



INSIGHT

THE COVID-19 CRISIS AND THE CLOSURE OF EXTERNAL BORDERS: ANOTHER STRESS-TEST FOR THE CHALLENGING CONSTRUCTION OF SOLIDARITY WITHIN THE EU?

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ABSTRACT: This *Insight* assesses the impact of the COVID-19 pandemic on the external borders of the EU. It first presents measures enacting the EU travel ban and also their implications on the European asylum system, as implemented by Member States' administrations. In this context, it discusses some of the challenges which emerge: these concern mainly the soft law instruments deployed and their relation with the EU legal order, and the complex achievement of solidarity within the EU.

KEYWORDS: COVID-19 and the EU – EU travel ban – closure of external borders – asylum-seekers – soft law – solidarity.

I. THE COVID-19 EMERGENCY, BORDERS AND ASYLUM-SEEKERS

The outbreak of COVID-19 pandemic has tested the responsiveness of the European Union as a governance system on many fronts.¹ This *Insight* is focussing on the implications of the “closure of the external borders” against the background of the European principle of solidarity, with specific attention to the way EU and Member States have interacted on borders' closure and its impact on asylum-seekers, during the pandemic.

As known, the external border of the EU is a composite entity because it results from the juxtaposition of the external borders of the single Member States. With Schengen, a Member State's function to control (its) external borders acquired a double significance: the state controls its borders “for itself” and also in a process of delegation, since other Member States might be affected by another state (good or bad) behaviour. There is an implicit process of delegation between states, which presupposes mutual

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¹ C. BEAUCILLON, *International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 387 *et seq.*



trust on how states perform their tasks. Among the subjects most affected by external borders, we have asylum-seekers, i.e., vulnerable persons; the pandemic exacerbated this situation, since it has shifted political priorities on securing public health, and also because the lockdown has implied, for example, a suspension of procedures related to examination of asylum requests in many countries.² Therefore, asylum-seekers' situation deserves a special attention in these exceptional times.

As a preliminary remark, it must be recalled that EU's responsiveness to the COVID-19 has been tested on many aspects. The pandemic has implied numerous legal challenges, at all levels of governance. Among the most discussed, we have the economic consequences of the pandemic, as they are perceived in the public debate as the most urgent, right after public health issues. The governance of migration and asylum, by contrast, does not seem to be a priority at the moment. It is not a case that the publication of the Pact on Asylum and Migration, a text awaited in spring 2020,³ has been delayed for weeks, and then postponed after the EU27 reached an agreement on the Recovery and Resilience Facility; it has been eventually published only on the 23rd of September 2020.⁴

The next sub-sections will illustrate the measures adopted at the external borders in response to the pandemic (I.1) and their implications on asylum-seekers (I.2); the analysis will then proceed with the assessment of their compliance with the EU legal framework (II), before developing some observations on the relations between emergencies, borders and an emerging European transnational solidarity (III).

I.1. THE CLOSURE OF EXTERNAL BORDERS AS AN EFFORT OF COORDINATION OF MEMBER STATES' INITIATIVES

As to the EU's response to the management of external borders, one must recall that Europe was the epicentre of the pandemic from the beginning of March. In those days, EU states have become, first, addressees of travel ban from the US.⁵ If the first reaction of the Commission to the travel ban enacted by Trump has been of disapproval and disappointment for the lack of consultation with the EU,⁶ it took less than a week for the Commission to change its position, and emulate the US, on the initiative of French President Macron. The European approach is, however, mildly phrased as temporary restriction on non-essential travel of non-EU nationals to EU states.

² See *infra*, section I.2.

³ European Parliament, Press Release of 30 April 2020, *Asylum and Migration Pact: MEPs push for legal and safe avenues*, www.europarl.europa.eu.

⁴ Communication COM(2020)609 final of 23 September 2020 from the Commission on a New Pact on Migration and Asylum.

⁵ Euractiv, *Trump suspends travel from Schengen area to US in coronavirus crisis*, 12 March 2020, www.euractiv.com.

⁶ Euractiv, *Europe furious over Trump's unilateral travel ban*, 12 March 2020, www.euractiv.com.

If the European Council of 10 March 2020 had advocated for a joint European approach with regard to COVID-19 and Trump has banned travel from the EU on the 12th of March, the concerted move toward an EU-wide travel ban materialized between the 16th and the 17th of March. On the 16th of March the Commission published a Communication and guidelines for border management measures aiming at protecting the health of the population and “avoiding disruptions to the free movement of persons, and the delivery of goods and essential services across Europe”,⁷ which have been endorsed by the European Council of the day after.⁸ The area covers twenty-six Member States and the 4 Schengen Associated Countries (Iceland, Liechtenstein, Norway and Switzerland), and for this reason it is indicated as EU+ area.⁹

Later on, the ban has been extended twice,¹⁰ and, with the improvements in the management of the pandemic, next to the arrival of the summer season, the last recommendation has been to start lifting the travel bans to the EU+ area by the 1st of July 2020.¹¹

At the beginning of June,¹² in its third assessment on the application of temporary restrictions on non-essential travel to the EU, the Commission strongly encouraged the remaining Member States “to finalise the process of lifting the internal border controls and restrictions to free movement within the EU by 15 June 2020”. For the external borders, it proposed to extend the application of the current travel restrictions on non-essential travel to the EU until 30 June 2020, suggesting Member States to converge on a list of third countries for which travel restrictions could be lifted.

