fails to control its borders properly* [emphasis added]. The proposal extends this approach to several situations' (Ibid.).

In these explanations added to the 'Dublin II' proposal – the measure that aimed at transposing the Dublin Convention into Union law – the Commission underlines in a very explicit way why the logic behind responsibility allocation in the asylum system should be labelled 'costs-by-cause principle' and not, as it is almost always denoted, 'principle of first entry' or 'responsibility principle'. Strictly speaking, these are not misnomers, but they are incomplete and obfuscate the true impetus behind the Dublin system. Moreover, it is evident that this system of responsibility allocation necessarily penalises Member States at the southern and eastern borders since they have to cope with the migratory movements from the Global South. What's more, Italy and Greece, for example, simply cannot control their borders in der Mediterranean like Member States without external borders or just land borders can. This design makes the allocation criteria indifferent towards geographical location, economic strength, legal or historical genesis of the national asylum system. Hence, it disproportionally allocates responsibility to Member States at the EU periphery (Saracino 2019: 104 et seq.).

At the same time the transposition of the Dublin Convention into the EU acquis was negotiated, so was the Constitutional Treaty at the European Convention. The latter brought about the introduction of what is now Art. 80 TFEU. It was during those deliberations that the solidarity principle was given its new substantiation within asylum policy as including fair sharing of responsibility (European Convention 2002). This was arguably an attempt to create a primary law grounding for the solidarity principle within a CEAS that had proved its inability to substitute the costs-by-cause principle, thus creating a corrective provision and a basis for future reform.

The intent to sanction Member States for not preventing unauthorised immigration is not in line with the aim to achieve a CEAS that works for the benefit of the Union as whole that, in turn, is a breach of the solidarity principle. To accuse a Member State of being solely responsible for immigration is illogical. Motives for migration are highly individual and complex and have little to do with how well borders are controlled (Baumann, Lorenz and Rosenow 2011). No less perfidious is an understanding of claim to asylum – a human right – as punishment for a Member State. The clearly identifiable tenet of European asylum policy, to prevent unauthorised immigration, is the basis for this logic of responsibility allocation. Even if disagreeing with this view, one would inevitably have to assume that responsibility is deliberately allocated through geography (Hruschka and Maiani 2022: Art. 13; Kücük 2016). Both would constitute a violation of the solidarity principle, especially after the introduction of Art. 80 TFEU.

Early on, there were serious doubts about the effectiveness of the Dublin system. When evaluating it in 2000, the Commission admitted that the Convention had not met its objectives and that justifying its continuation would be questionable (European Commission 2000). In

multiple reform attempts the Commission has reiterated both that the failings in the CEAS can be traced back to the failings of the Dublin system (European Commission 2016) and that the Dublin system does not work the way it should (European Commission 2015a). These admissions of failure notwithstanding, the costs-for-cause principle has not been seriously put into question, not even in the latest reform proposal package (European Commission 2020a). Thereby, the fundamental problem is not being addressed: the Dublin system has been proven to be completely dysfunctional in terms of its objectives (Fröhlich 2016; ECRE 2008; Maiani 2016; Hruschka and Maiani 2022: Art. 1). Since it was devised under the premise that all Member States share similar political and economic conditions as well as coherent standards on their respective asylum systems, it was doomed to fail. This ideal never existed. Conversely, it incentivises asylum seekers to secondary movements and Member States to either relinquish their obligations or force them into non-adherence (Chetail 2016).[2] That would account for another violation of the solidarity principle. Not even the most basic objective, i.e., to register all asylum seekers at the external borders is being met by the Dublin system, which underlines its dysfunctionality (Costello and Mouzourakis 2017).

