



ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

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FLEXIBLE SOLIDARITY IN THE NEW PACT ON MIGRATION AND ASYLUM: A NEW FORM OF DIFFERENTIATED INTEGRATION?

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ABSTRACT: Flexible solidarity is presented by the Commission in the New Pact on Migration and Asylum as a solution to break the deadlock in the reform of the EU asylum policy. The aim of this *Article* is to analyse to what extent the development of flexible solidarity in the field of asylum will allow the EU to address the shortcomings that the CEAS is facing today. The key question is whether differentiation as regards solidarity serves to further develop the EU asylum policy by introducing a useful degree of flexibility to accommodate the different interests of the Member States or the multiplication of forms of solidarity will lead in the long run to more disintegration. It will also be assessed to what extent the gradual approach followed by the French Presidency of the Council in the first semester of 2022 will allow to make concrete progress on the New Pact on Migration and Asylum and achieve the ambition of a comprehensive asylum and migration policy at EU level in the future.

KEYWORDS: New Pact on Migration and Asylum – flexible solidarity – Common European Asylum system – external dimension of migration policies – differentiated integration – return sponsorship.

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I. INTRODUCTION

The existence of differentiation between Member States has become a structural feature of the EU legal order that has always been present in the integration process. Variable integration has constantly evolved through the different reforms of the Treaties in order to accommodate the political interests of some Member States or to take into account the lack of willingness of some countries to pursue further integration.¹ For this reason, various forms of differentiation have been developed in order to combine the right of some Member States not to participate in unwanted integration and the right of others to further pursue the integration process. Differentiated integration has been particularly intensive in the Area of Freedom, Security and Justice (AFSJ) in the last decades. The AFSJ covers a broad range of policies, including migration, asylum and border control, judicial cooperation in civil law and cooperation in police and criminal matters. The progress towards further integration has been combined with the emergence of intergovernmental cooperation in the AFSJ leading to the granting of derogations from common rules to a group of countries that opposed supranational cooperation, mainly the UK, Ireland and Denmark. The “opt-in/opt-out” arrangements are the most emblematic example of EU differentiation in the AFSJ. The relationship between supranational integration and intergovernmental cooperation has led to a complex decision-making system. As argued by Peers “the institutional framework for EU JHA (Justice and Home Affairs) is historically complex, in particular due to its use of different rules over time regarding decision-making, jurisdiction of the EU courts, legal instruments and their legal effect, and territorial scope”.²

As regards migration policies, some Member States were reluctant to transfer competences to the EU since this issue is very sensitive for national sovereignty. However, Member States have been willing to address together common transnational challenges and protect at the same time their national interests. As pointed out by Monar, differentiation in relation to migration and asylum matters “has emerged primarily in order to allow for the pursuit of a ‘deepening’ of integration in circumstances in which the full participation of some countries is not possible”.³ EU migration policies illustrate a system of differentiated

¹ On this issue, see, among others: K Hailbronner, ‘European Immigration and Asylum Law under the Amsterdam Treaty’ (1998) CMLR 1057-1059; 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* (VUB Press 2008) 493; J Santos Vara, ‘The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty’ (2008) *European Journal of Law Reform* 577-599; J Santos Vara and E Fahey, ‘Transatlantic Relations and the Operation of AFSJ Flexibility’ in S Blockmans (ed.), *Differentiated Integration in the EU: From the Inside Looking Out* (Centre for European Policy Studies 2014) 103; P García Andrade, ‘La geometría variable y la dimensión exterior del espacio de libertad, seguridad y justicia’ in J Martín y P de Nanclares (eds), *La dimensión exterior del espacio de libertad, seguridad y justicia de la Unión Europea* (Iustel 2012).

² S Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016 Fourth Edition) 7.

³ J Monar, ‘The “Area of Freedom, Security and Justice: “Schengen” Europe, Opt-outs, Opt-ins and Associates’ in K Dyson and A Sepos (eds), *Which Europe? The Politics of Differentiated Integration* (Palgrave 2010) 289.

integration *par excellence*.⁴ Ireland and the UK before Brexit, together with Denmark, have been the main beneficiaries of differentiated integration in relation to asylum and migration, having obtained positions that the Member States that joined the EU in the last two decades were unable to achieve. Acceding countries are not granted the possibility to choose whether to become bound by asylum and migration measures or not. The special status given to this group of countries is perhaps the epitome of differentiation in contemporary EU law. The opt-out/in provisions ostensibly indicate an outward constitutional stance of isolation towards further and deeper integration and seem to have generated much legal and even political incoherence. The Court of Justice has tried to protect the integrity of the EU legal order and limit the cherry picking approach as regards new measures building upon the Schengen acquis.⁵ After the withdrawal of the UK, the opt-out/in regime has lost its major significance since the UK was the biggest advocate of variable geometry in this field. As observed by Curtin and Patrin, “internal differentiation may thus shift towards legal instruments that are better embedded in the EU law framework and which allow for flexible participation in secondary law”.⁶

The departure of the UK only partially softens the tensions existing in the Common European Asylum System (CEAS) context since it enjoyed a number of opt-outs in the field; rather, other Member States are the new objectors to common policies and integration in the fields of asylum and migration. The EU has not been able to provide for adequate measures of solidarity, trying to address migration emergencies through temporary and *ad hoc* solutions. As it has rightly been argued, “the reform of the CEAS has been stalled for more than four years mainly due to a lack of consensus among the Member States on the implementation of the principle of solidarity [...]”.⁷

The implications of the principle of solidarity in asylum and migration policies are not well defined in the Treaties. According to arts 80 and 67(2) TFEU, the policies on border checks, asylum and migration shall be governed by the principle of solidarity and fair sharing of responsibility. However, the Treaties foresee only solidarity and fair sharing of responsibility between the Member States and not towards refugees and migrants. Art. 80 refers explicitly to financial solidarity, but the principle includes other forms of solidarity like the relocation of refugees, the establishment of redistribution quotas or of operational support.⁸ There is clearly a lack of support among Member States that is not compatible with

⁴ AC d’Appolinia, ‘EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation’ (2019) *Comparative European Politics* 194.

⁵ See Case C-137/05 *UK v Council* ECLI:EU:C:2007:805 para. 63.

⁶ D Curtin and M Patrin, ‘EU Constitutional Standards of Democracy in Differentiated Integration’ (EU Working Paper RSC 2021/80).

⁷ M Moraru, ‘The New Design of the EU’s Return System Under the Pact on Asylum and Migration’ (14 January 2021) *EU Migration and Asylum Law and Policy* eumigrationlawblog.eu.