Later on, at the end of June and upon proposal of the Commission, the Council adopted the Recommendation to gradually lift the travel bans for the residents of Algeria, Australia, Canada, Georgia, Japan, Montenegro, Morocco, New Zealand, Rwanda,

⁷ Communication COM(2020) 115 final of 16 March 2020 from the Commission on COVID-19: Temporary Restriction on Non-Essential Travel to the EU, and Document C(2020) 1753 final of 16 March 2020 from the Commission on COVID-19. Guidelines for border management measures to protect health and ensure the availability of goods and essential services.

⁸ Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 17 March 2020, www.consilium.europa.eu. On this occasion, the European Council stated: “We agreed to reinforce our external borders by applying a coordinated temporary restriction of non-essential travel to the EU for a period of 30 days, based on the approach proposed by the Commission”.

⁹ Ireland does not apply the travel restrictions.

¹⁰ With Communication COM(2020) 148 of 8 April 2020 from the Commission on the assessment of the application of the temporary restriction on non-essential travel to the EU and Communication COM(2020) 222 of 8 May 2020 from the Commission on the second assessment of the application of the temporary restriction on non-essential travel to the EU.

¹¹ Communication COM(2020) 399 of 11 June 2020 from the Commission on the third assessment of the application of the temporary restriction on non-essential travel to the EU.

¹² *Ibid.*, p. 3.

Serbia, South Korea, Thailand, Tunisia, Uruguay and China.¹³ This list of countries is going to be reviewed and updated every two weeks, with the same process established for its creation. At the same time, the list remains flexible since travel restrictions may be lifted or reintroduced for a specific third country listed, in case the situation in that country worsens quickly.

Furthermore, the Recommendation has considered to exempt from travel limitations Union citizens and third-country nationals who are family members and enjoy free movement rights according to Directive 2004/38/EC, and for third-country nationals long-term residents.¹⁴ Next to it, the scope of essential travel has been broadened, including also students and persons in need of international protection or for other humanitarian reasons.¹⁵

In this respect, the role of the Commission has been to foster communication and coordination between Member States' initiatives, in the effort of avoiding free-riding and lack of coordination that could damage Schengen and the internal market.¹⁶ At the same time, the Commission has steered the process, by providing guidance in order to ensure compliance to EU law in this complex circumstances,¹⁷ by devising the principles, the methodology and the criteria for the gradual process of lifting the travel ban to the EU+ area.¹⁸

The Council Recommendation is a measure that creates a common playing field and does not exclude that states can adopt more restrictive measures. The Commission provides guidance on the compliance with EU law in a spirit of loyal cooperation, but states remain responsible for their external borders. A closing statement of the Recommendation shows this: "A Member State should not decide to lift the restriction on non-essential travel into the EU for a specific third country before the lifting of the restriction has been coordinated in line with this Recommendation".¹⁹

¹³ Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction.

¹⁴ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

¹⁵ Cf. Annex II of the Council Recommendation (EU) 2020/912.

¹⁶ Communication COM(2020) 399, cit., p. 6.

¹⁷ Document C(2020) 1753, cit., and also Communication C(2020) 2050 final of 30 March 2020 from the Commission on COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy.

¹⁸ These are: assessment of the epidemiological situation and response to covid-19 in the third country; the application of containment measures during travel, including physical distancing while building and maintaining trust; reciprocity and travel advice; checklist, prepared on the basis of the criteria indicated, and forming the basis of the coordination mechanism, governed by the Commission with the contributions of the COVID-19 Information Group – Home Affairs, the Health Security Committee and of the IPCR, the Integrated Political Crisis Response Mechanism, which have the task to prepare a list of countries for which states of the EU+ area can agree upon, to be proposed to the Council.

¹⁹ Council Recommendation (EU) 2020/912, cit.

If this is the content of the Recommendation, Member States can restrict the travel bans depending on specific situations. For example, after the Council Recommendation, in Italy the Minister of Health has issued an administrative measure (“*ordinanza*”) with an entry and transit ban for persons who stayed or transited in a list of countries,²⁰ including Bangladesh. This measure has been taken after a surge in the epidemic in the region of Rome has been reported amid the Bangladeshi community,²¹ and it shows that the responsibility of the maintenance of the public health remains firmly in the hands of the Member States,²² like the responsibility of the closure of the external borders, as posited by the Schengen Borders Code.²³ Indeed, besides the efforts conducted by European institutions, and because of the relatively limited competences of the EU in public health, states are the main actors bearing the responsibility for public health and for border controls, also during a pandemic.²⁴ Easing unilaterally travel restrictions is not excluded, but the Commission recommends this should take place within a coordination mechanism, in light of the implications it can have on the whole Schengen area.²⁵

The next sub-section will explore the impact that the closure of the external borders has had on the situation of asylum seekers.