Adding a case law perspective to corroborate the argument, the ECJ, in a seminal 2011 judgement, has prioritised a duty to support connected to the solidarity principle over the costs-by-cause principle in the Dublin system (European Court of Justice 2011). The Court found that Member States in specific instances are not obligated to process an asylum claim even if mandated by the Dublin system. These instances arise in situations where Member States are confronted with a disproportionate burden that violate Art. 80 TFEU (Ibid.: mn. 87). The judges found that Member States that are disproportionality burdened within the CEAS must mandatorily be supported by the other Member States (Ibid.: mn. 94). The Court clarified that less burdened Member States must not demand compliance from Member States that are disproportionally burdened. An interpretation that understands the ECJ's judgement as a confirmation of the Dublin systems' ineptitude to ensure a fair sharing of responsibility seems more than reasonable. Hence, this case highlights that the Dublin system creates situations in which Member States are unable to fulfil their legal obligations and that the authoritative jurisdiction views that violation as lawful. Given that the ECJ decided on a case from 2009 where no particular increase of asylum numbers existed, this judgement is substantial evidence for the assertion that Dublin's allocation mechanism violates the solidarity principle irrespective of the number of people seeking asylum in the EU.

In light of these violations of what Art. 80 TFEU entails, some voices argue that a case against the Dublin system could be brought before the ECJ (Bast 2016; Moreno-Lax 2017). On the other hand, more sceptical views highlight doubts about the justiciability of Art. 80 TFEU (Thym 2022). Although many Member States disproportionally suffer from the failures of the

Dublin system and its ineffectiveness is widely accepted, so far, no action has been filed. The political barriers seem too high to surmount. The contrasting policy preferences among Member States and between Member States and institutions seem too hard to consolidate. But without discarding the costs-by-cause principle – the birth defect of the CEAS – its pathologies will remain in the form of Union law violations and the dysfunctionalities of the Dublin system that go against the solidarity principle. Hence, the costs-by-cause principle creates a permanent solidarity crisis in the European asylum policy that has existed since its very inception.

A CEAS that is governed by the rule of law and that works for the common good of all members – thus being in accordance with the solidarity principle – is not achievable with the current logic of allocating responsibility within the asylum policy of the EU. It would need more coherent standards and procedures throughout the EU, and effective mechanisms to adequately assist those on the periphery. The financial and operational flanking measures in place are insufficient to effectively establish the solidarity principle (Saracino 2019). The logic behind the allocation mechanism seems like a poor idea that has never worked in practice, incentivises law violations and at the same time is impossible to reform, revealing a concerning path-dependency. Although the Dublin system's dysfunctionality is largely accepted by Union actors and scholarship, it is being clung to because Member State preferences haven't aligned accordingly since its inception. The solidarity crisis will persist as long as the costs-by-cause principle governs responsibility allocation for asylum claims and is replaced by one that is true to Art. 80 TFEU.

The 2015/2016 asylum governance crisis as a(nother) symptom of the solidarity crisis

The identified continuous solidarity crisis in Europe's asylum policy occasionally shows symptoms in the form of certain special events. One of those symptoms was the political crisis that arose as a result of the increased migratory movements to Europe in 2015/2016. However, a prelude to the asylum governance crisis was the so-called Franco-Italian affair in 2011. Back then, a comparably small influx of asylum seekers (approx. 25 000) into Italy and the subsequent actions of the Italian government caused a short-lived diplomatic conflict in the EU, mainly carried out between France and Italy, that led to a reform of the Schengen regime (Saracino 2014). The urgency and conflict potential emerging from that rather small-scale occurrence triggered a political response that is comparable to what unfolded during the refugee influx in 2015/2016 and delineates the basis of the Schengen problems still prevalent today (de Somer 2020). In this regard the Franco-Italian affair can be considered a 'dress-rehearsal' for the 2015/2016 solidarity crisis symptom, underlining not only the volatile potential

for conflict in the EU but also the fact that the actual refugee numbers only play a minor role in bringing the pathologies of the CEAS to light.

The onset of the asylum governance crisis response can be identified on 20th April of 2015.[3] After continuing migrant shipwrecks in the Mediterranean, an exacerbating situation on the Balkan route and an ever-increasing number of asylum applications, the Justice and Home Affairs and External Action Council convened for a special meeting and came up with a 10-point-plan to tackle the situation (European Commission 2015b). Shortly after, the European Council confirmed these objectives and promised to look into options for emergency relocation among all Member States (European Council 2015a). The European Parliament demanded either the activation of the 'Temporary Protection' Directive or an emergency relocation mechanism on the basis of Art. 78(3) TFEU (European Parliament 2015). Taking up the demands of its partner institutions, the Commission presented its Agenda on Migration on 13 May 2015, an extensive plan to tackle the challenge with short-term and long-term measures (European Commission 2015a). Most importantly, it announced a proposal for an emergency relocation mechanism according to Art. 78(3) TFEU 'for persons in clear need of international protection to ensure a fair and balanced participation of all Member States to this common effort' (European Commission 2015c). In doing so, the Commission opted against the TPD.

