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The EU Barbed-wire External Perimeter

The Belarusian
Instrumentalisation of Migration:
Implications for the EU
Migration and Asylum System

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This Food for Thought paper is a document that gives an initial reflection on the theme. The content is not reflecting the positions of the member states but consists of elements that can initiate and feed the discussions and analyses in the domain of the theme. All our studies are available on www.finabel.org

DIRECTOR'S EDITORIAL

Foreword

Since the height of the 2015 migration crisis, the European Union (EU) has been involved in the implementation of measures that could strengthen its external borders and prevent illegal migratory flows. Similarly, NATO has established arrangements enabling direct links with Frontex at the operational and tactical levels and has cooperated with EU agencies and members with the monitoring and surveillance of illegal crossings in the territorial waters of Greece and Turkey, for example. Nevertheless, what occurred in May 2021 at the Eastern perimeter of the Union brought to the surface some weaknesses in the EU migration and asylum policy. Amidst the Russian territorial aggression on Ukraine, the already-ongoing state-sponsored migratory flows encouraged by the Belarusian regime heavily affected three European bordering countries: Latvia, Lithuania, and Poland. The European Commission President, Ursula von der Leyen, said in her State of the Union address in September 2022 that the Belarusian regime has led a hybrid attack to destabilise Europe. This came after the Commission's proposals for (i) an amended Schengen Borders Code (SBC) and (ii) a Regulation addressing situations of Instrumentalisation, such as the one of President Alexander Lukashenko's regime. For several reasons, namely, the concerns about its significant impact on fundamental rights and rule of law, and the appropriate definition of "instrumentalisation", the negotiations on the Instrumentalisation Regulation in the European Parliament and the Council are currently on hold. Whilst migration has been a hot topic both in the EU Institutional Triangle and at the Member State level, changes to the EU's legal framework are needed to swiftly respond to the state-sponsored instrumentalisation of people at the EU's external borders.



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EXECUTIVE SUMMARY

In May 2021, an increasing number of people started to sporadically cross the European borders from Belarus. These migratory flows, artificially created by state-sponsored actions from President Alexander Lukashenko, mainly affected three European bordering countries: Latvia, Lithuania, and Poland. This specific case exemplifies the heavily debated instrumentalisation of migration, or, as specified by the European Commission, the series of events in which “a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third-country nationals to the external borders”. It can be easily understood that these actions are perpetrated with the objective of destabilising and asserting pressure on the Member States and the European Union (EU) at large, with the final intention of undermining vital State functions, such as territorial integrity and national security in primis. In the short term, Latvia, Lithuania, and Poland have reacted to the growing number of undocumented individuals through stricter border controls, whilst in the long run, the instrumentalisation of migration has translated into a proper humanitarian crisis that has shaken the Union. Whilst the latter had already sanctioned key political and economic figures of the Belarusian regime after the fraudulent presidential victory of 2020, EU countries bordering Belarus have proceeded in different ways, at times even acting against the EU acquis and international law. These acts evidenced the presence of ideolog-

ical disagreements rooted within the Union, particularly on how to handle the migration and asylum crises.

Undoubtedly, inefficiencies and gaps in the EU migration and asylum system are not new. For instance, the 2021 Belarusian instrumentalisation of migration brought to the surface an apparent lack of harmonisation between the Member States, which resulted in a structural solidarity deficit. The absence of a collective EU response has already created inconsistencies in the EU asylum acquis in the past, and it is becoming more problematic now, as a general malaise has spread across the Union. Whilst the Member States have primarily managed the 2021 instrumentalisation of migration on their own, many questioned the reasons behind the little consideration of such an important occurrence from the Union. Similarly, the EU Agenda on Migration and the New Pact on Migration and Asylum have not yet succeeded in creating a common external border control policy, fostering the inability of framing a unique response. Besides, another significant challenge concerns the lack of interoperability of information between EU countries, which seem to closely cooperate in the case of common border security emergencies, denoting a crisis response discourse rather than crisis management.

Furthermore, as the Belarusian instrumentalisation of migration was followed by the Russian territorial aggression on Ukraine, the EU migration and asylum system is now terribly overburdened. For instance, through

an extensive analysis of the EU migration and asylum policies, this report considers the concerns posed by Belarusian state-sponsored migration. An evaluation of the status quo, i.e., how the Institutional Triangle is responding to such instrumentalisation, is carried out alongside an assessment of the Latvian, Lithuanian, and Polish responses and misalignment to EU and international law obligations. Furthermore, the study shall look at past cases that highlight the negative impact of the absence of a common EU migration approach,

showing that the latter, and not migration per se, is detrimental to border security in the EU. Lastly, some policy recommendations are considered as a starting point to realise a stronger and more responsive migration and asylum system in the Union. This would potentially be through ad hoc reforms and adjustments to already existing rules or proposed protocols, such as the Instrumentalisation Regulation brought forward by the Commission in December 2021.