1.2. THE SPECIFIC MEASURES RELATED TO ASYLUM-SEEKERS AND THEIR IMPLEMENTATION IN THE MEMBER STATES

The closure of the external borders of the Member States has had an impact also on the situation of asylum-seekers; this has happened though the law requires that travel restrictions do not affect asylum seekers or persons “who must be admitted to the territory of the Member States for other humanitarian reasons”; nevertheless, COVID-19

²⁰ Armenia, Bahrein, Brazil, Bosnia Erzegovina, Chile, Kuwait, North Macedonia, Moldova, Oman, Panama, Peru, Dominican Republic.

²¹ Cf. Ministero della Salute, *Covid-19, Speranza: “Divieto di ingresso per chi arriva da Paesi a rischio”*, press release n. 218 of 9 July 2020, www.salute.gov.it.

²² F. CASOLARI, *Prime considerazioni sull'azione dell'Unione ai tempi del Coronavirus*, in *EuroJus*, 2020, p. 95 *et seq.*

²³ See the Schengen Borders Code, recital 6: “Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations”. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

²⁴ These are stated in Art. 6 TFEU, as a supporting, coordinating and supplementing competence of the EU, in Art. 9 TFEU as a transversal policy objective, and especially in Art. 168 TFEU and followings, in the Title XIV dealing with EU’s competences in public health. Next to it, public health features as a limitation to fundamental freedoms. On this, see F. BESTAGNO, *La tutela della salute tra competenze dell’Unione europea e degli Stati membri*, in *Studi sull’integrazione europea*, 2017, p. 317 *et seq.*

²⁵ Communication COM(2020) 399, cit., p. 6.

measures have affected the way states implement European law provisions and related administrative procedures on asylum, return and resettlement.

On these aspects too, the Commission has provided its guidance in order to avoid states going in all possible directions during the pandemic, in a document drafted with the support of EASO and of the European Border and Coast Guard Agency "Frontex", whose main merit is to embed measures limiting the spread of COVID-19 into a process based on the respect of the EU rule of law and legal order.²⁶ In particular, the Commission recalls that every process limiting rights, and in particular fundamental rights, should be based on risk assessment and scientific advice, and must be proportional, non-discriminatory in its implementation, and respectful of the principle of *non-refoulement* and other obligations under international law. Also during the pandemic, health protection must be balanced with other fundamental rights enshrined by the Charter of Fundamental Rights of the EU (the Charter), which implies that access to asylum procedures should continue to the greatest extent possible. In particular, all applications for international protection must be registered and processed, even if with certain delays. Emergency and essential treatment of illness, including for COVID-19, must be ensured.

On the specific aspect of processing applications, and since the Procedures Directive²⁷ does not foresee a pandemic among the derogatory rules, the Commission has suggested that countries can consider the case of large number of simultaneous applications, which is provided for in Article 6, paragraph 5 of the Directive.

For the Dublin Regulation,²⁸ this instrument allows for flexibility on personal interviews and on the application of discretionary clauses. For example, Art. 17, para. 2, states that: "The Member State [...] may, at any time before a decision is taken on the substance of an application, request another Member State to take charge of applicants in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that Member State is not in principle responsible".

As to the Reception Conditions Directive,²⁹ Member States can use the possibility to resort to different modalities of material reception conditions, which must however cover the basic needs and healthcare. According to Art. 13 of the Reception Conditions Directive, health screenings can be requested for public health reasons, respecting fun-

²⁶ Communication C(2020) 2516 final of 17 April 2020 from the Commission on COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement.

²⁷ 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.

²⁸ Regulation (EU) 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.

²⁹ 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.

damental rights and the principles of necessity, proportionality and non-discrimination. Furthermore, Art. 19 requires states to provide the necessary healthcare, including treatment for COVID-19, if the case. Measures of quarantine and isolation can be provided for, if based on national law, and if applied in a reasonable, proportionate and non-discriminatory manner.

The guidance of the Commission, with the support of EASO,³⁰ has pointed to different legal provisions allowing for the flexibility needed in order to face the pandemic in compliance with obligations resulting from EU asylum law. Nevertheless, states encountered difficulties in ensuring compliance with European law during the first months of the pandemic, as reported also by EASO.³¹ For example, in 2020 there has been a dramatic decrease in asylum applications, because of the closure of external borders and of most asylum offices, and this has precluded the arrival and registration of migrants as asylum seekers. In a similar vein but with different ratios, in April the number of irregular border crossings has been 900 compared to the 6400 of the same time last year. In April 2020 the number of applications dropped significantly compared to pre-COVID-19 levels, but in May, with emergency measures being gradually relaxed, asylum applications went rising again.

