ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
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DIFFERENTIATION IN THE EU MIGRATION POLICY: THE 'FRACTURED' VALUES OF THE EU

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ABSTRACT: As with the whole Area of Freedom, Security and Justice (AFSJ), EU migration policy is one area of EU policy-making in which differentiated integration has found its clearest expression. Owing to its intergovernmental roots, differentiated governance has been considered the necessary compromise for a deeper integration in this policy field since the Amsterdam Treaty entered into force. The adoption of flexible mechanisms aimed to accommodate the political interests of some Member States. While many of the technical intricacies related to this special institutional set-up have now disappeared in the aftermath of Brexit, looking at the possible intersections between the recent migration and rule of law "crises" has brought to the fore a more serious form of disagreement between the Member States on the deeper values – or the possible absence thereof – with respect to EU migration policy. This has become especially clear in the way in which the Court of Justice of the EU (CJEU) seems to have adopted a disconnected approach in its case law relating, respectively, to the "rule of law crisis" and the "migration crisis" so far. This *Article* argues that beyond the fragmented scope of the EU migration policy caused by differentiation, lies a deeper "fracture" on the values that underpin it. In this sense, it invites for a more careful examination of what could become a widening gap by examining especially the relevant case law of the CJEU on asylum in the aftermath of the "migration crisis".

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I. INTRODUCTION

I.1. FROM INITIAL REJECTION TO ACCEPTANCE OF DIFFERENTIATED INTEGRATION AS AN INSTITUTIONAL FEATURE OF THE EU MIGRATION POLICY

As is the case with the whole Area of Freedom, Security and Justice (AFSJ), the EU migration policy is one area of EU policy-making in which differentiated integration has found its clearest expression. As Ariane Chebel D'Appollonia put it: "[t]he EU's immigration policy illustrates a system of differentiated integration *par excellence*".[1] Owing to the intergovernmental roots of the EU migration policy, differentiation has appeared as the necessary compromise for further integrating this policy field after the adoption of the Amsterdam Treaty.[2] Through the adoption of a flexible approach to integration in this field, the "opt-in/opt-out" arrangements aimed to accommodate the political interests of some Member States. While many of the technical intricacies related to this special institutional mechanism have now disappeared in the aftermath of Brexit, the recent "migration crisis" has brought to the fore a more serious form of disagreement between the Member States when it comes to the deeper normative[3] foundations of the EU migration policy. This *Article* argues that beyond the fragmented scope of the EU migration policy caused by its differentiation, lies a deeper "fracture" on the values that underpin it. From the more formal perspective, these values directly relate to art. 2 TEU, which gives a broad overview of the normative foundations of the EU. These values include: "the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

Initially, the negative impact of differentiation – in the sense of "variable geometry" – on the larger EU integration process was heavily criticised, especially in the way in which

[1] A Chebel d'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' (2019) Comparative European Politics 192.

[2] See for instance K Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) CMLRev 1047, 1057 ff; B Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs' in B Martenczuk and S Van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (VUBPRESS 2008) 493.

[3] In the context of this *Article*, "[n]orms are defined as 'collective expectations' about proper behaviour for a given identity [...]. [N]orms can be *constitutive* (acting as rules defining an identity) or *regulative*, acting as standards for the proper enactment or deployment of a defined identity [...]". See K Zwolski, 'The EU and a Holistic Security Approach after Lisbon: Competing Norms and the Power of the Dominant Discourse' (2012) Journal of European Public Policy 988, 990 (emphasis in the original text cited). In this sense, "norms" are approximate notions to "values" and "principles".

it applied to the AFSJ and to migration as an essential dimension thereof.[4] Jörg Monar described it this way: "The amazing range of 'flexibility' in justice and home affairs offers an unprecedented scope for accommodating the diverging interests of Member States. Yet the price to be paid for this 'flexibility' is a plethora of new problems and risks",[5] and especially the "major risk of legal fragmentation and political tensions [...]".[6] In this respect, Steve Peers said that the AFSJ had an "inauspicious start".[7]

More recently, there seems to be more acceptance of differentiated integration as being a structural feature of the EU's institutional architecture.[8] Deirdre Curtin has observed that: "Differentiation has become a stable element of the EU legal system".[9] Similarly, Bruno De Witte notes that: "The existence of a controlled system of differentiation between Member States has now become a stable characteristic of EU law".[10]

While accepting differentiated integration as an inevitable feature for the EU legal order to function, the same authors also express their concern over the "fuzziness"[11] or the lack of clarity[12] that differentiated form of governance has induced to the "contours of the EU legal order".[13]

I.2. The "migration crisis" and the "fractured values" of the EU migration policy: differentiated integration as an indicator or a catalyst?

Although it is still difficult to fully appreciate the impact of differentiated integration in the context of the recent so-called "migration crisis", it goes without saying that the simple existence of differentiation has introduced a high level of complexity in the functioning of EU migration policy, making it more difficult to find a way out of the crisis. This is what Ariane

[4] J Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' (1998) ELR 320.

[5] *Ibid*. 334.

[6] *Ibid*. 335.

[7] S Peers, 'Justice and Home Affairs: Decision-Making after Amsterdam' (2000) ELR 183, 191.

[8] For instance, see A Chebel d'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit.; D Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' (EUI Working Papers RSCAS 37-2020) and B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 9.

[9] D Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' cit. 3.

[10] B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' cit. 23.

[11] *Ibid*. 25.

[12] Deirdre Curtin remarks that: "Overall, differentiated integration blurs the lines between supranational and intergovernmental, between ins-and-outs-members, between EU and international law. The clarity of the European project is affected, and so is the democratic accountability line between the Union's institutions and its citizens". D Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' cit. 22.

[13] B De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' cit.