STATE OF PLAY

The management of EU external borders is a shared responsibility of the 27 EU Member States, the Schengen Associated Countries, the EU, and its agencies. Border security and border management have always been crucial topics for the Union, either because of exogenous migratory shocks that hit the territory or the different heterogeneous preferences of its members. After the end of the Cold War, the Union started a process of debordering – or openness – of its internal and external borders. During this period, which F. Schimmelfennig (2021) calls the dilutive phase of integration, the EU opened its external boundaries to states of the same type, thus, democratic regimes, and lifted the internal controls that were present during the two de-

acades between the 1960s and 1980s. In 1986, the European Economic Community enacted the Single European Act (SEA) to create “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured” (Resolution on the Single European Act, 1986). The SEA was the first attempt toward a borderless internal Union, but the significant step forward came with the implementation of the Schengen Convention (SC), which was signed in 1990 and entered into force five years later. Although it was only applicable to the Benelux States, France, and Germany, it was also integrated into the EU acquis in 1999, with the signature of the Treaty of Amsterdam.¹

1. With the Treaty of Amsterdam, the basic principles of the EU were laid out. These are the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The treaty made compliance with these principles a prior condition for accession to the Union by new Member States.

EU external borders: Schengen System and main migratory routes

The Schengen Agreement aimed at abolishing all internal borders and creating a common external boundary. This agreement enabled the freedom of movement for persons within the Schengen area. It provided the EU with a common visa system, the right to work freely within Schengen countries, and the ability to exchange information among members for border security and border management-related issues. Although the Schengen Agreement does not concern migration per se, it outlines policies regarding border control. With the integration of Schengen in the EU acquis in 1999 through the Treaty of Amsterdam, further cooperation within the Member States with regard to asylum-seekers and immigration entered into play. The Treaty of Amsterdam aimed at creating a uniform visa process, strengthening border check systems and developing standards for the movement of third-country nationals between the Member States.

The Schengen area undoubtedly enhances cooperation, interoperability of information among states, and ensures a stable and safe border-free area, where countries must share knowledge and data through police collaboration and cross-border surveillance. This makes, or should make, surveillance of suspected criminals at the Schengen borders easier and smoother. In particular, the Schengen Information System (SIS) is a large-scale information hub that has the objective of maintaining internal security within the Schengen members in the absence of internal border controls. Through the SIS, police, migration,

judicial, and other government authorities have the possibility to enter and consult alerts on missing persons, or objects related to criminal offences and on non-EU nationals who should not be allowed to enter and stay in the Schengen area.

Although the Schengen area and its system provide a secure area in Europe, there are still too many undocumented migrants crossing the borders of the EU through different migratory routes. For instance, national authorities under Schengen rules can and have temporarily introduced internal border controls to tackle cases of a massive influx of illicit migration.

- The Central Mediterranean route is the most used route, with illicit arrivals by sea to either Italy or Malta. Migrants most frequently leave from the coasts of Libya, Tunisia, or Turkey, which accounts for 16% of total irregular arrivals in 2022, as shown by the European Commission Report on Migration and Asylum of October 6 (European Commission, 2022 Report on migration and asylum, October 6, 2022).
- The Eastern Mediterranean route refers to migratory pressures on Cyprus and Greece. Today, the former country accounts for 60% of arrivals along this route (ibidem).
- The Western Mediterranean or Atlantic route bears witness to migratory flows from Algeria, Morocco, or Western Sahara to Spain and its Canary Islands.
- The Western Balkan route is starting to become a growing concern for the EU and Schengen states, as 106,396 irregular entries were registered by the European

Border and Coast Guard Agency (Frontex) in September 2022. Of particular concern is the Serbian visa policy², which allows third-country nationals that are on the EU list of visa-required nations to enter the country and from which these nationals then easily cross the northern borders to stay within the Union. For this specific reason, Austria and the Czech Republic have reinstated temporary border controls (Frontex, 2022).