⁸ See D Thym and E L Tsourdi, ‘Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions’ (2017) *Maastricht Journal of European and Comparative Law* 611.

art. 80 TFEU. This reality allows for different interpretations of what solidarity implies in practice.⁹ As it has been pointed out, “although its concrete content may be fluid, contextual, and with varying degrees of thickness depending on the circumstances, it does permeate the European project in a structural way, whatever the policy area, type of competence, and level of integration concerned”.¹⁰

In this *Article*, differentiation is understood as the non-application or exclusion from EU common rules or policies of at least one Member State. According to de Witte et al., differentiation refers to “the facilitation and accommodation of a degree of difference between Member States or regions in relation to what would be otherwise common union policies”.¹¹ Differentiation in the field of asylum takes different legal forms, ranging from the non-participation of the UK in the past and Ireland and Denmark today in most legal instruments to the EU’s tolerance in cases of incorrect implementation of common asylum standards.¹² This *Article* distinguishes formal differentiation from the model of flexible and differentiated solidarity proposed in the New Pact on Migration and Asylum, both of which can be conceived as differentiated integration in the field of asylum.¹³ Even though flexible solidarity is not strictly speaking a form of differentiation, it might lead in practice to a lack of uniform application of the CEAS in various Member States.

Flexible solidarity is presented by the Commission in the New Pact on Migration and Asylum as a solution to break the deadlock in the reform of the EU asylum policy.¹⁴ There are several references to the word “flexibility” in the Pact. Flexible solidarity in the fields of asylum and returns is considered a key instrument to advance in the reform of asylum system in the EU by allowing common agreement among Member States. The aim of this *Article* is to analyse to what extent the development of flexible solidarity in the field of asylum will allow the EU to address the shortcomings that the CEAS is facing today. The first section of this *Article* presents the evolution of differentiated integration taking into account its inter-governmental origins and its substantial implications in the field of asylum. In the second section, flexible solidarity in the New Pact on Migration and Asylum will be analysed paying

⁹ See F Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’ (20 October 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu; R Bejan, ‘Problematizing the Norms of Fairness Grounding the EU’s Relocation System of Shared Responsibility’ (EUI Working Papers 2018/35) 10.

¹⁰ V Moreno-Lax, ‘Solidarity’s Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy’ (2010) Maastricht Journal of European and Comparative Law 740–762. See also S Peers, ‘Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon’ (2008) European Journal of Migration and Law 219–236.

¹¹ B de Witte, D Hanf and E Vos, *The Many Faces of Differentiation in EU Law* (Inersentia 2001).

¹² 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.

¹³ Communication COM(2020) 609 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 September 2020 on a New Pact on Migration and Asylum, p. 22.

¹⁴ *Ibid.*

particular attention to the legal and political issues involved in this proposal. The key question is whether differentiation as regards solidarity serves to further develop the EU asylum policy by introducing a useful degree of flexibility to accommodate the different interests of the Member States or the multiplication of forms of solidarity will lead in the long run to more disintegration. The third section will be devoted to analysing the implications of flexible solidarity for the relations with third countries. As a result of the deadlock in the reform of CEAS, the EU institutions and the Member States are increasingly paying attention to enhancing cooperation with third countries in order to increase the rate of return of irregular migrants. The fourth section will focus on analysing to what extent the gradual approach followed by the French Presidency will allow to make concrete progress on the New Pact on Migration and Asylum and achieve the ambition of a comprehensive asylum and migration policy at EU level in the future.

II. THE EVOLUTION OF DIFFERENTIATED INTEGRATION IN THE FIELD OF ASYLUM

Differentiated integration is not a new phenomenon in the field of asylum and migration. Before their integration within the former Community pillar by the Treaty of Amsterdam in 1997, EU Member States started developing their cooperation in this area following an intergovernmental method. The most well-known example of this experience was the signature of the Schengen Agreement in 1985 and the subsequent adoption of an international Convention for its implementation in 1990. However, since migration and asylum policies are very sensitive from the perspective of national sovereignty, Member States have always been reluctant to transfer competences to the EU. The EU was endowed with competences in this area for the first time by the Maastricht Treaty. The entry into force of the Treaty of Amsterdam led to the introduction of differentiation in the field of migration and asylum since not all EU acts apply to all Member States. Those Member States that opposed communitarisation were given the possibility of participating in the AFSJ to the extent that they wished. For this reason, it has been argued that “the flexibility clause introduced within the framework of Title IV should be regarded less as closer cooperation, and more as a communitarisation *à la carte*”.¹⁵

In the Amsterdam Treaty, the UK, Ireland and Denmark obtained opt-outs from Title IV of the former EC Treaty on visas, asylum, migration and other policies related to the free movement of persons. However, the Treaty of Lisbon complicated this situation by extending the exclusion of these two countries to police and judicial cooperation in criminal matters.¹⁶ At

¹⁵ G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff 2006) 30.

¹⁶ Currently, the situation of Ireland is regulated by three different protocols: Protocol 19 of the European Union of 26 October 2012 on the Schengen Acquis integrated into the framework of the European Union, Protocol 20 of the European Union of 26 October 2012 on the application of certain aspects of art. 26 TFEU to the United Kingdom and to Ireland and Protocol 21 of the European Union of 26 October 2012 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

the same time, according to the Protocol on the Position of Denmark, this country remains completely out from the measures adopted in the AFSJ, with no possibility of opting in.¹⁷ The application to Denmark of any measure adopted pursuant to Title V of the TFEU depends on the conclusion of an international agreement between this country and the other Member States.¹⁸ Therefore, Denmark participates in Schengen related measures on an intergovernmental basis and not within the framework of EU law. In practice, the recourse to parallel agreements has allowed to develop an effective cooperation between Denmark and the other EU Member States.¹⁹ The position of Ireland – and in the past the UK – differs substantially from the situation of Denmark. While the UK and Ireland were not willing to participate in a cooperation concerning the establishment of an area without borders, Denmark was concerned with the transfer of competences in this field to the EU. For this reason, the cooperation with Denmark has developed in this area following an intergovernmental method.