The first Commission proposal to relocate 40,000 people in need of protection was accepted by the Council in July 2015 (Council of the European Union 2015a). Meanwhile, the numbers of refugees had markedly increased, and the situation on the Balkan route and Hungary had exacerbated. Hence, the Commission felt compelled to propose another emergency relocation, adding 120 000 people in need of protection to the scheme (European Commission 2015d). In this proposal, Hungary was envisioned to be one of the beneficiaries and was supposed to gain as much support as Greece. On 14 September 2015, the first proposal to relocate 40 000 people (24,000 from Italy, 16,000 from Greece) was put into force by the Council, based on voluntary reception contingents (Council Decision 2015/1523). On 22 September 2015, the Council adopted the proposal to relocate 120 000 persons with the exclusion of Hungary as a beneficiary using mandatory Member State contingents (Council Decision 2015/1601). Apparently, the Hungarian government had insisted on being exempt due to its general opposition to the measure and disagreeing with the notion of being a Member State with an external border (Regierungen des Großherzogtum Luxemburg 2015; European Court of Justice 2017a: para. 14). Hungary, alongside Slovakia, Romania and the Czech Republic voted against the proposal (Council of the European Union 2015b). Accounting for the offsetting from the EU-Turkey Statement's relocation contingent, the real number of persons to relocate by means of both Council decisions ended up being 98 000 (Council Decision 2016/1754).

With regard to the second relocation mechanism, the Commission proposal as well as the Council decision bore direct references to bringing to bear Art. 80 TFEU. However, none of the countries opposing the Council decision mentioned Art. 80 TFEU in their statements or agreed to the intended goal of creating a fairer responsibility sharing (Council of the European Union 2015b: 4 et seq.). In any case, the unofficial Council norm of seeking unanimity could not be met, highlighting the controversies in the decision-making process (Trauner 2016). The political prudence of making an exception to the quasi-unanimity in this highly contested decision should be put into question, especially considering the European Council had demanded an agreement by consensus (European Council 2015b). The decision to put forward a mandatory relocation mechanism was legal beyond doubt, but questions about its legitimacy remain.

Hungary and Slovakia decided to bring legal actions before the ECJ, claiming procedural errors as well as lack of proportionality and legal basis (Case C-643/15; Case-647/15). After the Polish elections brought the PiS into government, the country joined in on the actions (European Court of Justice 2017a: para 30). In its 2017 decision, the Court rejected the actions on all accounts (European Court of Justice 2017b). The judges ascertained that all measures within asylum policy must adhere to Art. 80 TFEU (European Court of Justice 2017c). According to the judgement, neither the financial nor the operative assistance, nor the implemented border management measures were sufficient to relieve the burden on the respective Member States (Ibid.: para 258). The Council decisions were interpreted by the Court as necessary expressions of Art. 80 TFEU (Ibid.: para 252).

When the implementation period of the relocation mechanism had passed after two years, only 29.144 persons had been relocated (European Commission 2017a). Only Malta and Estonia had honoured their obligations fully (European Commission 2017b). The Commission called upon the Member States to continue relocation from Greece and Italy on a voluntary basis (European Commission 2017c). Until 7 March of 2018 the overall number increased to 33 846 (European Commission 2018). That amounted to about a third of the envisaged target, a sobering result. Reasons for the poor record were, among others, cumbersome bureaucracy and lack of cooperation between the Member States (Maiani 2016). The main obstacle, though, remained the refusal of a few Member States to participate at all.