The Eastern perimeter of the Union

Particular attention must also be drawn to the Eastern perimeter of the Union, that of the border with Belarus. The 2021 migratory crisis caused by an influx of migrants from Belarus is not the only concern for Eastern European countries, with the Russia-Ukraine war having recently generated the largest forced displacement of people in Europe since the Second World War. The recent announcement of a partial mobilisation by Vladimir Putin on September 21, 2022 (Address by the President of the Russian Federation, 2022) has created a new wave of refugees across the EU. According to the Operational Data Portal monitoring the Ukraine refugee situation, as of November 29, 2022, 7.891.977 Ukrainian refugees have been registered across Europe, with 6.947.301 having crossed the Ukrainian-Polish border (Ukraine Situation Flash Update #36, 2022). Although the Belarusian migratory crisis and the influx of Ukrainian refugees are distinctive phenomena, the EU has reacted to them in contrast-

ing ways, with the former being met with the construction of fences, while refugees from Ukraine were welcomed by the unprecedented activation of the Temporary Protection Directive (TPD)³ to welcome people fleeing Ukraine, both reflect the need for structural reforms to the EU's asylum and migration system. The Belarusian and Ukrainian migratory inflows are not the only two that hit the Union showing its weaknesses. During the last 15 years, several exogenous events led to a demand for boundary reconfiguration. As a consequence, EU members became more isolationist and started to close their borders both internally, with the suspension of the Schengen system in 2015 and 2020, and externally, with more rigid border controls.

The roots of the Dublin System

The EU external migration policy aims at guaranteeing international protection of third-country nationals and/or stateless persons respecting the Principle of Non-Refoulement⁴ of Article 33(1) of the Geneva Convention of 1951 (United Nations, 2012). It is based on common goals set by the Member States and is rooted in the Common European Asylum System (CEAS), established in 1999. With the creation of the CEAS under the Tampere Programme, five legislative instruments and one agency were adopted: the Eurodac Regulation⁵, the Temporary Protection Directive, the Reception of Asylum Seekers Directive, the Dublin Regulation replacing the 1990 Dublin Convention, the

2. Although Serbia is not part of the EU, it was granted candidate status in 2012, which requires, inter alia, an alignment of its visa policy with the Union standards.

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

4. Under this principle, no Contracting State may return a refugee, no matter the circumstances, to a territory that would result in a violation of the person's liberty and life because of his/her perspective on life, which may include religion, nationality, political opinion, gender, etc.

5. Based on the Eurodac Regulation, the Eurodac system is used to collect asylum seekers' fingerprints upon their entrance into the EU.

Qualification Directive, and the Asylum Procedures Directive (European Commission, Common European Asylum System, 2022).

Dublin Regulation

The Dublin Convention, which deals with the asylum policy, entered into force in 1997 and was subsequently modified twice: in 2003 by the Dublin II Regulation, with the EU Regulation No 343/2003, and in 2013 by the Dublin III Regulation, with the EU Regulation No 604/2013. The Dublin framework is similar to a certain extent to the asylum provisions included in Chapter VII SC (The Schengen acquis, 2000), and maintains that only one Member State is responsible for examining the asylum application lodged within the European Community in accordance with that member's national laws and international obligations. The responsible state is determined through hierarchy criteria laid down in Articles 4 to 8 of the Convention (Dublin Convention, 1997). The first criterion concerns the Member State in which the asylum applicant has a family member⁶, who already has refugee status. Article 5 refers to the Member States which have issued a valid residence permit or visa, while Article 6 deals with illicit entry, and affirms that the Member State whose external borders the asylum applicant illegally crossed will be responsible.⁷ Additionally, Article 7 retains responsible the Member State where the asylum seeker entered legally upon the necessity of a visa. Lastly, Article 8 considers the first Member State where the asylum applicant lodged for asylum to be responsible for managing their

asylum claim. Nonetheless, it is important to highlight that Member States can avoid applying the aforementioned principles in two cases with the consent of the asylum seeker. First, the sovereignty clause contained in Article 3.4 of the Convention allows each EU member to analyse the asylum application within its territory even when it is not held responsible under the Dublin criteria. Second, under the humanitarian clause contained in Article 9, a Member State can let another Member State examine an asylum application for humanitarian reasons.

Although the Dublin Convention was considered a step forward from the Schengen asylum rules, inefficiencies due to heterogeneous national policies and the lack of a common interpretation of the Dublin provisions have created incompatible information systems between EU members, slowing down the efficacy of the Dublin provisions. Especially as the identification of the responsible Member State became extremely difficult as applicants arrived in their countries without the proper documents that could reconstruct their immigration history. As a matter of fact, 95% of all asylum applications were processed outside the Dublin system between 1998 and 1999 (Hailbronner & Thym, 2016). For instance, in 2000, the EU began adopting the Eurodac system to help Member States understand whether an asylum seeker had already lodged an application in another EU country or if they had crossed an external border. The Eurodac Regulation was finalised in 2003, at the moment of the replacement of the Dublin Convention by the Dublin II Regulation. Despite this update, it is already evident that the Dublin provisions

6. Family member indicates the spouse of the asylum applicant or his/her unmarried and minor child of under eighteen years of age, or his/her father/mother where the applicant himself or herself is an unmarried child who is a minor of under eighteen years (Dublin Convention, Article 4 (2)).