Chebel d'Appollonia refers to as being the outcome of a process of "chaotic differentiation"[14] that is slowly embedded across time and on a rather contingent basis. In particular, she sets out three factors: First, "historical contingencies",[15] "such as successive enlargements"[16] and "the refugee crisis following the collapse of former USSR".[17] Second, there is the "*raison d'être* of the EU immigration policy"[18] relating to the "motivations of member states in their attempt to protect their national interest while having to address common transnational issues".[19] And third, there is "... the assumption that some elements of flexibility – related to the decision-making process, participation, and implementation – are unavoidable in pursuit of the EU integration project".[20] In other words, "...[d]ifferentiated integration (...) had already become part of the DNA of EU migration policy before the 2015 refugee crisis [and w]hat was already a multi-layered system became even more chaotic when EU member states reacted to this crisis by abusing [*sic*] legal elements allowing flexibility".[21] This is what Nadine El-Enany also refers to as a form of "informal flexibility".[22] Chebel d'Appollonia gives the example of Germany triggering the "sovereignty clause" of the Dublin III regulation to assume the responsibility for examining the asylum claims of Syrian refugees who would have otherwise applied for international protection in other Member States.[23] In this respect, she points to the attitude of some Member States – including Hungary and the Czech Republic – that allowed Syrian refugees to transit through their territory to apply for international protection in another Member State.[24] While it would be difficult to disagree that the somehow flexible legal framework of EU migration policy has given way to severe discrepancies in the reactions of Member States during the recent crisis, a closer look at them might actually highlight another dimension of differentiation in this field, which tends to be overlooked. This other dimension of differentiation would go beyond the legal technicalities to interrogate what could be considered a differentiation – or as the article argues a "fracture" – in the deeper values or norms that shall or should underpin EU migration policy and perhaps the AFSJ as a whole. As Chebel D'Appollonia stated, this is best reflected in the diverging reactions of at least some Member States during and in the aftermath of the crisis. In this sense,

[14] A Chebel d'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit. 194 ff.

[15] *Ibid*. 194-195.

[16] *Ibid*. 194.

[17] *Ibid*.

[18] *Ibid*. 195.

[19] *Ibid*.

[20] *Ibid*. 196.

[21] *Ibid*.

[22] N El-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 362, 368 ff.

[23] A Chebel D'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit. 196.

[24] *Ibid*. They were not the only ones, see: case C-646/16 *Jafari* ECLI:EU:C:2017:586. In this case, Croatia and Slovenia respectively allowed the transit of the applicants – asylum-seekers – to Germany and Austria.

it is unsettling that some of the issues currently addressed by the CJEU as part of its case law on the "rule of law crisis" appear to be somehow disconnected from its recent case law on migration and in particular, asylum. It would be over-ambitious to assess comprehensively how "values" are diverging between the EU Member States when it comes to how they approach EU migration policy. Therefore, this article will limit itself to examining a few concrete cases illustrating the way in which the unaddressed 'fracture' in the values underlying the integration process in the field of immigration might reveal the widening gap of the EU integration project itself. This paper is structured as follows. Section II looks at how differentiation concretely operates as a governance tool in the field of migration. To do so, this section starts by defining the scope of the EU migration policy today, before exploring its intergovernmental roots as the best factor explaining the resort to differentiated governance in this field. Last, this section briefly examines the institutional challenges caused by the differentiated governance of the EU migration policy and in particular, the way in which differentiation has made its functioning particularly complex.

Finally, section III examines a facet of differentiation that relates to the deeper values underpinning the EU migration policy. Relying on a few examples stemming from the recent "migration crisis" and its aftermath, this final section will highlight how in spite of the formal adherence of the EU migration policy to the fundamental values – and especially fundamental rights – that lie at the heart of the EU integration project, there is no solid(ified) agreement between the EU Member States regarding the values on which this policy is actually based. In this sense, the intergovernmental roots of the EU migration policy translate in the lack of a genuine cohesion between the Member States on these values. To better illustrate this point, this final section will focus on the way in which the CJEU appears to have somehow "dis-connected" its case law on the "migration crisis" and on the "rule of law crisis". This article concludes with an invitation to further analyse and reflect on what may be perceived as the "fractured values" of EU migration policy.

II. Differentiation as a governance tool: the intergovernmental roots of the EU migration policy

II.1. Defining EU migration policy

Before looking at the evolution of EU migration policy, it may be useful to recall what this policy field includes. Since the Lisbon Treaty, migration-related issues are an essential part of Title V of the TFEU on the AFSJ. More precisely, according to art. 67(2) TFEU, the EU "…shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals (…)".

Unlike the formulation of the Amsterdam Treaty whereby measures related to external border control, asylum and immigration were "flanking measures" to the establish-

ment of free movement of persons within the EU,[25] the Lisbon Treaty makes the realisation of a common policy in the field of asylum, immigration and external border control, a policy objective in its own right.

Although they are conceptually – and irreducibly – connected to one another, it may be useful to briefly review the legal bases for achieving each part of what can be broadly defined as the migration policy.