This overall limitation of the (EU) right to ask for asylum has taken place in a context of enforcement assured by national administration, which is a feature and a pitfall of the Common European Asylum System. Looking at actual circumstances of irregular migration and asylum management during the COVID-19 pandemic, we can find a variety of responses and situations. For example, states as Italy and Malta have adopted measures declaring their ports “unsafe” for disembarkation.³² This has re-politicized the issue of disembarkation, which has been since time a topic of discussion and negotiation between Member States.³³ The suspension of the right to apply for asylum, instead, has concerned, e.g., Hungary and Spain, which had declared state of emergency. Belgium and the Netherlands closed down arrival centres for newly-arrived asylum seek-

³⁰ For example, see EASO, *EASO Practical recommendations on conducting the personal interview remotely*, May 2020, www.easo.europa.eu.

³¹ EASO, *EASO Special Report: Asylum Trends and COVID-19*, 11 June 2020, www.easo.europa.eu.

³² According to EASO, “arrivals and attempted arrivals in the central Mediterranean remained on a par with 2019, despite Italian and Maltese announcements that their ports could not be considered as safe due to the COVID-19 pandemic.” Source: *EASO Special Report: Asylum Trends and COVID-19*, cit., p. 2. On these measures, see: F. MUNARI, *Il decreto interministeriale per gestire l'emergenza covid-19 nell'ambito degli obblighi dell'Italia ai sensi della Convenzione SAR: l'insostenibile "intermittenza" del luogo sicuro per i migranti diretti verso l'Italia*, in *SIDIBlog*, 16 April 2020, sidiblog.org; on the same decree, see also A.M. PELLICONI, M. GOLDONI, *La banalità dei porti chiusi per decreto. Osservazioni sui profili di legittimità del decreto interministeriale 150/2020*, in *Diritto, Immigrazione e Cittadinanza*, 2020, p. 219 et seq.

³³ S. PENASA, G. ROMEO, *Sovereignty-based Arguments and the European Asylum System: Searching for a European Constitutional Moment?*, in *European Journal of Migration and Law*, 2020, p. 11 et seq.

ers.³⁴ Asylum hearings have been suspended and detention centres have been closed for visitors, e.g., in Malta like in Greece.³⁵

Though most states have taken, under the COVID-19 emergency, measures restricting enjoyment of rights in an effort to contain the pandemic, some states have chosen the opposite direction to reach the same target. For example, Portugal decided that protection of public health and the effort of public authorities in the direction of the containment of the coronavirus went through granting full access to healthcare services to all migrants and asylum seekers in the country.³⁶

To conclude, emergency measures adopted by Member States under the umbrella of the fight to COVID-19 have implied a compression of rights granted by EU law, including the right to asylum protected by the Charter.³⁷ Next to it, national reactions to COVID-19 have been diverse, because EU asylum law rests on Member States' administrative machineries and procedures: this patchwork system limits the overall uniformity and coherence of the implementation of EU asylum law.

Irrespective of the different answers by Member States to asylum-seekers, COVID-19 is likely to increase the demand for asylum and international protection³⁸ and that the law must provide the answers which are up to the societal challenges: for this purpose, some courts are already recognizing that the emergency related to COVID-19 constitutes a reason for being granted (humanitarian) protection.³⁹

After having sketched the measures adopted at the external borders to face the pandemic and (some of) their implications on asylum, the attention will be turned to the legal framework and to the challenges that make us argue that COVID-19 has provided a stress-test for EU law and solidarity in the European Union system.

³⁴ However, in the Netherlands, an emergency shelter has been opened for asylum-seekers, thus contributing to avoid homelessness.

³⁵ The summary above has been collected from associations protecting the rights of refugees and asylum-seekers. Source: *How are coronavirus measures affecting refugees?*, in *Aditus*, 7 April 2020, aditus.org.mt. See also K. BABICKA, *The COVID-19 Measures Impact on the Rights of Migrants and Refugees in the EU*, in *OpinioJuris*, 29 June 2020, opiniojuris.org.

³⁶ *Portugal Grants Migrants and Asylum Seekers Full Citizenship Rights During COVID-19 Outbreak*, in *Schengen Visa Info*, 2 April 2020, www.schengenvisainfo.com.

³⁷ S. CARRERA, N. CHUN LUK, *Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area*, 3 April 2020, www.ceps.eu.

³⁸ EASO, *EASO Special Report: Asylum Trends and COVID-19*, cit., p. 3.

³⁹ See Tribunale di Napoli, sez. spec. immigrazione, decreto 25 giugno 2020, and comment by M. FLAMINI, *L'emergenza sanitaria da Covid-19 nel paese d'origine integra uno dei presupposti per il riconoscimento della protezione umanitaria?*, in *Questione Giustizia*, 15 July 2020, www.questionegiustizia.it.

II. THE LEGAL FRAMEWORK CONCERNING THE CLOSURE OF THE EXTERNAL BORDERS AND ITS RELATION WITH THE ASYLUM SYSTEM

In this section the focus will shift on the relationship between the COVID-19 containment measures adopted by the EU and the Member States, and how they relate to the EU legal framework.