According to Protocol 21 on the Position of the UK and Ireland in respect of the entire AFSJ, these countries did not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. The reasons commonly asserted for the need for a particular regime relate, firstly, to the Common Travel Area shared by Ireland with the UK and, secondly, to the common law tradition also shared by both countries, a tradition that is asserted to require special treatment in this regard.²⁰ Consequently, its effect was that “no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable to the UK or Ireland”.²¹ The conclusion of international agreements was also complicated by the peculiar position of the UK and Ireland. Since the UK enjoyed an opt-out regime, it could be considered that the withdrawal of the UK from the EU did not have implications for migration policies. However, the UK has made ample use of the opt-in mechanism to take part in internal measures and international agreements involving a complex exercise of EU competences in this field. As it has been stated, “if extracting oneself from a derogation regime was expected to be simple, the legal imbroglio characterising variable geometry in the AFSJ [...] clearly contradicts this”.²²

¹⁷ Protocol 22 of the European Union of 26 October 2012 on the Position of Denmark.

¹⁸ The Danish Protocol provides that this country may decline to avail itself of all or part of this Protocol. However, Denmark rejected in a 2015 referendum the option to move towards an opt-out/opt-in regime similar UK/Irish model. As a result of it, the Danes maintained a full opt-out from the AFSJ.

¹⁹ It has been held that “the fact that practical arrangements revert or at least minimize the explicit wish of exclusion of a Member State undermines the democratic legitimacy of such cooperation and diminishes the significance of popular vote”, see D Curtin and M Patrin, ‘EU Constitutional Standards of Democracy in Differentiated Integration’ cit. 35.

²⁰ J Santos Vara and E Fahey, ‘Transatlantic Relations and the Operation of AFSJ Flexibility’ cit. 103-123.

²¹ Art. 2 Protocol 21 cit. A similar provision is included in art. 2 of Protocol 22 cit.

²² P García Andrade, ‘Outside the Opt-out: Legal Consequences of the UK’s Withdrawal from the EU for External Action in the AFSJ’ in J Santos Vara and R Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 112.

The situation of the UK, Ireland and Denmark introduced a high level of complexity and diversity into the development of the asylum and migration policies. This was the price that had to be paid in order to achieve the “communitarisation” of the third pillar. As it has been argued, “allowing the possibility of too many ‘speeds’ going in too many different directions might have helped to end the pillarisation but [might have created] an Area of Freedom, Security and Justice too prone to ‘differentiation’ and ‘exceptionalism’”.²³ Furthermore, Title V of the TFEU continues to reflect the tension between Community and intergovernmental approaches.²⁴ The opt-out regime of Denmark, Ireland and the UK before Brexit raises serious challenges as regards representation, political and legal accountability as well as transparency since EU law provides different status of Member States and the jurisdiction of the Court of Justice is not uniform.²⁵ One of the major implications of differentiation in the AFSJ is that it is not always easy to understand “who is in, who is out and who is partially out”.²⁶

The possibilities of differentiated integration laid down in primary law have had a substantial impact in the field of asylum over the past few years. While the UK and Ireland have initially cooperated in the development of the CEAS, this attitude changed after the entry into force of the Lisbon Treaty and the hostile political atmosphere towards further integration that emerged in the UK in the first two decades of this century. The UK, Ireland and Denmark did not take part in the second phase of the CEAS. As a consequence, the directives on qualification, reception conditions and procedures were not binding on these three countries.²⁷ The only exception was the Dublin and Eurodac regulations that are applicable to all Member States, as well as to the Schengen associated countries (Norway, Iceland, Switzerland and Liechtenstein).²⁸ Such a differentiated regime granted the UK and Ireland

²³ S Carrera and G Florian, ‘The Reform Treaty & Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice’ (17 August 2007) CEPS Centre for European Policy Studies www.ceps.eu 8.

²⁴ J Santos Vara, ‘The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty’ cit. 577-599.

²⁵ D Curtin and M Patrin, ‘EU Constitutional Standards of Democracy in Differentiated Integration’ cit. 36-37.

²⁶ *Ibid.*

²⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; 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; 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; Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of “Eurodac” for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-

a preferential status allowing them to return asylum seekers to the country of first entrance and to lower the protection standards for asylum seekers without applying the legislation that provides for minimum standards protection at EU level. EL-Enany has correctly argued that “the refusal to agree to the legally enforceable safeguards that underlie the Dublin system raises questions as to whether the EU should in principle tolerate such cherry-picking in a sensitive area of law that directly affects the lives of vulnerable individuals”.²⁹ In the aftermath of Brexit, the UK/Irish opting out/in has lost its major implications as Ireland is the only Member State that can profit thereof. However, Ireland has not yet opted into the directives on qualification, reception conditions and procedures.

More recently, a new form of differentiation between Member States emerged as a result of the so called “European refugee crisis of 2015”. Member States substantially diverged not only on the approach to be followed in order to confront the crisis, but also on how to reform migration policies. In recent years, the CEAS has revealed many of its shortcomings in the aftermath of the Arab Spring and the Syrian and Libyan crises. The Dublin system has put unsustainable pressure on the Mediterranean frontline states in the EU and has led to the collapse of asylum systems in Greece, Malta and partly also in Italy and Spain. The refugee crisis of 2015 revealed that the system was ill-suited to respond to the increase of refugee arrivals to the EU Member States. The reform of the Dublin rules or *ad hoc* relocation arrangements have been opposed by a group of mainly Central and Eastern European Member States that were not affected by migration until the outbreak of the war in Ukraine or were mere transit countries. This group has traditionally opposed extra-European migration for ideological and cultural reasons. However, the Mediterranean countries contested the criteria and mechanisms determining the country responsible for examining asylum applications. As a result of the crisis “what was already a multi-layered system became even more chaotic when EU member States reacted to this crisis by abusing existing legal elements allowing flexibility”.³⁰ The lack of agreement between Member States is also explained by “the deep disagreement – if not ‘fracture’ – that exists between Member States on the values that lie at the foundation of this policy”.³¹

Internal differentiation in the field of asylum has been combined with external differentiation since legal acts adopted in this area are applicable to a group of third countries. The four associated States to the Schengen system are included in the territorial scope of EU legislation in this area (Iceland, Liechtenstein, Norway and Switzerland). The

country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

²⁹ N EL-Enany, ‘The Perils of Differentiated Integration in the Field of Asylum’ cit. 367.

³⁰ AC d’Appolinia, ‘EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation’ cit.