First, the establishment of an integrated system of external border controls[26] was always envisioned as the external dimension – and essential requirement – for the abolition of internal border controls through the establishment of the Schengen area. In this field, the TFEU provides for legal bases – among others – on short-term visas,[27] external border checks,[28] the conditions under which non-EU nationals may enjoy freedom of movement,[29] measures for the gradual establishment of an integrated system for the management of the EU's external borders[30] and the absence of control on persons crossing internal borders.[31]

Second, as regards asylum – more widely understood as international protection within the EU legal framework[32] – art. 78(2) TFEU goes on to detail the different subject matters for adopting EU legislation in this field. They include the definition of a uniform status of asylum and subsidiary protection and the definition of a common system of temporary protection for displaced persons in the event of a massive inflow. EU legislation may also determine the common procedures for granting and withdrawing the uniform asylum or subsidiary protection status, the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection and the standards concerning the conditions for the reception of applicants for asylum or subsidiary protection. Art. 78(2)(g) TFEU also lays down a legal basis for establishing "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection". This provision does not appear to have been ever used, even at the heart of the "refugee crisis". It seems that less legally constraining instruments were preferred such as the EU-Turkey Statement[33] or the EU-Afghanistan Joint Way Forward[34]. Last – but not least – art. 78(3) TFEU provides for the adoption of emergency measures in "the event of one or more Member States being confronted

[25] Art. 61(a) of the Consolidated Version of the Treaty Establishing the European Community (1997).
[26] Art. 77(1) TFEU.
[27] Art. 77(2)(a) TFEU.
[28] Art. 77(2)(b) TFEU.
[29] Art. 77(2) (c) TFEU.
[30] Art. 77(2)(d) TFEU.
[31] Art. 77(2)(e) TFEU.
[32] International protection covers: "traditional" asylum in the sense of the 1951 Geneva Convention, subsidiary protection and temporary protection.
[33] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.
[34] Joint way forward of 2 October 2016 on migration issues between Afghanistan and the EU.

by an emergency situation characterised by a sudden inflow of nationals of third countries [...] for the benefit of the Member State(s) concerned".

Third, in the field of immigration – *stricto sensu* – art. 79(2) TFEU provides for the legal bases for adopting EU legislation as regards the following: the conditions of entry and residence of non-EU nationals and the standards on the issue by Member States of long-term visas and residence permits "including those for the purpose of family reunification"; the definition of the rights of non-EU nationals who reside regularly in a Member State, including the conditions that govern their movement to and residence in other Member States; the irregular immigration and unauthorised residence, including the removal of irregular immigrants and last combating trafficking in human beings, especially women and children. Two other provisions are worth mentioning: the first one sets out a legal basis for the EU to adopt international agreements with third countries for the purpose of the readmission of their respective nationals staying irregularly in their territories (art. 79(3) TFEU). The second one relates to the reserved competence of the Member States to determine the volume of admission of third-country nationals coming to the EU to work (art. 79(5) TFEU).

The current legal bases that exist in the field of migration represent quite an achievement in light of the rather tortuous history of this policy field. Indeed, since its beginning, the EU migration policy has faced considerable hurdles, which explains some of the structural issues that is still faces today – including its differentiated pattern of integration.

II.2. The evolution of the EU migration policy: from a purely intergovernmental to a quasi-fully integrated policy

To understand differentiated governance as one inherent feature of EU migration policy, it is useful to recall its deep intergovernmental roots. This comes from the fact that, traditionally, Member States have always been reluctant to fully relinquish control over this very sensitive area of national sovereignty. As Giorgia Papagianni pointed out: "...[T]o the extent that migration related issues are concerned Member States have always managed to secure their central role as well as to reserve a predominant position in that area..."[35] As she explains: "It is true that in general Member States have a strong interest in cooperating; however, one should not forget that the entry and residence of foreigners in each Member State's national territory is primarily perceived as a sovereign right, the exercise of which is based on principally national economic, social and political considerations".[36] The so-called "migration case"[37] of 1987 constitutes a clear example of the initial reluctance of the Member States to envision the integration of their migration policies beyond security issues. Although this case may seem outdated, it is quite telling about the original

[35] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff 2006) 199.

[36] *Ibid*. 200.

[37] Joined cases C-281/85, C-283/85 to C-285/85 and C-287/85 *Federal Republic of Germany and others v Commission* ECLI:EU:C:1987:351.

attitude of the Member States when it comes to integrating migration issues within the EU institutional framework. In this case, on 8 July 1985, the Commission had adopted a Decision setting up a prior communication and consultation procedure on migration policies in relation to non-EU countries (based on former art. 118 of the Treaty establishing the European Economic Community (EEC) [please put *in extenso*], social policy). Several Member States questioned its competence to do so, as for them migration issues rather pertained to their public security, which was beyond the scope of Community competence. While the Court declared the decision to be partially void, it also stated that: "…[T]he argument that migration policy in relation to non-member States falls entirely outside the social field, in respect of which Article 118 [EEC] provides for cooperation between the Member States, cannot be accepted".[38] However, the Court was not more specific as to which part of this policy was not pertaining to public security.

Taking this as the "common denominator"[39] explaining Member States' "actions and reactions to the process of forging a common policy at the EU level",[40] Papagianni defines the following tendencies as underlying in this policy field. First, the "indisputable preference for intergovernmentalism and 'flexible' solutions".[41] Second, "a certain rigidity, a secrecy obsession and mistrust by the Member States towards both the general public and the other national and EU actors"[42] and last the adoption of a "rather pragmatic and security-oriented approach".[43]

While some of these features have clearly softened over time – in particular the second one – looking at how EU migration policy has developed provides a wealth of examples to illustrate how each of these trends have manifested in the different steps leading to the elaboration of what the Lisbon Treaty envisions as a common EU migration policy. The rather bizarre geographic construction of EU migration policy – best described as its "variable geometry" – or rather "variable geography" – is still one of its most peculiar features to this day. In this respect, one can only agree with Steve Peers that: "Since the normal EU rules on decision-making, legal instruments, and judicial control have applied to EU immigration and asylum law for a number of years, the question of the territorial scope of Justice and Home Affairs (JHA) measures remain the only issue that clearly differentiates JHA issues from most of the rest of EU law".[44] Echoing Giorgia Papagianni, the "complexity of this issue results from the reluctance of several 'old' Member States to participate fully in the EU integration in this area (…), the unwillingness of all 'old' Member

[38] *Ibid*. para. 18.
[39] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 200.
[40] *Ibid*.
[41] *Ibid*.
[42] *Ibid*. 202.
[43] *Ibid*. 203.
[44] S Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2016) 26.