In principle, the Schengen Borders Code does not provide for measures such as travel bans, nor for the closure of the Member States' external borders; in contrast, the Chapter II of the same code regulates extensively the temporary reintroduction of border control at internal borders (Arts 25 -35). As to the external borders, the EU's competence started as a competence to adopt "flanking measures" in the aftermath of the Schengen Agreement, and has progressively developed into a shared competence, because Art. 77 of the TFEU provides that the Union shall develop a policy with a view to:

- carrying out checks on persons and efficient monitoring of the crossing of external borders;
- gradual introduction of an integrated management system for external borders.

In this context, the EU travel ban should be framed as an automatic entry ban, which is, strictly speaking, not provided for in the Code. Instead, the Schengen Borders Code provides at Art. 14 for the refusal of entry if a person does not fulfil the entry conditions of Art. 6. In the case of a pandemic,⁴⁰ one could argue that the entry conditions of the Schengen Borders Code are not met; indeed, Art. 6, para. 1, let. e), could find application, prohibiting access to third-country nationals who are considered "as a threat to public policy, internal security, public health or the international relations of any of the Member States".

This situation could apply to the case of a pandemic, but by way of derogation from paragraph 1, we have a further provision⁴¹ which states that:

"Third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member States to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations [...]. The derogation can apply also to persons which have an alert in SIS and it means that Member States have the discretion to allow entry to their territories on humanitarian grounds, considering as well the international obligations EU Member States can have with regard to the [European Convention on Human Rights]".

Nevertheless, according to Art. 14 of the Code,⁴² a refusal of entry which can be adopted to preserve public health, must require a substantiated decision stating the precise reasons for refusal. It shall be immediately effective, but the person refused en-

⁴⁰ Considered as a "threat to public health", according to the definition of Art. 2, para. 21, of the Schengen Borders Code.

⁴¹ Art. 6, para. 5, let. c), of the Schengen Borders Code.

⁴² *Ibid.*, Art. 14, para. 3. See also Detailed rules in part A of Annex V.

try shall have the right to appeal. At the opposite, the EU Travel Ban should be considered as an automatic refusal of entry, applicable without an individual assessment of each case; therefore, the EU travel ban is shaped along the lines of the Code provisions, but not fully respectful of the rules and procedures posited in the Code, since it applies irrespective of an analysis of the single case, but as an *a priori* generalized rule.

At the same time, in a further provision,⁴³ the Schengen Borders Code foresees that border checks on persons require individual assessments, both for the case of “minimum checks” for persons entitled to move within the EU, and for the “thorough checks”, applicable to third-country nationals.⁴⁴

In light of the above, it is here argued that the Commission has adopted the communications on the EU travel ban, adapting or rather “stretching” the Schengen Borders Code to the emergency circumstances, requiring urgent actions, and in an effort to coordinate or provide a common framework for potentially diverging Member States’ initiatives. In its Guidance, assistance has been provided on how to implement the EU Travel Ban in a way not to prejudice the rights of EU citizens, of nationals of Schengen Associated Countries and their family members, irrespective of their nationality, as well as third-country nationals with a residence permit and their dependants.⁴⁵ Furthermore, it has been reminded that entry bans must be proportionate, non-discriminatory and implemented in a way ensuring respect for human dignity.⁴⁶

If this is the way the ban relates to the legal framework, its rationale is a crucial aspect too. While the World Health Organization has questioned the effectiveness of travel bans in countering a pandemic, the outbreak of the COVID-19 has shown that, when faced with extraordinary challenges, states are inclined to make choices in an uncoordinated manner, irrespective of the magnitude, nature and type of threat. This has happened because states bear the primary responsibility for public health and the EU has only limited powers for public health emergencies.⁴⁷

In this context of public health emergency, borders became a sensitive topic again, and freedom of movement has been perceived as a source of risks: more precisely, Schengen, and the facilitation of travels it entails, has been perceived as an additional threat for national health systems; suspending Schengen has been the extension of restrictive lockdown measures enacted in some states. The EU travel ban should be inter-

⁴³ *Ibid.*, Art. 8, on border checks on persons.

⁴⁴ On the application of the notion of public policy (Art. 6 Schengen Borders Code) to third-country nationals, see Court of Justice, judgment of 12 December 2019, case C-380/18, *Staatssecretaris van Justitie en Veiligheid v. E.P.*, para. 34. For earlier case law on public policy, see Court of Justice, judgment of 29 April 2004, joined cases C-482/01 and C-493/01 *Orfanopoulos and Others v. Land Baden-Württemberg and Oliveri v. Land Baden-Württemberg*, paras 95-97.

⁴⁵ Communication C(2020) 2050, cit., pp. 4-5.

⁴⁶ *Ibid.*, p. 3.

⁴⁷ See F. BESTAGNO, *La tutela della salute*, cit.

preted in this context of closure, of fear that domestic resources would not suffice: the closure of external borders has been enacted as a measure to bring (a sense of) security within the EU, or, at least, to make sure that external borders did not represent additional threats for the Member States.