After sustained refusal by Hungary, Poland and the Czech Republic to implement the provision, the Commission embarked on the path to an infringement procedure which eventually led to legal action brought before the ECJ in December of 2017 (European Commission 2017d). The Court found that the defending Member States had infringed Union law by not complying with the relocation mechanism (European Court of Justice 2020b). The judges confirmed that all asylum measures must adhere to Art. 80 TFEU and that all Member

States must abide by the principle of solidarity and fair sharing of responsibility (European Court of Justice 2020c). Member States may not, moreover, unilaterally determine a lack of effectiveness of an Union act, particularly not in terms of public order and internal security, to avoid obligations emanating from Union acts, since this would go against the objective of solidarity (Ibid.: para 180). This can be interpreted as a refusal by the ECJ to acknowledge Member States' mere invocation of the *ordre public* proviso in Art. 72 TFEU as sufficient for defeating the duty to solidarity. Member States must also not refuse their legal obligations simply by unilaterally pre-determining their ineffectiveness.

The continued intransigence of the respective Member States shows a new dimension of Europe's solidarity crisis: violating the solidarity principle by openly and sustainably refusing the duty to implement Union law. The Council decisions' objective to bring to bear the principle of solidarity by invoking Art. 80 TFEU in order to mitigate the pathologies within the CEAS caused by the Dublin system and create a fair sharing of responsibility has failed. The fact that Member States just plainly and irreversibly refuse to implement common policy measures is novel to the integration project and thus a new quality of the solidarity crisis in Europe's asylum system. With their unlawful and continued course of action, the intransigent Member States have placed themselves outside of the EU legal order. This can be assessed as an open revolt against the common asylum policy. By ignoring the ECJ and relying simply on the lack of law enforcement, the rule of law is severely threatened. Engendered by the birth defect that is the costs-by-cause principle in the responsibility allocation system, it is a very visible symptom of the underlying and continuous solidarity crisis brought about and perpetuated by the Dublin system. The *sine qua non* of the integration project is being violated, creating its own rule of law crisis (Guild, Costello and Moreno-Lax 2017; Tsourdi 2021). The EU's central doctrine is being put in jeopardy and puts into question the way forward not only in asylum policy, but also for the whole integration project.

In the aftermath of the failed mandatory relocation experiment, the common ground for common asylum policy had been eroded a great deal, especially in terms of a fair sharing of responsibility. Even after the 2020 ECJ judgement, the transgressing Member States did not experience any negative repercussions, quite the opposite. More Member States pivoted towards their positions. The Commission did not seek any punitive action but rather incorporated these rather extreme political stances in their policy-making approach. In an attempt to revive asylum cooperation, the Commission presented an asylum governance package later in the year 2020 (European Commission 2020a). It turned out to be rather inadequate with regard to necessary substantial reforms, particularly pertaining to responsibility allocation (Maiani 2020; Thym 2020). The costs-by-cause principle remains alive

and well regardless of the ostensible farewell to the Dublin regulation, as does the apparent path-dependency (European Commission 2020b).

Most strikingly, the reform proposals try to enclose extreme positions like those of Hungary and Poland, thus opening a flank towards unlawful behaviour and rewarding conduct that erodes European integration. Attempting to reconcile interests that incorporate these extreme policy preferences in the area of asylum is challenging. It can lead to assuaging extreme policy preferences as opposed to more moderate ones, which includes moving farther towards externalisation of migration, deflection of protection seekers, and fundamental law violations. A misunderstood pragmatism that is only focussed on what is feasible, not on what is required and necessary, becomes appeasement. It could turn out very detrimental for the European Union to accommodate rule of law violators instead of drawing a red line and reinforcing values and principles that honour the tenets of the integration project.

The activation of the 'Temporary Protection' Directive in light of the 2022 refugee movements from Ukraine

After Russia's unprovoked attack on Ukraine on 24 February 2022, the European Union and its partners gave a united and strong diplomatic response. On the basis of an estimated number of over 3 million refugees seeking protection in Europe – the UNHCR estimates were even higher – the Commission declared a 'muss influx' and proposed the activation of the 'Temporary Protection' Directive (European Commission 2022a). An unprecedented move since the Directive had never been used and laid dormant for more than two decades.

Originally, the TPD was devised 'on the basis of solidarity' (Directive 2001/55/EC: Art. 16):

> [T]o establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons (Ibid.: Art. 1).