States to apply the full Schengen acquis immediately to new Member States, and the interest among several non-Member States in adopting the relevant EU measures".[45]

To better understand the way in which differentiated integration has always been a key dimension of EU migration policy, it is important to look at its intergovernmental origins.[46] Before their integration within the former "first" or "Community pillar" following the adoption of the Treaty of Amsterdam in 1997, migration-related issues were at the heart of intergovernmental cooperation between the EU Member States. The best – and most successful – expression of this cooperation was the signature of the Schengen Agreement in 1985 and the subsequent adoption of an international Convention for its implementation in 1990. The Schengen *acquis* was subsequently included in the former "first" or "Community" pillar through the adoption of a separate protocol to the Amsterdam Treaty.

Following the adoption of the Amsterdam Treaty, differentiated integration in the field of migration has meant mostly a variation in the territorial scope of application of EU legal measures. In other words, not all EU legal measures apply to all Member States – or not in the same way – and not all the States to which EU legal measures on migration apply are EU Member States. This latter hypothesis corresponds to the inclusion of so-called associated States to the Schengen "system" – namely States that take part in the European Economic Area (EEA): Iceland, Lichtenstein and Norway, on the one hand, and Switzerland, on the other.[47] Not only these countries are part of the Schengen system but they are also part of the so-called "Dublin" system establishing different criteria to determine the State that is responsible for examining an asylum claim. The specific situation of the EU Member States which have most recently joined the EU is also to be mentioned, especially in connection with the application of the Schengen *acquis*.

Although most of the institutional peculiarities of the EU migration policy disappeared with the adoption of the Lisbon Treaty, one last feature of this policy area is still enduring. With the adoption of the Amsterdam Treaty, the door was open to differentiation – that is differentiated governance among Member States. In this sense, three Member States did not participate fully in the new Title IV and/or the Schengen *acquis*. This was the case of Ireland and the UK – which overall followed a similar position – and Denmark. For these three Member States, separate protocols were added to determine the extent of their participation in this new policy framework. The next subsection will elaborate on how differentiated governance concretely works in the field of migration by looking at the rules governing its fragmented territorial scope.

[45] *Ibid*.

[46] For a complete overview of the evolution of the EU migration policy, see: S Peers, 'EU Justice and Home Affairs Law (Non-Civil)' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 269.

[47] F Filliez, 'Schengen/Dublin: The Association Agreements with Iceland, Norway and Switzerland' in B Martenczuk and S Van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* cit. 145. For more details on these States, see: S Peers, *EU Justice and Home Affairs Law* cit. 37 ff.

II.3. The institutional challenges of differentiation for EU migration policy: defining the territorial scope of EU migration law

The most visible impact of differentiated integration is a general one that is not limited to migration-related issues. It mainly consists in the lack of uniform application of EU law across the EU territory. In other words, different rules will apply differently depending on the Member State and even beyond the EU territory. When it comes to migration more precisely, another key issue concerns the lack of legal certainty that non-EU nationals might face in the application of EU law to their specific legal situation. This situation is particularly detrimental in the field of asylum.[48] In this latter respect, Nadine El-Enany has argued that: "The field of asylum should be entirely free from differentiated integration arrangements. As a field of law which directly affects the rights of individuals in a context in which their physical survival and psychological wellbeing is at risk, the field of asylum law is unlike other competences of the EU where there is scope for differentiated integration".[49]

In the field of migration, differentiated governance has had different definitions, ranging from "variable geometry"[50] to integration "*à la carte*"[51], "flexible" integration,[52] "closer cooperation" and more recently "enhanced cooperation".

The underlying logic behind this form of governance in EU migration policy is twofold. First, to make the rules in the field somehow "optional" in the sense that Member States should freely decide to apply them or not. The second aspect of differentiated governance relates to its variable geographical scope of application.

Steve Peers gives a very detailed overview on the way in which the territorial scope of measures in the field of migration is articulated.[53] Currently, differentiation concerns two Member States: Ireland on the one hand – which used to share a similar position with the UK in this respect – and Denmark. The Irish – and formerly British – exceptions are covered by three protocols: Protocol n. 19 on the Schengen *acquis* integrated into the framework of the European Union, Protocol n. 20 on the application of certain aspects of art. 26 TFEU and Protocol n. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. As for the Danish exceptions, they are covered by Protocol n. 22.

As Giorgia Papagianni has explained, the position of Ireland – and formerly the UK – differed from Danish objections. While the Ireland and the UK were rather concerned

[48] N El-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' cit. 362.

[49] *Ibid*. 362-363.

[50] B Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs' cit.

[51] A Chebel D'Appollonia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit. 192; G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 30.

[52] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 30.

[53] For a general overview of the territorial scope of application of EU migration law, see: S Peers, *EU Justice and Home Affairs Law* cit. 26-41.

with the very objectives of the measures adopted on migration, Denmark was rather concerned with their legal status.[54] In this sense, as a contracting Party to the Schengen Agreement, Denmark "was willing to participate in a cooperation concerning the establishment of an 'area without internal frontiers'",[55] however, "it contested, mainly for internal political reasons, the transfer of such a competence to the community level. It opted instead for the maintenance of such cooperation within the intergovernmental sphere".[56]

As for Member States that accede to the EU, the Schengen *acquis* is binding but it is not applicable immediately.[57] For them, the *acquis* may only apply after the adoption of a unanimous decision by the Council. This approach has been replicated for Bulgaria and Romania – although they have applied to participate in the Schengen Information System (SIS) since 2010. As the latest Member State to have joined the EU in 2013, Croatia has not yet joined the Schengen system either. Nine of the ten Member States that joined the EU in 2004 have participated in the full Schengen system since December 2007 – and since March 2008 for air borders. Because it is still divided between its Greek and Turkish parts, Cyprus is another Member State that does not yet participate in the Schengen System.