7. It is important to note that, contrary to Schengen provisions, the responsibility of the Member State will cease when the asylum applicant has been living in that territory for at least six months upon application.

fostered confusion and created a burden for the Member States, particularly for those bordering the external perimeter of the Union. Additionally, Article 3.5 of the Dublin Convention became a matter of discussion for asylum seekers, as it stipulates that any Member State has the right to transfer an applicant to a safe third country not a party to the Convention, thereby not respecting the principle of non-refoulement.

The first stage of the CEAS and the Dublin II Regulation

Building upon the Tampere European Council in 1999 (Tampere European Council Conclusions), the CEAS was created as a turning point for the Europeanisation of its asylum policy. Apart from the Eurodac Regulation, the 2001 Temporary Protection Directive is another tool adopted under the CEAS in response to the migratory influx of people from the former Yugoslavia and gives temporary protection in the case of mass flows of displaced persons from third countries. With the establishment of the CEAS and the replacement of the Dublin Convention by the Dublin II Regulation (2003), a major change between the two provisions was created. For instance, as the Dublin II Regulation is a Community instrument, it has a direct effect and is binding on all the Member States. Once again, there is hierarchical criteria of the responsibility for the Member State and is structured as follows: Article 7 and 8 refer to the Member State in which the applicant has a family member⁸ whose application for asylum is being examined or who is recognised as a refugee. Article 9 to the Member State which

has provided the applicant with a residence document or a visa, Article 10, the Member State whose border has been crossed illegally by the asylum applicant, and Article 11 to the Member State where a third-country national entered legally and where the need for a visa is waived. Nonetheless, if none of these criteria is applicable, the responsibility lies with the first Member State where the asylum application was lodged under Article 13.

Apart from some slight changes, the provisions of Dublin II are very similar to the ones in the Dublin Convention. Once again, a burden persists on countries on the eastern and southern borders of the Union, while shortcomings continue to affect both the EU members and the asylum seekers. The small number of transfers alongside the ever-increasing migratory flows has exposed the ineptitudes of the Dublin System. In its Green Paper on Asylum of 2007, the European Commission pointed out that “the Dublin system may de facto result in additional burdens on the Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location” (European Commission, 2007). Moreover, the denial of access to asylum procedures in some Member States and the evident difference in recognition rates among EU countries fostered a sentiment of malaise and implicit rejection of the Dublin II Regulation. As the data of the UNHCR show, in 2009 the recognition rate in Finland was 77.8%, around 40% in Denmark, Germany, Italy, Latvia, and Poland, and by far the lowest rate was 2.2% in Greece (UNHCR, 2010).

8. In the Dublin Regulation II, the definition of family member not only concerns the spouse of the asylum seeker, also his/her unmarried partner in a stable relationship, provided that unmarried couples are treated in a comparable way to married couples according to the legislation or practice of the Member State. Additionally, in the definition of family member, there are also minor children who are unmarried and dependent.

Therefore, the initial objective of Dublin II to guarantee that every applicant's procedure will be examined by one Member State has not been respected.

The second stage of the CEAS

As the Dublin System was already deemed inefficient, ineffective, and lacking legal safeguards, it did not help the Member States in sharing responsibility and helping each other, rather it shifted responsibility toward those periphery members which had limited absorption conditions. Paradoxically, the Dublin system was being undermined from the inside, with the lack of mutual trust between the Member States coming from the differences in national asylum systems.

Five years after the European Council's meeting in Tampere, the second stage of the CEAS began with the objective of establishing a common asylum procedure and a uniform status for those who had gained asylum seeker status. For instance, the EU Regulation No 439/2010 established the European Asylum Support Office (EASO) in May 2010 to "facilitate, coordinate, and strengthen practical cooperation among Member States 'on the many aspects of asylum'" (Official Journal of the European Union, EU Regulation No 439/2010, 2022). In 2011, the second-phase Qualification Directive was already activated, whilst the Reception Conditions Directive, the Asylum Procedures Directive, the Eurodac Regulation, and the Dublin III Regulation were agreed upon in 2013.

The Dublin III Regulation

As the inefficiencies of the Dublin system became more evident, on June 26, 2013, Dublin