The provision was originally designed as a response to the Balkan crises in the 1990s that produced severe refugee movements towards central Europe. The CEAS was not yet in place and the responsibility allocation criteria based on the Schengen Convention and later adopted in the Dublin Convention were not able to create a fair sharing of responsibility. Hence, a measure was devised to deal with mass influx via temporary protection, leading the way to the TPD in 2001.

Generally, its protection scheme envisages less rights for beneficiaries than international asylum law would provide (Peers 2015). It was meant as an instrument focussing

on deterrence with a stringent focus on returns (van Selm 2022). The measure has to be activated by the Council upon proposal from the Commission by qualified majority vote (Directive 2011/55/EC: Art. 5). The Directive does not clarify what constitutes a 'mass influx', but it is delineated as Union-wide, substantial in numbers, and coming from one single country or region only (Ibid.: Art. 2). It aims at ensuring that national asylum systems will not malfunction when faced with a mass influx. The insufficiency of a Member States' ability to absorb an influx, though, is not a sufficient indicator for activation. Neither is an increased influx to a single Member State unless the reason for that increase is its proximity to the main region of displacement (Skordas 2022).

The objectives of the Commission's proposal on 2 March 2022 aimed at, first, harmonised rights that displaced persons seeking refuge in the EU from the war should enjoy across the Union and be offered an adequate level of protection. Second, at preventing national asylum systems to be overwhelmed by bypassing asylum provisions. Third, to manage the expected influx in a controlled and effective manner, respecting fundamental rights and international obligations. Finally, and maybe most astonishingly, to promote balanced efforts between Member States by free choice of host country for the beneficiaries of temporary protection and the right to free movement in the EU (European Commission 2022b). In the proposal, solidarity was only mentioned in connection with a 'solidarity platform' to exchange information that was to be implemented and coordinated by the Commission).

The Council convened only two days after the proposal was published to adopt its decision (Council of the European Union 2022). Notably, the Council decision differs from the Commission proposal in that it gave the Member States more discretion to exclude non-Ukrainian nationals (Ibid.: Art 2 and 3; European Commission 2022b: Art. 2). Ultimately, it covers Ukrainian nationals residing in Ukraine before 24 February 2022 and their family members. In terms of third-country nationals and stateless persons, it covers those who enjoyed international or equivalent protection before 24 February 2022, and the benefit of temporary protection extends to their family members as well. Stateless persons and third country nationals with no such protection and only legal residence in Ukraine must return to their country or region of origin. Only in case such a return is not possible in safe and durable conditions, the respective persons fall under the Council decision (Council of the European Union 2022: Art. 2).

The general objectives remained the same between proposal and decision. The standards offered to Ukrainian refugees by the TPD are considered minimum standards that the Member States have discretion to extend. The scheme has a timeframe of one year, after which it can be automatically extended twice for six months. An extension of up to one additional and final year is possible but needs another Council decision upon proposal of the

Commission (Ibid.: Art. 6). The same procedure would be needed if the EU decided to prematurely end the scheme.

The Member States must issue residents permits, allow beneficiaries to take up employment, provide suitable accommodation, social welfare, medical care, education for minors and guarantee free movement for selecting the Member State the displaced person would like to take residence under the TPD. This free-choice model constitutes, without a doubt, a paradigm shift towards the long-standing finding within migration research that determining the responsible Member State can only work when the asylum seekers' preferences are incorporated into the decision (ECRE 2008; Wagner et al. 2016; Guild et al. 2015).

The decision to depart from the 'forum shopping' precept of the CEAS is hard not to overstate. What is often missed in the debate on the ostensible paradigm shift, however, is that the Commission had reflected a free-choice model for the responsibility allocation mechanism very early on. When evaluating the Dublin Convention three years after its implementation, the Commission seriously considered it as an alternative to the dysfunctional costs-by-cause principle (European Commission 2000). This consideration was picked up again in the Commission's proposal for the Dublin II regulation (European Commission 2001). However, the documents mention that for such a system to be effective, national asylum systems would have to be harmonised to a higher degree to prevent diverging standards to be the key criterium for asylum-seekers' decisions.