When it comes to participating non-EU States, the participation of Norway and Iceland in the Schengen system was deemed necessary, after the accession of Denmark, Finland and Sweden, to preserve the Nordic Passport Union between those five States.[58] As for Switzerland and Lichtenstein, they participate in the Schengen System respectively since 2008 and 2011.

It is notable that all of these non-EU countries also participate in the "Dublin" system. In this sense, it is interesting that in a recent case, the Court of Justice has established that an application for asylum in Norway could not be considered as holding the same legal status as an application for international protection within the EU.[59]

[54] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* cit. 30

[55] *Ibid*.

[56] *Ibid*.

[57] For more details on the situation of States acceding to the EU, read: S Peers, *EU Justice and Home Affairs Law* cit. 36 ff.

[58] *Ibid*. 37.

[59] Case C-8/20 *L.R.* ECLI:EU:C:2021:404. For a brief analysis, see: J Silga '*L.R*: An Asylum Application made to Norway is not an "Application for International Protection" under EU law' (25 May 2021) EU Law Live eulawlive.com.

III. Intersecting the migration and rule of law "crises": Unveiling a deeper layer of differentiated integration?

III.1. From the institutional to the normative dimension of differentiation in the EU migration policy

The territorial scope of application of EU migration law reveals a real challenge. This is not only because of the peculiar geography of the EU territory when it comes to the application of migration rules but also because of all the complexities brought about by this fragmented territory. Several questions have arisen in this respect. These questions also extend to the realm of the external action of the EU in which the issue of finding the adequate legal basis for concluding agreements pertaining to migration issues was further complicated by the peculiar positions of the UK and Ireland.[60] In a way, one may hope that, in spite of all the deep institutional and constitutional challenges that it has triggered, the withdrawal of the UK – now a "disempowered outsider"[61] – might constitute an opportunity to bring EU Member States closer when applying EU law measures in the field of asylum and migration.

While this hope is sound from the institutional point of view, the same cannot be said about what we may call the "normative crisis" of the EU migration policy revealing the deep disagreement – if not "fracture" – that exists between Member States on the values that lie at the foundation of this policy. Reflecting the different ways in which the Member States have reacted during the recent "refugee crisis", this "crisis" relates to the fact that there is no deep agreement between the Member States on the "values" that underpin and guide the EU migration policy. This is connected with the different histories of the Member States and as a consequence their political choices and identity – somehow akin to their national identity – which the EU is bound to respect. However, not reflecting more deeply on this question could seriously jeopardise any effort to address the way in which a common EU migration policy will be designed and function effectively in the future.

First of all, it is useful to recall that the normative basis of EU migration policy has always been ambiguous, and this ambiguity plagues it to this day. As previously mentioned, migration-related concerns are traditionally framed as security issues by States. For practical reasons, early cooperation on migration issues was deemed necessary to achieve other related purposes and it increasingly became clear that this integration would progress to the extent that we can observe today in Title V of the TFEU. Nevertheless, the Member States were always cautious that such integration would not mean that

[60] See: B Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs' cit.; J Silga, 'Assessing the Consistency of EU Development Cooperation with Readmission in the EU-Philippines Agreement Case – A balancing Exercise' (2015) ELR 439, 452 ff.

[61] D Curtin, 'Brexit and the EU Area of Freedom, Security and Justice – Bespoke Bits and Pieces' in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 182, 199.

they were losing their sovereign control on whom to admit in their territory and under which conditions – except in very limited circumstances.

From the purely legal point of view, it is clear that after the adoption of the Lisbon Treaty, migration-related issues are part of the wider constitutional framework of the EU – including general principles and fundamental rights. However, the Treaties themselves provide for some "spaces" of ambiguity in which it is unclear how some migration-related issues fall under these rules or not. An important provision to highlight in this sense is art. 72 TFEU, according to which Title V "[…] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". More fundamentally, art. 67(1) TFEU provides in a rather obscure way that: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States". This emphasis on the respect of the different legal systems and traditions of the Member States already signals that it is an accepted fact that the national migration policies differ from one another. This seems to be somewhat contradictory with the claim of art. 2 TEU whereby, "…[the foundational] values [of the EU] are common to the Member States […]".

Exploring this argument in-depth would be impossible given the limited space. However, looking at the recent caselaw of the CJEU gives the best indication of how this normative debate is concretely settled – or not – at the EU level.

In the context of the recent crisis, this normative question has acquired a particular significance. Indeed, the arrival of an unprecedented number of people to the EU territory seeking international protection made the question of which "values" are actually guiding the EU migration policy more acute. In light of the diverging reactions of the Member States, and the related issues of the malfunction of the Dublin system, it became clear that while most Member States were not particularly ready – and even fewer were enthusiastic – to receive more asylum-seekers, some were less ready and enthusiastic than others.