Regulation III was adopted, thereby amending the Dublin II Regulation. The latter was proposed in 2008, and planned to be adopted in 2010, however, it was only approved in 2013, and it finally came into force on January 1, 2014 (ibidem). The general principle of Dublin III remains unchanged and implies that responsibility for asylum claims will be allocated to the Member State which has played the greatest part in the applicant's entry into or residence within the Member State, with an exception to protect family unity and unaccompanied children (ibidem). Additionally, the criteria for establishing responsibility for the Member States continue to be hierarchically based and unchanged from the previous frameworks. Nonetheless, some of the core changes concerned the scope of "family members", which also included married minor children and their parents, and the Member States' responsibility for applications concerning requests for international protection by a third-country national or a stateless person. Additionally, Article 33 introduces a crisis action plan, or a "mechanism for early warning, preparedness, and crisis management" (ibidem), in case of emergencies when a Member State's asylum system is unable to fully apply the Dublin III Regulation. Lastly, the Dublin III Regulation also contains some safeguard measures for asylum applicants that were inexistent in its predecessors. For instance, Article 4 requires the Member States to fully share information about the objectives and the consequences of the Dublin procedures with asylum applicants (ibidem). Among the information that must be shared, there is also the right to challenge a transfer decision and the right to access data relating to the appli-

cant, contained in Article 4.1. Whilst under Article 4.5, an interview must be held with the asylum applicant every time a decision is taken to transfer them to help inform the applicant of their legal situation in accordance with Article 4. Additional protection is also given to minors and dependent persons who are subject to the Dublin procedures.

Despite the changes that were implemented by Dublin III, the Commission, had by March 2015 deemed the Dublin System inadequate to sustain the migratory flows that started in the same year. Inter-Member State transfers were few, and the Member States at Europe's border were once again bearing the burden of receiving too many asylum applicants without a proper system that could support them. To add up to this, knowing the consequences of the Dublin System, migrants tried not to be identified by the Member States through the Eurodac system⁹. Henceforth, the Dublin System did not advance the reiterated emphasis on shared solidarity and responsibility, nor did it help the EU prevent secondary migratory flows. Instead, it promoted an unfair system through which responsibility is assigned, while the Member States have to wait a long time to know if they are responsible or not. This emphasises two types of the ineffectiveness of this Regulation. First, the long bureaucratic approach of the EU allocation schemes, and second, as there are national differences in asylum systems, there are resulting struggles between Member States' interests that hinder cooperation.

The 2015 refugee crisis: the EU response

The Dublin System was already deemed insufficient to respond to the migratory inflow that the EU was receiving from 2011. The inflows were mainly caused by the Syrian civil war and the start of the Arab Spring, whose civil unrest and uprisings shed light on the EU's progressive externalisation of its migration policy. In this case, the Commission called for the EU to improve its external migration policy through mutually beneficial acts between EU and non-EU countries. These partnerships are known as Dialogues for Migration, Mobility, and Security (Carrera, 2011). However, these dialogues were not enough to protect and prepare Europe's borders for the massive wave of migration that followed in the wake of the Arab Spring.

Only on April 19, 2015, when 800 migrants lost their life due to a boat accident (Kirchgaessner, 2015) in Lampedusa – an Italian island located in the southern Mediterranean – the EU started to consider a response to such migratory inflows. As the former UN High Commissioner for Refugees, Antonio Guterres, asked for an immediate “comprehensive European approach to address the root causes of migrant movements to Europe” and “a decisive [EU] role to prevent future such tragedies” (UNHCR, 2015), the EU's Foreign and Home Affairs Council meeting gathered on April 20, 2015. On that day, a ten-point action plan to control the migrant flows across the Mediterranean was created. On April 23, 2015, during the special meeting of the European Council, EU leaders decided to focus their response to the tragic events in

9. As Jones affirmed in “11 Years of Eurodac” (2014), some migrants mutilated their fingers upon arrival in order not to be fingerprinted.

the Mediterranean on four main areas: (1) strengthening the presence at sea, (2) fighting traffickers, (3) preventing illegal migratory flows, and (4) reinforcing internal solidarity and responsibility. Additionally, EU leaders called for a rapid buildup of operations Triton (in Italy) and Poseidon (in Greece), by tripling their financial resources for 2015 and 2016. Likewise, less than a month later, the former President of the European Commission, J.C. Juncker, proposed the European Agenda on Migration, outlining measures against irregular migration, addressing the root causes of migration in countries of origin, fighting against smugglers, enhancing border management controls whilst strengthening the role of Frontex, and designing a “new policy on legal migration” (European Commission, 2015). Building on this Agenda, a Common Security and Defence Policy (CSDP) Operation in the Mediterranean was established to dismantle traffickers’ networks and the ‘business model’ of smugglers, so as to identify, capture and destroy vessels used by smugglers.