³¹ J Silga, ‘Differentiation in the EU Migration Policy: The “Fractured” Values of the EU’ (2022) European Papers www.europeanpapers.eu.

participation of Denmark, Finland and Sweden in the Schengen system has led Norway and Iceland to join it in order to preserve the Nordic Passport Union between those five countries. Switzerland and Liechtenstein participate in the Schengen area respectively since 2008 and 2011. This group of countries are also part of the Dublin system establishing different criteria to determine the State that is responsible for examining asylum applications. As a result of the overlapping of internal and external differentiation, “a layer of international agreements is added on top of the EU supranational legal framework”.³² Furthermore, the UK may cooperate with the EU in the future within the framework of the Trade and Cooperation Agreement (TCA) since this broad international instrument is expected to be completed by specific agreements between both sides.³³

III. FLEXIBLE SOLIDARITY IN THE NEW PACT ON MIGRATION AND ASYLUM

III.1. THE PROPOSAL FOR A REGULATION ON ASYLUM AND MIGRATION MANAGEMENT: A FRESH START?

The Commission presented the New Pact on Migration and Asylum as “a fresh start” to address the challenges that the EU faces in the field of asylum.³⁴ The Commission intends to close gaps between the various realities faced by different Member States and promote mutual trust by delivering results through effective implementation. In its Proposal for a Regulation on asylum and migration management (RAMM), the Commission admitted that “the current migration system is insufficient in addressing these realities. In particular, there is currently no effective solidarity mechanism in place and no efficient rules on responsibility”.³⁵ The incapacity to find political agreement to reform the Dublin system is a clear indicator of the limits of the current legal framework. During negotiations on the 2016 CEAS reforms, the proposal to introduce a mandatory scheme of solidarity was strongly opposed by a group of countries.³⁶

In New Pact on Migration and Asylum, the Commission proposes to abolish Dublin III Regulation and to withdraw its 2016 proposal amending the Dublin Regulation while

³² D Curtin and M Patrin, ‘EU Constitutional Standards of Democracy in Differentiated Integration’ cit. 44.

³³ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part of 30 April 2021.

³⁴ COM(2020) 609 final cit. 22.

³⁵ Communication COM(2020) 610 final Proposal for a Regulation of the European Parliament and of the Council of 23 September 2020 on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], p. 2.

³⁶ According to COM(2016) 270 final Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 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, once a Member State received asylum applications exceeding 150% of its capacity level, a so-called corrective allocation mechanism would enter into place.

replacing them with a new, broader instrument for a common framework for asylum and migration management.³⁷ However, the core elements of the Dublin system, determining the State that is responsible for asylum applications, are preserved in the New Pact on Migration and Asylum.³⁸ The Commission considers that “no Member State should shoulder a disproportionate responsibility and that all Member States should contribute to solidarity on a constant basis”.³⁹ Solidarity is conceived in the new Regulation “as a corrective mechanism to the functioning of the ordinary rules on the attribution of responsibility”.⁴⁰ The objective of the RAMM is to develop an integrated approach for migration and asylum policies, that ensures a fair sharing of responsibility and addresses effectively mixed arrivals of persons in need of international protection and those who are not. This new solidarity mechanism aims to reflect the different challenges created by different geographical locations and ensures that irregular arrivals of refugees are handled by the EU as a whole.⁴¹

The Commission decided to move away from the mandatory relocation system. The Council Decisions of 2015 on relocation were adopted as emergency measures and derogated for the first time the rules on attribution of responsibility set by the Dublin system.⁴² The Commission proposed in the RAMM a flexible solidarity system among Member States. If a Member State is faced with certain migratory pressure, other Member States will have to support it, depending on their GDP and population size.⁴³ According to the original proposal of the Commission, solidarity contributions allow other Member States to choose between the relocation of a number of asylum applicants, sponsorship of the return of illegally staying third-country nationals, relocation of beneficiaries of international protection, capacity-building and operational support, or a combination of these measures.⁴⁴ In other words, Member States will have the flexibility to decide whether and to what extent they will share their effort between persons to be relocated and those to whom return sponsorship would apply. The Commission considered that the new solidarity system leaves

³⁷ COM(2020) 610 final cit.

³⁸ COM(2020) 609 final cit. See 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.

³⁹ COM(2020) 609 final cit. 2.

⁴⁰ European Parliament, ‘The European Commission’s New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment’ (12 August 2021) www.europarl.europa.eu 88.

⁴¹ European Commission staff working document SWD(2020) 207 final Proposal for a Regulation of the European Parliament and of the Council of 23 September 2020 on asylum and migration management amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund].

⁴² Decision 2015/1601 of the Council of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; Decision 2015/1523 of the Council of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.

⁴³ Art. 54 COM(2020) 610 final cit.

⁴⁴ *Ibid.* art. 45.

Member States with viable alternatives to relocation and ensures that the pressure on a Member State is effectively alleviated by relocation or return sponsorship. A similar system will be applied when a Member State needs support in cases of disembarkation following Search And Rescue (SAR) operations.⁴⁵ This mechanism intended also to replace the *ad-hoc* solidarity initiatives following SAR disembarkations of the past years.

The mechanism of flexible solidarity responds to the realpolitik vision that is present in the proposals included in the New Pact.⁴⁶ In the last years, Member States have shown that they have different views on how to ensure a fair sharing of responsibility of persons in need of international protection. While Mediterranean countries have been calling for the introduction of an EU mandatory relocation system for asylum seekers, the Visegrád States (Hungary, the Czech Republic, Poland and Slovakia) have fiercely opposed such a system. The proposal of the Commission is based on the assumption that those Member States that strongly opposed mandatory relocations in the past will be more willing to accept a fair share of responsibility of asylum seekers if the mechanism is flexible.

III.2. THE MANAGEMENT OF FLEXIBLE SOLIDARITY

According to the system proposed by the Commission in 2020, every Member State will have the flexibility to decide whether and to what extent they will share their effort between persons to be relocated and those to whom return sponsorship would apply. Furthermore, Member States may choose to contribute through other forms of solidarity such as capacity building, operational support, technical and operational expertise, as well as support on the external aspects of migration. The solidarity mechanism was presented as comprehensive and it could be adapted to the different situations presented by the migratory challenges faced by the Member States.⁴⁷

Flexible solidarity will primarily focus on relocation or return sponsorship. Under return sponsorship, Member States would provide all necessary support to the Member State under pressure to swiftly return those who have no right to stay, with the supporting Member State taking full responsibility if return is not carried out. If returns are not conducted within eight months, or four in cases of crisis, the migrants have to be transferred to the territory of the sponsoring state.⁴⁸ Member States can focus its support on the nationalities from which they are expecting to reach a better chance of effecting returns. The supporting State can provide financial or logistic assistance, support in

⁴⁵ *Ibid.* arts 47-49.