This found a particular expression in the case that was brought before the Court by Hungary and Slovakia to obtain the annulment of the relocation decision adopted by the Council in support of Greece and Italy on the basis of art. 78(3) TFEU.[62]

While the Court dismissed their actions, it is interesting to note that the two Member States – supported by Poland – raised some arguments relating to the fact that accepting the relocation of asylum seekers would threaten their ethnic homogeneity.[63] The Court rejected these arguments both because it would make the relocation scheme practically useless[64] and for their clearly discriminatory undertones.[65] It is fortunate that the Court did not "dive" too deep into these rather alarming arguments on this occasion. However,

[62] Joined cases C-643/15 and C-647/15 *Slovakia v Council* ECLI:EU:C:2017:631.
[63] *Ibid*. para. 302.
[64] *Ibid*. para. 304.
[65] *Ibid*. para. 305.

it is also regrettable that the Court did not take this opportunity precisely – because of the alarming nature of these arguments – to reaffirm more strongly that the EU migration policy is anchored in the broader EU constitutional framework as expressed in art. 2 TEU. In this respect and as we will see in the following subsection, another point that is regrettable is the fact that so far, the Court has made no explicit connection between the "migration crisis" and the "rule of law crisis" in its case law. In this sense, it is useful to remember that the Court did not follow the invitation of former Advocate General (AG) Bobek in its Opinion in *Torubarov*.[66] Instead, the Court only implicitly connected its case law on the two issues.

One particular "hint" indicating that the Court does not entirely consider the two issues to be separate relates to the latest cases of the Court of Justice in the field of asylum concerning Hungary and adopted in the aftermath of the "migration crisis". In this sense, while the case law related to the rule of law crisis in other Member States, such as Poland and Romania, has essentially focused on judicial independence, the core of the "struggle" between Hungary and the European Commission has been taking place in the field of asylum. In spite of that, it is striking that the Court has not been more explicit in connecting its case law on the "rule of law crisis" and especially the way in which it has strengthened the concept of the right to an effective remedy and its migration case law after 2015/2016.

III.2. *Worlds apart*? The dis-connection between the rule of law and migration "crises" in the case law of the CJEU

When one looks at migration in general and asylum in particular, it is impossible not to connect it with the "rule of law" broadly understood and especially, the way in which the Court has recently developed this notion with respect to the right to an effective remedy. In particular, in its judgment of February 2018 based on a claim of the Trade Union of the Portuguese Judiciary,[67] the Court clearly stated? that: "The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law".[68]

As the scholarship has already extensively commented,[69] this ruling has built a rather unexpected bridge between art. 2 TEU and art. 19(1) TEU, second indent, whereby: "Member States shall provide remedies sufficient to ensure effective legal protection in the

[66] Case C-556/17 *Torubarov* ECLI:EU:C:2019:626.

[67] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[68] *Ibid*. para. 36. This case opened the way for a very rich line of cases, including: case C-284/16 *Achmea* ECLI:EU:C:2018:158; case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586; case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531; joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România'* ECLI:EU:C:2021:393.

[69] See among others: N Kirst, 'The Perspective from Luxembourg: How Does the European Court of Justice Respond to The Rule of Law Crisis Within the Member States?' (2020) Trinity College Law Review 108;

fields covered by Union law". In doing so, the Court overcame the question pertaining to the material scope of application of art. 47 of the Charter of Fundamental Rights, which had been – this far – the only textual and formal translation of the principle of individuals' right to an effective judicial protection under EU law. This astute extension of the scope of application of the right to an effective remedy – thanks to the newly gained relevance of art. 19(1) TEU – was the first step for the Court to develop its subsequent case law on judicial independence in the Member States facing a "rule of law backsliding".[70]

When it comes to asylum, it is important to clarify right away that the right to an effective remedy is not particularly controversial in this field, whether from the legislative[71] or judicial[72] point of view. The first case in which the Court was given the opportunity to make a connection between its emerging case law on the "rule of law crisis" and the right to an effective remedy in relation to asylum was the *Torubarov* case.[73]

In this case, Mr Torubarov had applied for international protection in Hungary in December 2013 following which the Hungarian Immigration Office rejected his application in August of the following year. He subsequently brought an appeal against this decision before the Hungarian Administrative and Labour Court and in May 2015, the Administrative and Labour Court annulled the decision of the Immigration Office and ordered it to conduct a new procedure and make a new decision. In September 2015, a new law was introduced that withdrew the power of administrative courts to vary ("alter") the administrative decisions on international protection. As a result of this, Mr Torubarov found himself at the heart of a procedural "ping-pong"[74] between the Immigration Office, which kept rejecting his application for international protection and the Administrative and Labour Court, which kept annulling the rejection decisions without being able to actually end this.

Eventually – seized of a third appeal – the Administrative and Labour Court decided to refer a question to the CJEU for a preliminary ruling asking whether it may vary an administrative decision on international protection (relying on art. 46(3) of the Directive 2013/32 – 'Procedures Directive' – read in conjunction with art. 47 of the Charter). The question that the Court had to answer in this case was whether the duty of the national

A Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence' (2020) Maastricht Journal of European and Comparative Law 105.

[70] Laurent Pech and Kim Lane Scheppele define the "rule of law backsliding" as "...[t]he process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party". L Pech and K Lane Scheppele, 'Illiberalism Within Rule of Law Backsliding in the EU' (2017) CYELS 3, 10.

[71] 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, art. 46.

[72] For example, see: case C-585/16 *Alheto* ECLI:EU:C:2018:584. See also *Torubarov* cit.

[73] *Torubarov* cit.

[74] It is precisely with the metaphor of table tennis or "procedural ping-pong" that AG Bobek opened his Opinion: case C-556/17 *Torubarov* ECLI:EU:C:2019:339, opinion of AG Bobek, para. 1.

judge to ensure an effective judicial protection meant that s/he must vary an administrative decision, even when this is prohibited by national law. Following the Opinion of AG Bobek in this case, the Court gave a positive answer.

To be clear, the Court had already explained in its prior ruling *Alheto*[75] that:

> "Article 46(3) of Directive 2013/32 would be deprived of any practical effect if it were accepted that, after delivery of a judgment by which the court or tribunal of first instance conducted, in accordance with that provision, a full and *ex nunc* assessment of the international protection needs of the applicant by virtue of Directive 2011/95, that body could take a decision that ran counter to that assessment or could allow a considerable period of time to elapse, which could increase the risk that evidence requiring a new up-to-date assessment might arise".[76]

However, in this case, the Court had left open the question of the practical consequences of a judicial decision that would be contrary to the administrative decision.