The reinstatement of internal border controls, indeed, has been marked by a lack of coordination between Member States, in the first weeks of pandemic outbreak, to which the Commission has tried to remedy coordinating national measures, which however presented several aspects of divergences.⁴⁸ Therefore, the external border has been assigned an important symbolic function: i.e., to represent a security perimeter for all Schengen states, and support the effort of the Commission in governing this “domestic chaos”, threatening the core pillars of European integration, such as free movement of goods and persons.⁴⁹

The Commission had warned that the temporary reintroduction of controls at internal borders was potentially having “a serious impact on the functioning of the Single market as the EU and the Schengen area is characterised by a high degree of integration”.⁵⁰ Because of the price at stake, the Commission has recognized that the “External border regime offers the opportunity of concerted action among Member States to limit the global spread of the virus”.⁵¹

Considering that COVID-19 requires health professionals more than border guards, the policy of closure of the external borders has been used as part of a treatment against the reinstatement of internal border control measures,⁵² which is the main side-effect of the COVID-19 pandemic for the EU.

Furthermore, the measures adopted to contrast the COVID-19 pandemic should have safeguarded and guaranteed the respect of rights the EU confers to asylum-seekers. Among them, the right to claim for asylum, and the respect of the principle of non-refoulement⁵³ should be firmly established also during a pandemic. In contrast, only few states had included asylum-seekers in their exemption from travel bans,⁵⁴ and this means that the right to seek asylum, as protected by the EU Charter and specified by secondary law, has not been enforced by a number of countries. In this respect, the travel ban, as implemented by Member States, and as monitored by the Commission, does not seem to have guaranteed the respect of EU law, including fundamental rights.

⁴⁸ S. CARRERA, N. CHUN LUK, *Love thy neighbour?*, cit., p. 25.

⁴⁹ Communication COM(2020) 115, cit.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*: “Such a measure would also enable the lifting of internal border control measures, which several Member States have recently reintroduced in an effort to limit the spread of the virus”.

⁵³ S. NICOLOSI, *Non-refoulement During a Health Emergency*, in *EJILTalk*, 14 May 2020, www.ejiltalk.org.

⁵⁴ S. CARRERA, N. CHUN LUK, *Love thy neighbour?*, cit., p. 25.

Similarly, the principle of non-refoulement prohibits states from transferring anyone to a country where one would have his/her life threatened on account of race, religion, nationality, belonging to a particular social group or for political opinions. An automatic travel ban, less than other measures such as health checks at borders, and quarantine, does not allow much respect for the principle of non-refoulement, also because the implementation of the principle allows the possibility for states to send asylum-seekers to transit or origin countries if they can be considered as 'safe countries'.⁵⁵

III. ANY NEW LESSON LEARNED ON THE RELATION BETWEEN EMERGENCIES, BORDERS AND SOLIDARITY?

The European approach to Member States' external borders during COVID-19 pandemic represents a reaction that reminds us the symbolic function performed by borders.⁵⁶ Borders define and divide the inner and the outer space of a community, are connected with security and, most importantly, with the *subjective* interpretation that national governments forge of it:⁵⁷ it is not a case that many leaders have used the "war narrative" in order to explain the challenges states were facing in the fight against a very unusual and miniscule enemy, like a virus.⁵⁸ In times when a pandemic emergency threatens daily life, external borders have been (re-)allocated the function to foster a feeling of protection from external threats, even when the virus was already well introduced with-

⁵⁵ The situation of the administration of restrictive measures in reception centres deserves a full examination of its own, especially in relation to the respect of right to access to the healthcare, also protected by the Charter and specified in Reception Conditions Directive. See K. BABICKA, *The COVID-19 Measures Impact on the Rights of Migrants and Refugees in the EU*, cit.

⁵⁶ D. THYM, *Travel Bans in Europe: A Legal Appraisal*, in *Verfassungsblog*, 19 March 2020, verfassungsblog.de.

⁵⁷ As recalled in the Opinion of AG Jacobs delivered on 6 April 1995, case C-120/94, *Commission v. Hellenic Republic*, at para. 54: "I should like to emphasize at this point that it is not for the Court to adjudicate on the substance of the dispute between Greece and FYROM. It is not for the Court to determine who is entitled to the name Macedonia, the star of Vergina and the heritage of Alexander the Great, or whether FYROM is seeking to misappropriate a part of Greece's national identity or whether FYROM has long-term designs on Greek territory or an immediate intention to go to war with Greece. What the Court must decide is whether in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM could degenerate into armed conflict. I stress that the question must be judged from the point of view of the Member State concerned. Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. *Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless*".

⁵⁸ Macron's statement "nous sommes en guerre" is emblematic of this narrative, www.lemonde.fr.

in Europe.⁵⁹ In another perspective, and to a different extent depending on the country considered, the closure of external borders has been seen as the ‘normal’ prolongation of national lockdown measures, that have been very strict in some Member States, prohibiting movements also within the country, even from own’s home, unless justified for serious and documented reasons.