To alleviate the burden shared by Italy and Greece, the Commission for the first-time employed Article 78(3) TFEU¹⁰, and established a relocation of 40.000 people – 16.000 from Greece and 24.000 from Italy – to other Member States within a window of time of 2 years (2015). On September 14, 2015, the EU’s Justice and Home Affairs (JHA) Council agreed upon a second emergency mechanism which sought the relocation of 120.000 people seeking international protection within Italy and Greece (2015). However, as of 2019, only a total of 34.705 eligible migrants have

been relocated from Italy and Greece in the end, with many states refusing the relocation of applicants, while others hindered the implementation process of this initiative (European Court of Auditors, Special Report No. 24, 2019). As a matter of fact, Hungary and Slovakia challenged the Council Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, which had previously been adopted by Qualified Majority Voting (QMV), however, the CJEU rejected this case in September 2017. All in all, the Temporary EU Relocation System used in the 2015 refugee crisis helped resettle over 22.000 people from outside Europe. However, the number of “relocated people” was so low that it would have taken “750 years to relocate the 160,000 asylum-seekers covered by a now-expanded resettlement plan” (Higgins, 2015).

The Hotspots approach

Following the Temporary EU Relocation System, a second measure was introduced to help Italy and Greece while easing the “migration issue”. This was the hotspot approach created in some areas of Italy and Greece, where operational support from Frontex, Europol, and EASO was employed in the screening of third-country nationals. Registration and screening of irregular migrants are overseen by Frontex to determine their identity and nationality, while the fingerprinting and registration in EURODAC are implemented by national authorities and, if needed and requested, by EU agencies. After the screening, EASO supports those who wish to apply for

10. Article 78(3) TFEU provides for the adoption of provisional measures in emergency migratory situations at the EU’s external borders and will be mentioned several times in this report. The Council clearly states: “In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament” (EUR-Lex - 12008E078 - EN - EUR-Lex, 2022).

asylum, whilst Frontex handles individuals who must be immediately returned to their countries. Through a joint operational headquarter, the EU Regional Task Force (EU-RTF) and national authorities easily collaborate with the three EU agencies coordinating the hotspot activities. In Italy, hotspot areas include Augusta, Lampedusa, Porte Empedocle, Pozzallo, Taranto, and Trapani, with the EURTF headquarters in Catania, Sicily. While in Greece, the main hotspot areas were in Lesbos, Chios, Leros, Samos, and Kos, with the EURTF headquarters based in Piraeus.

The externalisation of the “migration issue”

Many states were aware that the proposed cooperation among states and responsibility sharing had not worked and could not work during a refugee crisis. For instance, the Visegrad states¹¹ opposed the solidaristic solution and the resettlement of the refugees inside the Union. This led to an externalisation of the issue to Turkey since most of the refugees were entering Europe from Syria across the Turkish border. In the words of former French President F. Hollande: “Europe must work with Turkey to ensure the refugees can stay there, find a job, and wait for the situation in Syria to improve” (Karnitschnig, 2015). As Turkey hosted more than 2.8 million registered Syrians, on October 15, 2015, together with the EU, it agreed on a joint action plan designed to strengthen their cooperation in supporting Syrian nationals while managing migration. On November 29, 2015, the Heads of State or Government of the Member States of

the European Union met with their Turkish counterpart and activated the Joint Action Plan. The price tag for this cooperation and humanitarian assistance for Turkey was initially €3 billion in financial aid to assist Syrians within the country. Additionally, the refugee deal also implied progress in Turkey’s accession to the EU, whose negotiations had been stalled since November 2013, via visa liberalization for Turkish citizens in the Schengen area by October 2016 and a “structured and more frequent high-level dialogue” between the two countries (European Council, 2015). It is important to emphasize that, in this “do ut des” relationship, Turkey, had to block the influx of irregular migrants into the Union, whilst also improving the living conditions of the Syrians registered under its temporary protection scheme. This resulted in the March 2016 Statement between the EU and Turkey, in which Brussels expressed its trust in Ankara whilst giving additional funding and visa allocations. Consequently, the EU provided an additional disbursement of €3 billion under the Facility for Refugees and that “for every Syrian being returned to Turkey from Greek islands, another Syrian [would] be resettled from Turkey to the EU” (ibidem). Ankara was also recognised as a safe third country¹², meaning that all illegal migrants that entered the Union’s borders from Turkey could be returned to Turkey’s safe third country provision. However, deeming Turkey a safe third country was extremely controversial and led to an escalation of tensions within the EU. Furthermore, the relationship with Turkey was enigmatic since the beginning, in effect

11. Czech Republic, Hungary, Poland, and Slovakia.

12. Under Article 36 of the EU’s 2005 Asylum Procedures Directive (APD), a safe third country refers to “a country that has adopted the 1951 Geneva Convention without any geographical limitations and has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and observes its provisions.”

the EU was giving Turkey the keys to its gates, thereby letting it become the protector of the so-called Fortress Europe. Moreover, the EU was incentivising Turkey to cooperate on the issue of migration using the card of accession to the Union, which in turn would be almost impossible to achieve as the Turkish borders would have been even more troubled. Although in 2020, the Commission estimated that irregular arrivals from Turkey have decreased by 94% since 2015 (European Union Agency for Asylum, 2020), relocation and transfers were stagnant. In late February 2020, when the Turkish authorities decided to suspend the deal with the EU because of massive movements of migrants toward the Greek coast, tensions over the EU borders escalated once again. Since 2020, the EU and Turkey have resumed talks on migration while €4.7 billion of the €6 billion under the Facility for Refugees has been disbursed to Turkey as of June 2022.