In spite of their shared conclusion, the Court and AG Bobek adopted a slightly different reasoning. AG Bobek anchored his reasoning as part of what he called the "broader (constitutional) picture"[77] in relation to the case law developed by the Court in the broader context of the "rule of law crisis" starting with the case on the Trade Union of the Portuguese Judiciary.[78] In doing so, he did not restrict himself to applying and developing the case law of the Court specifically pertaining to the question that was asked in the context of asylum. As he pointed out: "The clarifications [already] given by the Court in (...) [this case law] constitute an expression, in the specific field of international protection, of more general principles related to the requirement of effective judicial remedy now enshrined in Article 47 of the Charter and referred to in the second subparagraph of Article 19(1) TEU".[79] After making this statement, he went on to emphasise that: "effective judicial review" is the "bedrock of the rule of law".[80]

On the other hand, the Court did not follow this constitutional approach. Rather, it located its decision within the field of asylum and it relied on the need to ensure the "practical effect" of the right to an effective remedy as highlighted in *Alheto* and the role of the national judge in this specific context.[81] The Court confirmed its findings in a subsequent judgment of March 2020[82] in which AG Bobek also gave his Opinion, albeit without making further connections with the judicial developments relating to the "rule of law" crisis. Actually, it does not seem that this connection was ever attempted again after *Torubarov*.

[75] *Alheto* cit.
[76] *Ibid*. para. 147.
[77] *Torubarov*, opinion of AG Bobek, cit. paras 48-62.
[78] *Associação Sindical dos Juízes Portugueses* cit.
[79] *Torubarov*, opinion of AG Bobek, cit. para. 48.
[80] *Ibid*. para. 49.
[81] *Torubarov* cit. paras. 61-78.
[82] Case C-406/18 *PG* ECLI:EU:C:2020:216.

This does not mean, however, that there has been no condemnation by the Court of Justice of the Hungarian legal framework targeting asylum-seekers – far from it. This is what the following cases adopted in the context of Hungary – a Member State facing a "rule of law backsliding" clearly illustrate.

First, in another judgment of March 2020[83] (the so-called "Tompa" case), the Court ruled out that a new ground for concluding to the inadmissibility of an asylum application could be introduced by the Hungarian legislator in addition to the exhaustive list, already existing in the "Procedures Directive".[84] In substance, this new ground of inadmissibility related to the fact that some asylum-seekers had previously transited through Serbia, which the Hungarian legislator considered a "safe country of transit".

Second, in a judgement of the following month,[85] opposing the European Commission to the Czech Republic, Hungary and Poland, the Court established that these three Member States had failed to respect their obligations to relocate asylum-seekers as required by the two relocations decisions adopted in 2015 for the benefit of Greece and Italy. In doing so, the Court actually "gave teeth" to its previous ruling of September 2017.[86]

In a third judgment of May 2020,[87] the Court gave quite an extensive ruling on the conditions of asylum seekers stranded in the Röszke transit zone, among others with reference to their detention regime and their right to an effective judicial protection – in connection with the principle of primacy.

Fourth, in a decision of December 2020,[88] opposing the European Commission to Hungary, the Court declared that Hungary had violated several obligations under EU asylum law among others by imposing that applications for international protection of asylum-seekers arriving from Serbia could only be made in the transit zones of Röszke and Tompa, in which a systematic detention regime had been set up.

Last but not least, in a judgment of November 2021,[89] the Court ruled that Hungary had violated its obligations under the relevant EU asylum law *inter alia* by adopting legislation criminalising people who, in connection with an organising activity, provided assistance to asylum seekers, where it could be proved beyond all reasonable doubt that these people were aware that their asylum application would be rejected.

As these cases show, the Court has been quite outspoken in condemning – with the support of the European Commission – the violations carried out by Hungary against the

[83] Case C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompa)* ECLI:EU:C:2020:218.

[84] Art. 33 Directive 2013/32/EU cit.

[85] Joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2020:257.

[86] *Slovakia v Council* cit.

[87] Joined cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendeszeti Főigazgatósáa Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367.

[88] Case C-808/18 *European Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029.

[89] Case C-821/19 *Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile)* ECLI:EU:C:2021:930.

fundamental right to asylum. These rulings, which have been all adopted in the course of a short time and in particular in the context of the ongoing "rule of law crisis" may all point to the underlying intention of the Court to set some limits to how Member States may react in the context of both the rule of law and migration "crises". However, this connection appears to be implicit – at best – and it does definitely not go as far as fully embracing recent judicial developments as part of the 'broader constitutional' context as AG Bobek had initially suggested in *Torubarov*.

IV. Final remarks

This *Article* briefly reviewed the way in which differentiated integration has evolved in the field of EU migration policy with a view to revealing – beyond the technical difficulties of this particular institutional setup – a deeper "normative fracture" between the EU Member States as to the "core of values" that should guide the development of the EU migration policy. To do so, this *Article* especially looked at the way in which the CJEU has so far appeared reluctant to explicitly connect the issues pertaining to the rule of law and the migration "crises" in its case law. To conclude, it would be interesting to mention three tentative hypotheses that might explain this disconnection.