⁴⁶ D Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfall of the "New" Pact on Migration and Asylum' (29 September 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

⁴⁷ Proposal COM(2020) 613 final for a Regulation of the European Parliament and the Council of 23 September 2020 addressing situations of crisis and force majeure in the field of migration and asylum.

⁴⁸ Art. 55(2) COM(2020)610 final cit.

readmission negotiations with third countries, or even organize return flights.⁴⁹ As it has been argued, the RAMM “is purposely open and flexible about the forms of support that states acting as ‘return sponsors’ may offer”.⁵⁰

The Commission is entrusted itself with the role of identifying when a Member State is confronted with recurring arrivals, a situation of crisis or risk of migratory pressure, which allows for the activation of the solidarity mechanism.⁵¹ In these circumstances, the Commission will identify the overall needs of the Member State that receives an unexpected influx of migrants and set out in a report the measures needed to address the situation, after close consultation with the Member State concerned. Other Member States may contribute voluntarily to solidarity at any time, under the coordination of the Commission, but the contributions have to be orientated to address the needs of a specific Member State. The RAMM leaves us “with a Dublin system in all but name”, leading also to “an ultra-bureaucratic solidarity”.⁵²

The proposal of flexible solidarity also includes corrective mechanisms in case the contributions made by the Member States are not enough to address a specific migratory pressure. If, once all responses are received, there is a shortfall in relocation/return sponsorship, Member States will first be asked to revise their response choice in a Solidarity Forum. If, following this, there is still a shortfall of more than 30% of the necessary number of relocations or return sponsorships, each Member State would be asked to relocate or return at least 50% of the persons that they were allocated.⁵³ It is not entirely clear how the system would function in practice in case that it is adopted. As it has been rightly pointed out, “the solidarity mechanism will entail a complicated matching exercise between what benefiting states need and what sponsoring states are willing and able to offer”.⁵⁴ The Member States that are not willing to contribute, may find ways to avoid contributing to the solidarity mechanism. It has been stated that “the proposal in fact concentrates the power to make all the key decisions in the hands of the Commission, to decide what the solidarity needs are and how these should be distributed”.⁵⁵ Since the Commission is granted a wide discretionary power in the management of the solidarity mechanism, it is essential that the institution is perceived as an impartial broker among Member States.⁵⁶

⁴⁹ *Ibid.* art. 52(3).

⁵⁰ O Sundberg Diez and F Trauner, ‘EU Return Sponsorships: High Stakes, Low Gains?’ (19 January 2021) European Policy Centre www.epc.eu.

⁵¹ See F Maiani, ‘A “Fresh Start” or One More Clunker?’ cit.

⁵² See S Carrera and others, *The European Commission's Legislative Proposals in the New Pact on Migration and Asylum* (Study Requested by the LIBE Committee July 2021) www.europarl.europa.eu; F Maiani, ‘A “Fresh Start” or One More Clunker?’ cit.

⁵³ Art. 53(2) COM(2020) 610 final cit.

⁵⁴ O Sundberg Diez and F Trauner, ‘EU Return Sponsorships’ cit.

⁵⁵ V Moreno-Lax, ‘Solidarity's Reach’ cit.

⁵⁶ C Woollard, ‘Editorial: The Pact on Migration and Asylum: It's Never Enough, Never, Never’ (25 September 2020) ECRE Weekly Bulletin ecre.org; F Maiani, ‘A “Fresh Start” or One More Clunker?’ cit.

III.3. RETURN SPONSORSHIP: A CONCEPT THAT DID NOT PLEASE ANYONE

Return sponsorship has been presented as a solution to the political impasse that has characterised debates on solidarity in the EU.⁵⁷ However, this form of solidarity has been equally opposed both by Visegrád and Mediterranean countries. When the New Pact on Migration and Asylum was released, it was considered that the return sponsorship was a concession to the Visegrád group and countries, such as Austria, Denmark and Slovenia, because they have always opposed mandatory relocations of asylum seekers. This group of countries opposed the obligation to transfer migrants and refugees to the territory of the sponsoring State if the return to third countries is not successful.⁵⁸ Return sponsorship has even been qualified as relocation “through the back door”.⁵⁹ In a non-paper document, published in December 2020, they argued that “the relocation or other forms of admission of migrants have to be of voluntary nature. Member States must not be forced to implement any particular instruments that could be considered as violation of their sovereignty”.⁶⁰ On the other hand, Mediterranean countries expressed their concerns from the first moment as regards the concept of return sponsorship.⁶¹ In November 2020, Spain, Italy, Greece and Malta published a joint letter considering that “the imbalances we see in the proposed elements of solidarity and responsibility need to be addressed” in order to develop a truly European migration and asylum policy.⁶² They argued that the “the notion of mandatory relocation should remain and be pursued as the main solidarity tool”.⁶³ As there are huge political differences between the Member States, it seems that the concept of return sponsorship has been abandoned. In June 2022, the French Presidency of the Council has convinced the majority of Member States to start implementing a voluntary solidarity mechanism that does not include the concept of return sponsorship. The implications of this political agreement will be analysed in the last section of this *Article*.

The key question that was raised from the first moment was whether the system of flexible solidarity could provide a satisfactory solution to the challenges that the EU is facing in the field of asylum today. As it has been pointed out, “this raises the question of

⁵⁷ O Sundberg Diez and F Trauner, ‘EU Return Sponsorships’ cit.

⁵⁸ See M Peel and S Fleming, ‘Brussels unveils plan to overhaul EU migration policy (23 September 2020) Financial Times www.ft.com; M Martín, ‘El pacto migratorio europeo ignora las pretensiones de España’ (23 September 2020) El País elpais.com.

⁵⁹ J Barigazzi, ‘Germany’s Horst Seehofer: Yes, We Can Get a Political Deal on Migration’ (8 October 2020) Politico www.politico.eu.

⁶⁰ Polish Presidency of the Visegrád Group, ‘New Pact on Migration and Asylum: Joint Position of Poland, Hungary, Slovakia, Czech Republic, Estonia, and Slovenia’ (non-paper, 10 December 2020) www.visegradgroup.eu.

⁶¹ M Martín, ‘Sánchez asume el control del pacto migratorio para ganar fuerza en Bruselas’ (28 September 2020) El País elpais.com.

⁶² Government of Spain, ‘New Pact on Migration and Asylum: Comments by Greece, Italy, Malta and Spain’ (non-paper, 2020) www.lamoncloa.gob.es.