Guaranteeing free-movement to beneficiaries may turn out to be a game-changer: it signals a feasible alternative to the hitherto existing paradigms of responsibility-sharing by physical distribution, restriction of movements rights, or use of coercion; it could change the idea of sharing responsibility without the consent of respective people (Vitiello 2022). Even if in principle this may be true, at the same time it is contrasted with the ill-treatment of non-Ukrainian nationals at EU borders; however, it could be taken as a best-practice example. Steve Peers has commented that the Council decision shows the better side of the EU after its asylum law took a turn to a 'moral abyss' (Peers 2022).

Why was the TPD activated now?

One of the key questions in the debate revolves around why the TPD has been activated now and not during previous crises. A first insight to an answer might be that there was simply no political will to employ the TPD before. In 2011, during the movements that preceded the Franco-Italian affair, the Italian government considered to put triggering the TPD on the European agenda, but due to apparent negative reactions, it prescinded from a formal request

(Beirens et al. 2016: 126). The TPD arguably could have been triggered in 2015 (Ineli-Ciger 2016). But its activation was never seriously considered. The EU decided to go the temporary relocation route via Art. 78(3) TFEU. Due to the continued disregard even in face of apparent crises and muss influxes, the TPD has been called a 'waste of paper' (Gluns and Wessels: 83).

A thorough review of the TPD in 2016 which included interviews with Member States representatives, revealed that the main objections to applying the measure were concerns about national sovereignty, a protection period considered too long, the fear of creating a pull effect, not wanting to reward Member States for not equipping their asylum systems adequately for the CEAS to work properly, and the overall endowment of rights for beneficiaries that was perceived as a higher standard than some Member States were granting (Beirens et al. 2016).

As opposed to the current situation, during the Syrian civil war the neighbouring states took on the brunt of responsibility for refugees. Looking at the war in Ukraine, those responsible neighbours are now EU Member States. Besides geography, timeframe is another valid argument for triggering the TPD now over 2015, since the displacement was sudden, almost from one day to another, and expected to be overwhelming in a very short period of time. In terms of quantity, the estimated numbers of displaced persons seeking refuge in the EU now is much higher than it was in 2015.

The activation of the TPD should, moreover, be understood as a political statement of unity against the Russian aggression. In these extraordinary circumstances of hot war returning to European soil, it is very much a reaction to this historical watershed moment. Of course, the existing visa-freedom for Ukrainian nationals made it much easier to implement the TPD (Ineli-Ciger 2022). Nonetheless, the rationale behind temporary protection now seems to distinctly different from the original objectives of the provision, aiming at welcoming refugees and equipping them with wide array of rights, as opposed to focussing on lower fundamental rights standards and returns.

Pragmatism should also be considered when trying to explain the unprecedented activation of the TPD. Faced with a dysfunctional CEAS, and having unsuccessfully attempted the temporary relocation route in 2015, what other viable options would there have been to tackle this challenge in a unified manner? The TPD might have been the only choice left that offered a chance of a common EU response and a fair sharing of responsibility between the Member States.

Moreover, the TPD provides an allocation tool to circumvent the Dublin system. This could, in turn, provide substance for a future argument by Member States opposing the current CEAS, in that the Dublin system isn't needed for tackling such crises at all. Soon, there could

be evidence for the notion that asylum policy instruments that guarantee fundamental and human rights are no longer necessary, since all the EU needs from now on is temporary protection and border control policies. It would feed into the narrative and policy approach that views Europe's asylum policy as superfluous, aims at focussing all attention at externalisation and deflection, and equips the Member States with more leeway to manage migration flows. A new argument could emerge that whilst putting the primary focus on deflection, those who actually reach EU soil can be dealt with national temporary protection measures, whereas the TPD is needed only in extraordinary circumstances. A common European asylum policy could become largely obsolete.

The end of the solidarity crisis?