First, it appears that the case law of the Court in the context of the "migration crisis" has not been entirely coherent so far in connection with the right to an effective remedy. The two major examples in this respect are: the case relating to the EU-Turkey Statement[90] and the *X and X*[91] case on humanitarian visas. While the Court did not even take the opportunity to examine the former controversial measures, it did have a chance to decide on the problem of the humanitarian visas to be issued in the context of the conflict raging in Syria. Unfortunately, its position was quite disappointing,[92] all the more so as the European Court of Human Rights followed in its footsteps.[93]

Then, the Commission – and hypothetically the Court itself – might have been slightly selective as to the assessment of the way in which (other) Member States have failed to fulfil their obligations under EU asylum law. To be clear, the violations of the rights of asylum-seekers in Hungary were not acceptable and it goes without saying that the Court took the right decision. But what about other Member States? The main example – and coincidentally one of the Member States closely related with institutional "variable geometry" – is Denmark. Since the beginning of the "refugee" crisis, this Member State has

[90] See: Order of the General Court T-192/16 *NF v European Council* ECLI:EU:T:2017:128 and Order of the General Court T-193/16 *NG v European Council* ECLI:EU:T:2017:129.

[91] Case C-638/16 PPU *X and X* ECLI:EU:C:2017:173.

[92] For an overall critical review of the case law of the European Courts during the "migration crisis", see: J Silga and C Warin, 'Europe, Year 2020. What Ever Happened to the Right to Asylum?' (2 May 2020) EU Law Live eulawlive.com.

[93] ECtHR *M.N. and Others v Belgium* App. n. 3599/18 [5 March 2020].

adopted some more than controversial measures aiming at deterring asylum-seekers from entering its territory. The most well-known example was the adoption of the very much decried "jewellery law" (as part of Bill n. L87 adopted in January 2016),[94] threatening to seize the assets of asylum-seekers deemed to be too affluent as a way to contribute to the expenses for their own maintenance in this country.[95] While these highly contested measures were not implemented to the extent that was initially feared, this Member State did not stop there. More recently, Denmark passed another much criticised Bill n. L226 (in June 2021) providing for the externalisation of asylum procedures in third countries.[96] It also denied the renewal of the temporary residency status of some Syrian refugees considering that security in Damascus and Greater Damascus had improved.[97] In light of these alarming developments in the aftermath of the "migration crisis", the UN High Commissioner for Refugees expressed its concerns and formulated some recommendations to Denmark.[98] EU Commissioner Ylva Johansson also expressed her disapproval of the latest Danish Bill.[99] Some Members of the European Parliament (MEPs) similarly voiced their concerns[100] and some even demanded the European Commission to take more concrete action towards Denmark.[101] While this Member State is not part of the AFSJ by virtue of differentiated integration, this Member State is subject to the overall EU constitutional framework, including arts 2 and 19(1) TEU. Applying the same reading

[94] For a commentary, read: UI Jensen and J Vested-Hansen, 'The Danish "Jewellery Law": When the signal hits the fan?' (4 March 2016) EU Migration Law Blog eumigrationlawblog.eu. It is interesting to note that the parts of this Bill pertaining to the restriction of family reunification for refugees were held to be incompatible both with the relevant EU Law (the standstill clause provided under art. 13 of Decision n. 1/80 of the Association Council of 19 September 1980 on the development of the Association between the EU and Turkey) and with art. 8 of the European Convention on Human Rights (ECHR). On the incompatibility of the same legislation with EU law, see: case C-89/18 *A* ECLI:EU:C:2019:580. As for the incompatibility of the Danish legislation with art. 8 ECHR, see: ECtHR *M.A. v. Denmark* App. n. 6697/18 [9 July 2021].

[95] N Stokes-Dupass, 'Mass Migration, Tightening Borders, and Emerging Forms of Statelessness in Denmark, Norway and Sweden' (2017) Journal of Applied Security Research 40, 52 ff.

[96] For a commentary, see: N Feith Tan and J Vested-Hansen, 'Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law' (15 November 2021) EU Migration Law Blog eumigrationlawblog.eu.

[97] See question for written answer to the Commission E-002239/2021 (26 April 2021), *Revocation of residence of Syrian refugees in Denmark*, www.europarl.europa.eu. See answer by Commissioner Johansson (9 July 2021) www.europarl.europa.eu.

[98] United Nations High Commissioner for Refugees, *Recommendations on Strengthening Refugee Protection in Denmark, Europe and Globally* www.unhcr.org.

[99] Y Johansson, 'TimeToDeliverMigrationEU- Sending applicants for international protection outside the European Union is a bad idea' (18 June 2021) European Commission Blog Post ec.europa.eu.

[100] See *Revocation of residence of Syrian refugees in Denmark*, answer by Commissioner Johansson cit.

[101] On this point, read: Letter sent by Nikolaj Villumsen, Malin Björk and María Eugenia Rodríguez Palop (MEPs) to the attention of Josep Borrell and Ylva Johansson 'On the subject of the Danish Government's externalization of asylum seekers to third countries outside of the EU' (23 June 2021) left.eu.

of these provisions to Denmark could only contribute to better ensuring the general respect of the rule of law in the EU.

Last, the current institutional framework does not appear to be particularly promising for the rights of asylum-seekers in particular, as illustrated by the New Pact on Migration and Asylum that was proposed by the Commission in September 2020.[102] In this respect, it is quite interesting that as one of its arguments for justifying its violations of the EU asylum law in the most recent case mentioned previously, Hungary relied on an amendment of the current "Procedures Directive" that was currently in discussion by the EU legislature.[103]

For the time being, it seems that the Court has not clearly decided to which extent it is ready to follow the "tacit agreement" of Member States to disagree as to which values are guiding the EU migration policy. As a final conclusion, this paper would like to invite the Court to provide a clearer guidance on this point as the absence thereof might further undermine the constitutional framework of the EU beyond the current crises.

[102] For an analysis, see: J Silga and C Warin, 'The EU's New Pact on Migration and Asylum: Efficiency at the Expense of Rights?' (5 December 2020) EU Law Live eulawlive.com.

[103] *Commission v Hungary (Incriminationde l'aide aux demandeurs d'asile)* cit. para. 32.