If some lessons could be learned from the COVID-19 crisis is that coordination is important within the EU and among Member States.⁶⁰ This function has been performed especially by the Commission, supported by the agencies Frontex, EASO and Europol, which has tried to steer this complex process which started with the Member States taking all kinds of measures and directions jeopardising Schengen and, consequently, the internal market.⁶¹ The Commission has tried to preserve cooperation and coordination within the EU, has recalled that integration means also interdependency on each other, for medical equipment, on food supply and more in general on the offer of goods and services satisfying crucial needs in contrasting the pandemic. After the first weeks of living in a “COVID-19 world”, the main lesson to be learned is that integration requires coordination between Member States in a context of respect for EU law, also if the main actors fighting the pandemic are states’ administrations, which might have different (local) preferences.⁶² Ideally, next to coordination, the Commission should also control on the enforcement of the measures, in the sense that EU law should be respected while implementing EU recommendations and other soft law instruments: in this first phase, this aspect has been lacking, considering that national measures resulted in a picture of divergent implementation of the measures.⁶³ For example, discrimination issues between persons holding the nationality of a member state and long-term third-country nationals have been reported in the process of implementing travel bans,⁶⁴ which, it should be recalled, has been modelled along the lines of the Schengen Borders Code, in the sense that it has been implemented as an automatic refusal of entry, without an individual exam of one’s health circumstances, as described above.⁶⁵

⁵⁹ C. HRUSCHKA, *The pandemic kills also European solidarity*, in *EU Immigration and Asylum Law and Policy Blog*, 20 March 2020, www.eumigrationlawblog.eu.

⁶⁰ A.M. PACCES, M. WEIMER, *From Diversity to Coordination: A European Approach to COVID-19*, in *European Journal of Risk Regulation*, 2020, p. 283 *et seq.*

⁶¹ See also F. CASOLARI, *Prime considerazioni*, *cit.*, and G. CAGGIANO, *COVID-19. Competenze dell’Unione, libertà di circolazione e diritti umani in materia di controlli delle frontiere, misure restrittive della mobilità e protezione internazionale*, in *I Post di AISDUE*, 2020, 30 April 2020, www.aisdue.eu.

⁶² A.M. PACCES, M. WEIMER, *From Diversity to Coordination*, *cit.*, p. 287 *et seq.*

⁶³ See also D. THYM, *Op-Ed: The unexpected resurgence of the Schengen area*, 6 July 2020, www.schengenvisainfo.com. and S. CARRERA, N. CHUN LUK, *Love thy neighbour?*, *cit.*, at p. 26, talk about an “ambivalent position” on compliance.

⁶⁴ For example, between persons who acquired the citizenship of a Member State and long-term residents, who have been denied access to the EU Member State of residence, after a trip outside the EU. Media have reported this type of inconsistencies. Source: www.cittadellaspezia.com.

⁶⁵ S. CARRERA, N. CHUN LUK, *Love thy neighbour?*, *cit.*, p. 24.

A second remark is that, in this special context, the Commission and the Council have deployed mainly soft law instruments, such as various type of communications and recommendations.⁶⁶ Recourse to soft law instruments is something on which further research is needed: next to the flexibility and promptness, research is needed to clarify the relation between soft law and hard law, especially in the perspective of enforcement by Member States. It is of paramount importance that this relation is clarified because the way emergencies are tackled display consequences for EU law, fundamental rights and for legal certainty, for example.⁶⁷ At the same time, the choice of a type of instrument affects also the different powers of European institutions, and, consequently, also the rule of law. In another perspective, this pandemic has shown that soft law instruments are crucial in a context marked by speed and necessity; this seems to correspond to general “emergency regulatory powers” (*decretazione d'urgenza*) in domestic secondary law, which is something lacking in the EU legal order in the form of a competence of the Commission to enact regulations in emergency situations.

As to the relation between border closures and the curbing of the contagion, more inter-disciplinary research in a medical and virologic perspectives is needed in order to show the impact of the closure of the borders in countering the pandemic: the virus travels with persons irrespective of the legal borders to be crossed, or of the number of border guards deployed to make controls; this means that virus containment requires primarily a medical approach, instead of a law enforcement one.⁶⁸ The closure of the borders is an easy fix, but is not a solution in the long term. The long-term issues on the floor concern solidarity toward non-European nationals and solidarity between states on the humanitarian dimension of migration. These are long-standing challenges for the EU, for which COVID-19 is just another stress-test.⁶⁹

Since 2016, long before the pandemic, the EU has embarked into a process aiming at reforming core pillars of the CEAS, namely, the Dublin Regulation, the Procedures Di-

⁶⁶ O. STEFAN, *COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 663 et seq. See also R. BARATTA, *EU Soft Law Instruments as a Tool to Tackle the COVID-19 Crisis: Looking at the “Guidance” on Public Procurement Through the Prism of Solidarity*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 365 et seq.

⁶⁷ L. MARIN, *Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law*, in *European Journal of Migration and Law*, 2020, p. 60 et seq.

⁶⁸ S. CARRERA, N. CHUN LUK, *Love thy neighbour?*, cit., p. 26-27.