Against the backdrop of the unprecedented response to deal with refugee movements, the question arises whether this could constitutive a paradigm-shift or fresh start of Europe's asylum policy after a prolonged standstill. First of all, it should be acknowledged that there are discriminatory practices employed at EU borders. Cooperation with the Libyan 'coastguard' to pull back migrants on their way to Europe continue (Amnesty International 2021). Illegal pushbacks on the Eastern and Southern external borders, under passive involvement of Frontex, are common practice (Fallon 2022; EURACTIV 2022b). Persons seeking asylum primarily from the Middle East, trying to enter the EU through its Eastern Member States, has been framed as a 'hybrid attack' by the EU since the protection seekers were used as political pawns by Belarus' authoritarian leader (Euronews 2021; Kochenov and Grabowska-Moroz 2021). The fact that a negligible number of persons seeking refuge in Europe is being labelled an 'attack' reveals the underlying view of unauthorised immigrants are unwelcome as opposed to Ukrainians. Europe's response to the people persevering under the most precarious circumstances at the borders to Poland and the Baltic countries has been ruthless, unrelenting, and arguably illegal. In the wake of these developments, Poland has built a border fence to Belarus (Deutsche Welle 2022a). Lithuania has followed Poland's example (Deutsche Welle 2022b). Latvia is also building a fence, has suspended the right to seek asylum and legalised pushbacks (Jolkina 2022). Similarities to what has been exercised in the Spanish exclaves Ceuta and Melilla are evident (ECRE 2022b). Above all, there is ample evidence that people who don't look like the idea of typical Ukrainian fleeing the war are being treated in a clearly discriminatory manner (White 2022; Pop 2022; Howden 2022; Betts 2022). What these practices have in common is that they are directed at non-white, non-Christian refugees that are simply not welcome in the EU. Their entry continues to be unauthorised, wherefore there are calls for more protection-driven and non-discriminations standards within the EU approach

(Carrera et al. 2022). This discriminatory and nativist approach is historically documented, especially in European visa policy (Bueno-Lacy and von Houtum 2022).

In sharp contrast, purported threats to public order and internal security, as were brought forward in the ECJ cases against the temporary relocation mechanisms, do not seem to play a role in in terms of beneficiaries from Ukraine. Similarly waived seem concerns regarding national sovereignty or the ability to integrate protection seekers. Suddenly, secondary movements do not seem to be a problem anymore when it pertains to Ukrainian refugees. The lack of a rhetoric of invasion we have witnessed in previous refugee influxes is also astoundingly absent. Above all, there doesn't seem to be one single Member State government objecting to the application of the TPD. All in all, none of the former demurs against the TPD seem to be prevalent in this crisis. On the other hand, nothing has changed in the treatment of all other larger groups of people seeking asylum in the EU. Europe's double standard in treating refugees is, thus, hard to deny. The change of scope between Commission proposal and Council decision giving more discretion to Member States to exclude non-Ukrainians speaks volumes in this regard.

As a matter of fact, there seems to be no indication that the general preferences of those opposing the current asylum system have changed. Poland, for example, shows continuity in its refusal to adequately apply asylum standards by legalising pushbacks and building a border fence as well as maintaining a positive stance towards the treatment of Ukrainians. In 2020, 5 per cent of the population in Poland were Ukrainians (Tilles 2020). The country has long been welcoming Ukrainians who fill a significant workforce demand for its economy (Bill 2019). Also, as a country facing profound demographic change, it needs millions of immigrants in the coming decades (Eyre and Goillandeau 2019). In light of its nativist views on immigration, a PiS-led government that refuses non-white and non-Christian immigrants, naturally has an increased interest in admitting Ukrainians. Other countries facing labour shortages, like Germany, might have similar interests (EURACTIV 2022c).

Considering the TPD as a measure distinctly circumventing the provisions of the CEAS, a standstill in Europe's asylum policy can still be diagnosed. Nothing has changed in terms of practices at the external borders vis-à-vis non-beneficiaries of the TPD Council decision. And even in that case, discriminatory practices are well-documented. CEAS's birth defect, the costs-by-cause principle of the Dublin system, is still in place and not envisaged to be substituted in the new asylum package. This fundamental tarnish still breeds the pathologies observable in the dysfunctionality of Europe's asylum and border control policies. The solidarity crisis in Europe's asylum policy is still very much ongoing.