⁶³ *Ibid.*

whether such a degree of flexibility can be provided without undermining the overall system's balanced and fair functioning".⁶⁴ However, the most recent experiences of relocations adopted in the EU show a lack of willingness to contribute to relocations. In recent years, other mechanisms of flexible solidarity in the field of asylum have been adopted by the EU or groups of Member States. These include the Joint Declaration of Intent (Malta Declaration) of September 2019, by which several Member States committed to relocating a share of migrants disembarked in Malta or Italy following SAR operations, or the Commission's scheme to facilitate voluntary relocations of unaccompanied minors from the Greek island.⁶⁵ Even though they have provided support to Southern Member States, only a few Member States have voluntarily participated in both programs. In the absence of a common understanding of the scope and content of the solidarity principle, the objective of establishing mandatory and flexible solidarity runs the risk of leaving the problem unaddressed. The introduction of a cherry-picking approach as regards solidarity may lead to more differentiated integration in the field of asylum without accommodating the different interests of the Member States.

On 7 March 2022, the Council decision granting temporary protection to people fleeing Ukraine entered into force.⁶⁶ This unprecedented decision introduced a legal framework providing immediate protection in the EU for Ukrainians refugees. However, the Council Decision on the introduction of temporary protection has left Member States a wide margin of manoeuvre as to whether to extend the benefits to non-Ukrainian third country nationals.⁶⁷ The swift activation of the Temporary Protection Directive contrasts with the political blockage by EU Member States over the proposals presented in 2016 for reforming the EU asylum system.⁶⁸ The reform of the EU Dublin system or the introduction of *ad hoc* relocation arrangements have been mainly opposed by a group of countries that have an external border with Ukraine, in particular Hungary, Poland and Slovakia. It does not seem obvious that this group of countries has changed its perception of migration and will be willing to contribute in the future to the implementation of *ad hoc* relocations mechanisms benefiting

⁶⁴ O Sundberg Diez and F Trauner, 'EU Return Sponsorships' cit.

⁶⁵ See S Carrera and R Cortinovic, 'The Malta Declaration on SAR and Relocation: A Predictable EU Solidarity Mechanism?' (2019) CEPS Centre for European Policy Studies www.ceps.eu; European Commission, 'Migration: Commission Takes Action to Find Solutions for Unaccompanied Migrant Children on Greek Islands' (6 March 2020) ec.europa.eu.

⁶⁶ Implementing Decision (EU) 2022/382 of the Council of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of art. 5 of Directive 2001/55/EC and having the effect of introducing temporary protection.

⁶⁷ Directive 2001/55/EC of the Council of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁶⁸ See S Carrera and others, 'The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy' (14 March 2022) CEPS Centre for European Policy Studies www.ceps.eu p. 2.

Member States in Southern Europe. It is not straightforward that the acceptance to uphold their legal obligations as regards Ukrainian refugees will be extended to asylum seekers and refugees coming from Africa and other regions of the world. Poland and Hungary opted for not activating the solidarity mechanism between Member States foreseen in the Temporary Protection Directive.⁶⁹ As it has been observed, “this shows a consistent and persistent opposition of these governments to the wider idea of intra-EU ‘relocation’ of TP beneficiaries and asylum seekers more generally”.⁷⁰

IV. SOLIDARITY IN COOPERATING WITH THIRD COUNTRIES IN THE NEW PACT ON MIGRATION AND ASYLUM

Cooperation with third countries of origin and transit of migration flows is considered a key element in the New Pact to support the functioning of return sponsorships. The Pact aims to enhance mutual support in the relations with third countries that are generating particular migratory flows to Member States establishing what has been called an “external dimension of solidarity”.⁷¹ Solidarity contributions for the benefit of a Member State under migratory pressure may include “operational support and measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries”.⁷² It is argued in the New Pact on Migration and Asylum that “working closely with countries of origin and transit is a prerequisite for a well-functioning system of returns, readmission and reintegration”.⁷³

In the original proposal of the Commission, it was considered that the return sponsorship mechanism would allow an increase in the number of effective returns to third countries. Member States tend more easily to agree on issues relating to the external dimension – particularly, on return and readmission – than to the reform of CEAS or the introduction of *ad hoc* relocation arrangements. It is expected that the sponsoring Member State will mobilize its network of bilateral cooperation on readmission, or by opening a dialogue with the authorities of a given third country where the third-country national should be deported. As mentioned above, if returns are not conducted within eight months, the third-country national has to be transferred to the sponsoring Member State.

From the beginning of the New Pact on Migration and Asylum, the Commission reaffirms that “the internal and external dimensions of migration are inextricably linked”.⁷⁴ Section 6 entitled “working with our international partners” is devoted to engaging third

⁶⁹ See arts 24-26 Directive 2001/55/EC cit.

⁷⁰ S Carrera and others, ‘The EU Grants Temporary Protection for People Fleeing War in Ukraine’ cit.

⁷¹ European Parliament, *The European Commission’s New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment* (European Parliamentary Research Service August 2021) www.europarl.europa.eu 74.

⁷² Art. 45(1)(d) COM(2020) 610 final cit.

⁷³ COM(2020) 609 final cit. p. 22.

⁷⁴ *Ibid.*

countries in managing migration. The relationships with third countries have a direct impact on the effectiveness of policies inside the EU. Apart from addressing the root causes of irregular migration and developing legal pathways for legal migration, the Commission mentions the objective of reaching more effective cooperation with third countries on return and readmission. According to the Commission's press release, the Pact introduces "a change of paradigm in cooperation with non-EU countries" that will lead to "comprehensive, balanced and tailor-made partnerships", in particular with key partner countries of origin and transit of migrants.⁷⁵ As it has rightly pointed out "the approach adopted towards cooperation with third countries on migration has been 'comprehensive', 'global', 'balanced' – and some other synonyms – since the European Council in Tampere in 1999".⁷⁶ Therefore, the idea of putting into place flexible instruments that intend to address both the EU and partner countries' interests has always been present in the external dimension of migration.⁷⁷

The Commission expresses its willingness to address the challenges that the EU is facing in the area of returns. Readmission is a cornerstone element of the international migration partnerships. For this reason, it has been argued that the EU migration partnerships can be better understood as "insecurity Partnerships".⁷⁸ Apart from pursuing the full and effective implementation of EU agreements and arrangements on readmission with third countries and the completion of ongoing readmission negotiations, the Commission is looking for practical cooperative solutions to increase the number of effective returns.⁷⁹ The Commission is leaving aside in the New Pact the practical human rights implications stemming from the increasing number of informal arrangements on return and readmission, which are concluded in the absence of due democratic scrutiny and parliamentary oversight and are not subject to judicial scrutiny. In addition, as it has been held, "the Pact gives no consideration to the lessons learned from the ineffectiveness of past 'Partnerships' and EU's readmission priority".⁸⁰

⁷⁵ European Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance Between Responsibility and Solidarity' (23 September 2020) ec.europa.eu.