⁶⁹ The literature is reach. *Ex multis*, see V. MORENO LAX, *Solidarity's Reach: Meaning, dimensions and implications for EU (external) asylum policy*, in *Maastricht Journal of European and Comparative Law*, 2017, p 744 et seq.; S. MORANO-FOADI, *Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures*, in *European Journal of Migration and Law*, 2017, p. 227; E. TSOURDI, *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*, 2017, p. 667 et seq.; G. MORGESE, *Principio di solidarietà e la proposta di rifusione del regolamento Dublino*, in E. TRIGGIANI et al. (eds), *Dialoghi con Ugo Villani*, Bari: Cacucci, 2017, p. 471 et seq., and also *Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity*, special issue for the *European Journal of Migration and Law*, 2020.

rective, the Return Directive, the Schengen Borders Code. In this context, the migration crisis of 2015/2016 has showed that the legislative toolkit of the CEAS was not apt for a geopolitical system where important migration fluxes are increasingly common. Policy makers have resorted to solidarity to overcome the major obstacles created by instruments which should be reformed. The Court of Justice has recognized its importance and its nature of governing principle of EU asylum law;⁷⁰ however, the actual translation of the principle of solidarity into binding rules, into measures that must be enforced, has proved to be rather challenging: States have sought to achieve some forms of solidarity in the form of relocation schemes,⁷¹ alleviating the pressure of border management, search-and-rescue, reception and processing of asylum applications, but the limited success of 2015 Decisions is known: the first attempts have delivered open contestations from the “Visegrad states”, next to a record of poor enforcement.⁷² The new Pact on Migration and Asylum is also focusing on solidarity, showing however that so far it remains an unresolved “bug” of the EU.

However, the challenges they aimed to face are still here and the COVID-19 has repeated a pattern of difficult achievement of solidarity, with the exception of Greece, which has benefited from the European solidarity in the twenty days Greek-Turkish border crisis,⁷³ in order to keep the stability in the region and function as a “shield” for the whole EU, recalling the unfortunate expression of Commission’s President von der Leyen.⁷⁴

Next to this traditional aspect of inter-state solidarity, which is an accepted core value of European integration,⁷⁵ the COVID-19 crisis has showed once again the complexities of achieving transnational forms of solidarity: conceptualizing solidarity in a triangular relation between the EU, the Member States and third-country nationals, who should be the main addressees or beneficiaries of European solidarity,⁷⁶ is everything but an easy exercise. The pandemic can teach us many lessons on solidarity: it is a legal

⁷⁰ Court of Justice, judgment of 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland and others (Temporary mechanism for the relocation of applicants for international protection)*.

⁷¹ Council Decisions (EU) 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁷² L. MARIN, *Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation*, in *Freedom, Security & Justice: European Legal Studies*, 2019, p. 55 et seq.

⁷³ See G. MORGESE, *Solidarietà di fatto... e di diritto? L'Unione europea allo specchio della crisi pandemica*, in *EuroJus: L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive*, 2020, p. 98-99. For a full account on it, see A. SKORDAS, *The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law*, in *EU Immigration and Asylum Law and Policy Blog*, 8 May 2020, eumigrationlawblog.eu.

⁷⁴ A. JAMIESON et al., *Greece is 'Europe's shield' in migrant crisis, says EU chief von der Leyen on visit to Turkey border*, 4 March 2020, www.euronews.com.

⁷⁵ See R. BARATTA, *EU Soft Law Instruments as a Tool to Tackle the COVID-19 Crisis*, cit.

⁷⁶ V. MITSILEGAS, *Harmonizing Solidarity in European refugee law: The promise of mutual recognition*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 722. See also V. MORENO LAX, *Solidarity's Reach*, cit.

and moral value, it is crucial for integration, and it must be operationalized, providing for different forms of solidarity, such as financial solidarity, as *ultima ratio*. However, solidarity must be turned into a legal process that can be administered and controlled, also using financial incentives and financial penalties for the lack of cooperation.⁷⁷

After the stalemate on the Dublin reform, which was not concluded under the previous legislature of the European Parliament, the von der Leyen Commission will be assessed also for its capacity to bring solutions to the governance of asylum and migration, and the new Pact on Asylum and Migration⁷⁸ represents only the beginning of a new process of negotiations between states and institutions, showing how crucial solidarity is.

Migration is not simply a challenge for the EU as a normative power, but the governance of migration is crucial for the survival of the Schengen area.⁷⁹ The last years have witnessed a continuous process of suspension of Schengen. Since 2016, some states have conducted border controls, and have been able to justify them shifting from one legal basis to another, in order to bypass the expiry of the maximum periods allowing the temporary reintroduction of border controls. At the same time, States have reinstated border controls providing justifications which are dubious in relation to necessity and proportionality.⁸⁰ Depending on how the COVID-19 pandemic will evolve in the future, it is to be hoped that the European institutions will stand ready to defend the EU legal order from emergency measures states will adopt, and will support them in realizing the meaning of solidarity toward third-country nationals.

⁷⁷ I. GOLDNER LANG, *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, in *European Journal of Migration and Law*, 2020, p. 39 et seq.

⁷⁸ Communication COM(2020) 609 final of 23 September 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

⁷⁹ *Migration challenge is make-or-break for EU, says passionate Merkel*, in *Reuters*, 28 June 2018, www.reuters.com.

⁸⁰ S. MONTALDO, *The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go To Waste*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 523 et seq.