Conclusion

The article has provided an analytical lens to examine solidarity in the European Union, demonstrating that the role, scope, shape and content of the concept can indeed be specified cogently via a comprehensive transdisciplinary mixed methods approach, focussing on the pertinent context. Understood as encompassing the whole scope of the EU, it turns out it is a necessary condition of the Union as a whole. With regard to European asylum policy, it has been shown that there is a specific expression of solidarity, characterised by fair sharing of responsibility between the Member States. However, the bedrock of the CEAS, the Dublin system, violates the solidarity principle on account of its logic of responsibility allocation: the costs-by-cause principle that was implemented in the very beginning of asylum cooperation in Europe. It creates Union law violations and dysfunctionalities that are in clear breach of EU's solidarity principle, thus creating a permanent solidarity crisis. This 'birth defect' in the CEAS has been passed on over and over, showing not only pathologies like the 2015/2016 asylum governance crisis, but also deeply entrenched path-dependency in this policy area. Furthermore, it has added to the prevalent rule of law crisis, evidenced, for example, by practices at the Union's external borders that range from politically imprudent to outright illegal.

Examining the developments in European asylum policy since the outbreak of the war in Ukraine, at the time of writing there is no end to the solidarity crisis in sight. All constitutive elements that have led to the diagnosis are still intact. In fact, some of those factors have exacerbated since then. Illegal pushbacks have become common practice, evidence for the long-standing criticism of discriminatory border (and visa) practices has become even more prevalent. The EU and its Member States have found a way to circumvent the birth defect in the Dublin system by activating the 'Temporary Protection' Directive and prevent the pathologies it creates. However, it should be noted that this almost exclusively refers to the treatment of displaced Ukrainians. Generally, unwanted migrants are still being deflected, pushed back or even left to die at Europe's external borders, sometimes even at the same ones Ukrainian refugees are crossing, revealing a double standard detrimental to European laws, values, and political credibility.

The unprecedented application of the TPD rather reinforces the notion that the existing asylum governance is being eschewed since the measure provides the instruments to deal with authorised protection seekers on a temporary basis. The extraordinary nature of the cause for the influx as well as the notion of 'Europeanness' vis-à-vis Ukrainian refugees, combined with a dearth of other viable options, make the application of the TPD seem as an exception to the rule. At the same time, there is no identifiable change of policy or preferences, neither on Union level nor among the Member States, nor towards the treatment of asylum seekers outside of the beneficiaries of the TPD Council decision. This could mean that a successful

outcome of the temporary protection scheme might put the final nail in the coffin of European asylum policy. When prevention of entry becomes the sole focus and more effective, domestic temporary protection measures could be sufficient to deal with the bulk of protection seekers. Especially when the TPD is being viewed as a last resort instrument in cases the EU is faced with mass influx, and refugee protection is being further eroded. It is plausible that granting asylum procedures could become the exception to the treatment of refugees, and it would be in line with a growing number of Member State's preferences vis-à-vis asylum cooperation.

A key finding of this contribution is that without a revocation of the birth defect of the CEAS, the costs-by cause principle in allocating responsibility for asylum claims, the pathologies will not stop to show. Only an overhaul of the system of allocating responsibility to one that is in line with the solidarity principle, including a fair sharing of responsibility, could potentially end the solidarity crisis. Every reform that does not factor in this precondition is doomed to fail in attempting to eradicate the core problems of Europe's asylum governance. Reason for sanguinity, though, has been the Council opting for a free choice model in the temporary protection scheme that constitutes a departure from a long-standing precept of the CEAS. It could serve as a best-practice example in future negotiations. Keeping in mind that the ramifications of continued global heating will lead to rather more than less unwanted protection seekers in the EU, the task to shape a better functioning European asylum system is more important than ever. It can only work, though, when it honours the solidarity principle.

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[1] The ongoing departure from the rather distorting terminology 'refugee crisis' is desirable. In my view, the term 'asylum governance crisis' captures the complex case more aptly.
[2] Philipp de Bruycker and Evangelia Tsourdi (2016) suggest objective criteria to assess whether a Member State is either *incapable* or *unwilling* to fulfil its duties.
[3] The lead-up to the crisis, of course, was much longer. See Saracino (2019): p. 169 et seq.

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