Dublin IV: the proposal

Due to the burden caused by the migration crisis in 2015, the European Commission proposed a redesign of the Dublin Regulation “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 stateless person” (2013). Thus, the Commission submitted the Dublin IV proposal¹³, aiming to once again reform and fix the persisting issues of the Dublin System. Specifically, Dublin IV would address the uncontrolled secondary movement of people and the huge bur-

den placed upon the Member States situated at the border of Europe. In this way, the new Regulation would have sanctioned asylum applicants for their secondary movements inside the Union and would have provided stability through an efficient method of allocation of responsibility. The latter would have implied the introduction of a rule “that once a Member State has examined the application as member state responsible, it remains responsible for examining future representations and applications of the given applicant” (ibidem). The Commission also planned a corrective allocation mechanism to support the Member States in case of heightened pressure caused by sudden inflows of migrants.

Despite the Commission’s attempts to introduce new solutions that could help the EU in securing its borders and the Member States in dealing with illegal entries and asylum seekers, the persistent lack of interoperability among the EU hindered its successful implementation. Moreover, the suggestions of the Commission were aimed at policing and somewhat punishing the asylum applicants through sanctions, instead of addressing the motives behind their secondary movements. It is also important to note that this coercive framework could have been adopted if and only if the asylum applicants were registered in the first place. The same applies to the proposal regarding the responsibility of a Member State. Additionally, this provision could only be applied in circumstances of clear transparency, solidarity, and interoperability among the Member States, which, as shown in the previous sections, are almost inexistent. Thereafter, the political response to

13. Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM/2016/0270 final - 2016/0133 (COD).

the Dublin IV proposal was extremely controversial, with many EU countries opposing the legislation, preventing it from moving forward and becoming law.

The New Pact on Migration and Asylum

On September 23, 2020, the Commission launched the New Pact on Migration and Asylum (New Pact) as a fresh start for the Union and the Member States to continue addressing and managing migration through a more comprehensive approach. On June 22, 2022, the Council adopted the main elements of the first stage of the European policy reform on asylum and migration. Consequently, the European Parliament and Presidencies of the Council signed a joint roadmap indicating that all negotiations should be finalised by February 2024 and will enter into force a couple of months later at the latest. The New Pact, through the Regulation on Asylum and Migration Management, would replace the current Dublin Regulation and adjust the CEAS. Most importantly, the New Pact is considered a way to overcome the failure of the 2015 EU Agenda on Migration and the Dublin IV proposal.

The New Pact's objective is, *inter alia*, to harmonise the numerous challenges faced by the EU. Some of these challenges refer to the lack of a cohesive approach to implement the European asylum and migration management, and the several operational, legal, and procedural inefficiencies in the Dublin system, – such as the ineffective data processing that slows down the Member States and creates strong frictions and confusion between them

– and the plethora of national differences and inefficiencies that create delays in accessing the asylum procedure. Hereafter, the New Pact addresses these gaps through a package of five legislative proposals (1) on a new Screening Regulation, (2) revising the Asylum Procedures Regulation, (3) revising the Eurodac Regulation, (4) a new Regulation on Asylum and Migration Management, and (5) a new Crisis and force majeure Regulation.

As the Member States have different priorities and mainly disagree on a common approach to the relocation mechanism, expectations are now particularly high for this New Pact. In fact, solidarity is the key element of the latter, as a new mechanism of “voluntary and temporary” solidarity will replace the mandatory relocation quotas (European Commission, New Pact on Migration and Asylum, 2020). It is important to highlight that the solidarity mechanism enclosed in the New Pact is mandatory, as it is a legal obligation under Article 80 TFEU, but flexible. The latter feature is extremely interesting and implies that the Member States can choose to either relocate asylum seekers, sponsor the return of applicants whose applications have been rejected, or provide financial aid and even external cooperation for migration management in countries of origin or the transportation of at-risk migrants.

This solidarity mechanism is a logical and practical solution for those EU countries under pressure, who need to be fully supported at different stages of the migration policy to control their external borders. The flexibility of this tool is also interesting, as it implies that there exists no consensus between the Member States, but a disagreement, for which the

option of relocation or return sponsorship was included. In fact, during the negotiation period prior to the formalisation of the New Pact, the German, Portuguese, and Slovenian Presidencies underlined the persistence of major divergences, signalling that “this Pact is in fact not a Pact at all” (Carrera, 2020). Unsurprisingly, one might argue, the Member States continue to disagree on the fundamental structural aspects regarding migration and asylum policies.