⁷⁶ P García Andrade, 'EU Cooperation on Migration with Partner Countries within the New Pact: New Instruments for a New Paradigm?' (8 December 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

⁷⁷ See J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU in EU External Migration Law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019); J Santos Vara, *La dimensión exterior de las políticas de inmigración en tiempos de crisis* (Tirant lo Blanch 2020).

⁷⁸ S Carrera, 'Whose Pact? The Cognitive Dimensions of the New Pact on Migration and Asylum' (25 September 2020) CEPS Policy Insights www.ceps.eu 10.

⁷⁹ COM(2020) 609 final cit. 22.

⁸⁰ S Carrera and R Cortinovis, 'The Malta Declaration on SAR and Relocation' cit. 10.

The Commission continues to advocate for using a carrot and stick approach through the instrumentalization of other policy areas in order to incentivize expulsions.⁸¹ A first step was made by introducing a link between cooperation on readmission and access to Schengen visas.⁸² The revised Visa Code stipulates that the Commission assesses the level of readmission cooperation with third countries and reports to the Council on an annual basis.⁸³ In case the Commission reaches the conclusion that a partner is not cooperating sufficiently and taking into account “the Union’s overall relations with the country concerned”, it is expected to propose the Council apply specific restrictions to short-stay visa processing.⁸⁴ That linkage between cooperation on readmission and access to visas has been considered unfair to visa applicants and prejudicial to good international relations.⁸⁵ The idea of incorporating readmission into the whole external dimension is also reflected in art. 7 of the RAMM.⁸⁶ The conditionality is extended by calling the Commission to identify any measures which could be taken to improve the cooperation of a third country as regards readmission. The New Pact includes the possibility of applying restrictive visa measures to national countries not cooperating on readmission.

The implementation of flexible solidarity in the field of asylum could raise serious concerns from the perspective of external relations. It is not obvious that the third country concerned will accept the application of a readmission bilateral agreement concluded with the sponsoring Member State in the territory of the benefiting Member State. As it has been stated, “in acting as a sponsoring Member State, one is entitled to wonder why an EU Member State might decide to expose itself to increased tensions with a given third country while putting at risk a broader framework of interactions”.⁸⁷ In addition, not all the EU Member States have developed an extensive network of bilateral readmission agreements with third countries. In general terms, “more than 70 per cent of the total number of bilateral

⁸¹ For an analysis see J Santos Vara and L Pascual Matellán, ‘The Informalisation of EU Return Policy: A Change of Paradigm in Migration Cooperation with Third Countries?’ in E Kassoti and N Idriz (eds), *The Informalisation of the EU’s External Action in the Field of Migration and Asylum* (Springer 2022) 37-52.

⁸² Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) as amended by Regulation (EU) 209/1155 of the European Parliament and of the Council of 20 June 2019.

⁸³ *Ibid.* art. 25(a)(5). See Communication COM(2021) 56 final from the Commission to the European Parliament and the Council of 10 February 2021 on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy.

⁸⁴ COM(2020) 609 final cit. 23.

⁸⁵ E Guild, ‘Negotiating with Third Countries under the New Pact: Carrots and Sticks?’ (27 November 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu. Linking cooperation on readmission and visa policy does not necessarily lead to ensure the cooperation of third countries “especially when the latter are in position to capitalize on their strategic position with regard to some EU Member States”, see J P Cassarino and L Marin, ‘The New Pact on Migration and Asylum: Turning European Union Territory into a Non-Territory’ (20 November 2020) EU Law Analysis eulawanalysis.blogspot.com.

⁸⁶ COM(2020) 609 final cit. 23.

⁸⁷ J P Cassarino and L Marin, ‘The New Pact on Migration and Asylum’ cit.

agreements linked to readmission [...] concluded with African countries are covered by France, Italy and Spain".⁸⁸ It can be sustained that countries, such as Poland, Hungary and Czech Republic, "[...] are poorly placed to address bilateral readmission negotiations or the implementation of EU readmission agreements, which are a key bottleneck to successful returns".⁸⁹ If the "return sponsorship" mechanism is introduced in the future, it is doubtful that it will be helpful to develop a fair share of responsibility in the management of asylum and migration in the relations with third countries. If the mechanism of flexible solidarity is introduced in its original form, the EU return policy might end up being managed by a few Member States. It is doubtful that the system of return sponsorship would be acceptable if it would involve France, Italy and Spain acting as sponsoring Member States in the majority of cases. For these reasons, the introduction of flexible solidarity in the relations with third countries might lead to further differentiation and less fair share of responsibility in the management of asylum and migration policies. It seems that the majority of Member States realized that the flexible solidarity will never be implemented if it includes the ambiguous and controversial concept of return sponsorships.

V. THE GRADUAL APPROACH: TOWARDS A VOLUNTARY SOLIDARITY MECHANISM

The French Presidency of the Council has followed a gradual approach in order to make concrete progress on the New Pact on Migration and Asylum and achieve the ambition of a comprehensive asylum and migration policy at EU level in the future. As a result of this step-by-step approach, on 22 June 2022, the Member States agreed to start implementing a voluntary solidarity mechanism that does not include the concept of return sponsorship.⁹⁰ Previously, the Justice and Home Affairs Council reached a provisional agreement on the reform of asylum and migration policies.⁹¹ This agreement is very relevant since it is not expected that Czech Presidency makes a substantial effort to advance the different proposals that are part of the New Pact. It seems logical to abandon the idea to introduce return sponsorship since most Member States did not support it. The voluntary mechanism is based on contributions in the form of relocation, financial support to a benefitting Member State or also to projects in third countries that may have a direct impact on the flows at the external border. The voluntary nature of this mechanism allows Member States to freely decide "on the nature and the amount of their contributions, regarding for example the group of persons concerned by relocations (nationality, vulnerability, etc.) or the Member States to which solidarity is provided".⁹² Precedence is given to relocation upon other forms of solidarity in this new mechanism. It is foreseen

⁸⁸ *Ibid.*

⁸⁹ O Sundberg Diez and F Trauner, 'EU Return Sponsorships' cit.

⁹⁰ European Commission, 'Migration and Asylum: Commission Welcomes Today's Progress in the Council on the New Pact on Migration and Asylum' (22 June 2022) ec.europa.eu.

⁹¹ *Ibid.*

⁹² *Ibid.*

that relocations should primarily benefit Member States confronted with disembarkations following search and rescue operations in the Mediterranean and Western Atlantic route and also apply to other circumstances to take into account Cyprus' current situation or possible evolutions in the Greek islands.

The new system has been supported so far by 18 Member States and three associated Schengen countries that signed the Declaration on a solidarity mechanism in support of frontline Member States. While many Member States are not willing to offer relocation pledges in practice, only six Member States rejected directly the new mechanism – Hungary, Poland, Slovakia, Austria, Latvia and Denmark. The political agreement reached on the flexible solidarity mechanism has allowed the Member States to adopt a negotiating position on the proposals for the Screening and Eurodac Regulations, two of the most important legislative files included in the New Pact.⁹³ As it has been stated, the French Presidency managed to convince the Mediterranean countries “to agree on certain reforms and by doing so abandon the package approach, by providing a concrete win for them that can be sold to their publics, showing that they have convinced other Member States to provide them with ‘solidarity’”.⁹⁴ The Commission organized immediately in June 2022 a meeting on the solidarity platform with a view to rapidly implementing this mechanism and taking stock of the contributions. The Member States and the three associated countries that signed the Declaration on a solidarity mechanism committed to accept between 8000 and 9000 relocations pledges.

Although the voluntary solidarity mechanism agreed in June 2022 is a non-legislative and temporary instrument, it is considered a first step for the introduction of a permanent mechanism by the RAMM in the future and the gradual implementation of the New Pact. The Commission considered that “the implementation of this mechanism will provide useful lessons for the permanent mechanism on solidarity to be introduced by the Asylum and Migration Management Regulation, as proposed by the European Commission in 2020”.⁹⁵ There is no doubt that it is better to introduce a predictable system rather

⁹³ The Proposal on the Eurodac Regulation aims to modernise the database of asylum seekers and irregular migrants in order to better manage applications and fight against irregular movements. See Amended proposal COM/2020/614 final for a Regulation of the European Parliament and of the Council of 23 September 2020 on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818. The Council also approved the negotiation mandate of the “screening” regulation, which provides for uniform rules for the procedures for conducting security, health and identity checks on persons presenting themselves at the external border who do not meet the conditions for entry into the European Union. See Proposal COM/2020/612 final for a Regulation of the European Parliament and the Council of 23 September 2020 introducing a screening of third country nationals at the external borders and amending Regulations (EC) 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

⁹⁴ ECRE Editorial, *End Game of French Presidency: Passing on a Partial Reform* (25 June 2022) ecre.org.

⁹⁵ European Commission, ‘Migration and Asylum’ cit.

that *ad hoc* arrangements that have been put in place every time that a crisis has arisen. It is a correct step in the right direction because solidarity arrangements and mechanism put in place so far have been based on coalitions of the willing. Finally, it is still too early to determine if the partial agreement reached in June 2022 would lead to a new dynamic that would allow to introduce a substantial reform of the CEAS.

VI. CONCLUSIONS

The objectors to common policies and integration in the fields of asylum and migration wish to keep their freedom in the regulation of these matters and are reluctant to apply the burden-sharing that lies behind the development of a real CEAS. They assume that the limitation of discretion entailed in the burden-sharing in this field poses a challenge to their sovereignty. They even consider that some of the proposed elements of the flexible solidarity mechanism put its ability to reduce the number of refugees and migrants on its territory in jeopardy. This group of countries is not willing to introduce reforms that are not in line with their domestic policy agenda. In addition, the implementation of the CEAS varies dramatically from one Member State to another, leading to divergences in acceptance rates of asylum seekers' applications and the conditions of reception. Therefore, a common feature of EU asylum policy is the lack of uniform application across all Member States.

The Commission claims to have adopted a pragmatic approach taking into account different interests raised by the Member States in the New Pact on Migration and Asylum. It is doubtful that by developing flexible solidarity in the field of asylum it would be possible to put in place a functioning asylum system and improve the situation of refugees during the most vulnerable moments of arrival and reception. The failure to reach an agreement between the Member States on the reform of the CEAS has led the EU to intensify the external dimension of migration policies and, in particular, to the shifting of responsibilities to third countries of origin or transit of migrants in the management of migration. There is no doubt that the lack of trust towards particular Member States lies behind the proposal on flexible solidarity. The consequence is that "through the envisaged model of 'asymmetric' interstate solidarity, the Commission seeks to reach a compromise that would remedy the politically untenable 'one-size-fits-all' approach to solidarity but, would at the same time nurture more divergence leading to differentiated integration".⁹⁶

Introducing flexible solidarity for the allocation of migrants may alleviate the reluctance of some EU Member States, in particular Poland and Hungary, and encourage them to get more involved in the implementation of a functioning CEAS. This assumption cannot be taken for granted. As it has been pointed out in this *Article*, the differentiated

⁹⁶ See S Carrera and others, *The European Commission's Legislative Proposals in the New Pact on Migration and Asylum* cit.

integration of the UK has not led to further integration of this country on migration and asylum policies in the past. It is not self-evident that differentiated integration through flexible solidarity would be useful to support frontline countries that face a high pressure in their asylum systems and develop a more balanced and efficient distribution of responsibilities. Mandatory solidarity is only activated when a Member State is confronted with SAR cases, migratory pressure or a situation of crisis. There are no assurances that a significant number of refugees will be relocated since Member States may avoid relocation by offering solidarity in different ways. The effort to introduce a voluntary solidarity mechanism based on a predictable system is a welcome step that will avoid the need to find practical solutions every time that a crisis arises in the Mediterranean Sea. However, only the adoption of the RAMM would lead to develop a mandatory solidarity mechanism with a legislative basis.

The implementation of asylum policies directly affects the lives of individuals that are in a vulnerable situation. Flexible solidarity would not necessarily lead to better protection of asylum seekers and the development of more solidarity between Member States. More differentiation will probably not allow the EU to address the shortcomings that the CEAS is facing today as long as there is a lack of agreement between Member States on the implementation of the principle of solidarity. In the case that flexible solidarity is finally accepted in its current form by Member States, it will introduce a high level of complexity in the management of asylum and migration policies that will lead to further differentiation.