Furthermore, on November 11, 2021, the Parliament backed the transformation of the EASO into the EU Agency for Asylum (EUAA) which functions as a supportive mechanism for EU Member States in applying European laws on asylum and international protection. Operational in 13 EU countries, the EUAA is the first concrete step by the Union aimed at harmonising national asylum practices in line with the EU *acquis* through three pillars: (1) operational and technical assistance, (2) asylum knowledge through guidance and support to reception practitioners, and (3) training and professional development of reception officials. This should push EU countries to collaborate more with each other and share the responsibility of hosting refugees and asylum-seekers more fairly.

Solidarity and the Temporary Protection Directive

Following the start of the Russian war in Ukraine on February 24, 2022, 7.891.977 Ukrainians fled their country to the EU. Immediately, the Union implemented measures to guarantee equal standards and rights for people fleeing Ukraine in all EU Mem-

ber States. One such measure was the TPD, applied by the Council of the EU on March 4, 2022 (European Commission, Temporary Protection Directive, 2022). The TPD provides legal status and unprecedented protection across the Union and allows refugees from Ukraine to have the right to accommodation, medical care, work, and education (*ibidem*). As of November 29, 2022, 4.776.606 Ukrainian refugees have registered for Temporary Protection or adequate protection under Member States’ national law, while the UNHCR and UNICEF have jointly designed “Blue Dots” in several EU countries to receive Ukrainian refugees (Ukraine Situation Flash Update #36, 2022). This effort was closely coordinated with the EU Integrated Political Crisis Response and the Solidarity Platform which was established as a mechanism of support to the TPD and is chaired by the Commission, bringing together the Member States, Schengen Associated Countries, the European External Action Service, the EU Asylum Agency, Frontex and Europol, the International Organisation for Migration (IOM), and the UNHCR. Finally, the Solidarity Platform has focused mainly on offering education, employment, and sustainable accommodation, with a particular focus on the protection of children.

Although the TPD was swiftly implemented by all 27 Member States in record time, one should not forget the unresolved structural flaws embedded in the foundations of the EU migration and asylum policy that hamper an appropriate solidarity mechanism. The decision concerning the adoption of the TPD was taken through unanimity voting, although the Directive’s text affirmed that it could

have been approved by QMV. This Directive had been previously agreed upon in 2001, as mentioned in section 2.2.2 in the aftermath of the Kosovo War of 1999-98. However, it was never used until March 2022, signalling a stark contrast with the “crisis management” EU responses to the refugee crisis of 2015. The reason behind the non-activation of the TPD during the massive wave of migrants from 2011 onwards concerns its nature per

se, as it was deemed too politically unrealistic. Nonetheless, what the Ukrainians are facing is not different from what Libyans, Syrians, and Afghans have been experiencing so far. Thus, the EU response to the war in Ukraine can be considered a way to rethink the concept of solidarity.

THE “CRISIS RESPONSE” APPROACH AND SOLIDARITY CRISIS PLAY

Over the past two decades, the EU has been heavily criticised by many scholars and policymakers due to its lack of strategic response to the refugee crisis. In particular, researchers have affirmed that the EU response to numerous crises has evidenced a commitment-compliance gap, which was extremely marked by the lack of a coordinated policymaking approach in the 2015 refugee crisis (Juncker, 2016), often signalling a principal-agent problem (Menéndez, 2016; Schimmelfenning et al., 2015; Börzel, 2016; Juncker, 2016). Although the massive inflow of migrants from Syria has shed light on the structural inefficiencies of the Dublin System and the lack of solidarity amongst Member States, it was only in 2020, through the New Pact on Migration and Asylum that EU leaders made a real change in the EU migration and asylum policy. However, even this Pact includes several challenges and ambiguities, such as the approach of the mandatory yet flexible solidarity mechanism. If the Member

States have decided to partake in a political and economic Union, should they not share the burden in times of crisis? However, there are intrinsic differences in ideologies that hinder EU countries from achieving full cooperation in several fields, such as the relocation of refugees. Through these years, the Member States were incapable of finding a common European solution to the migration issues that many, if not most of them were facing, because of disagreements and nationalistic behaviours. Thereafter, the shared competencies in the field of migration and asylum between the Member States and the Commission have hampered the potential actions and efficiency of the EU response. The latter involved a variety of measures targeting different objectives: saving lives at sea from a humanitarian point of view, consolidating the external perimeter of the Union through structural adjustments, securitising migration by regulating and controlling migrant smuggling, and advancing new technological strategies to tackle illegal

migration and easing the burden of processing each asylum application on the Member States through intra-institutional support. Although the EU response entailed a considerable array of strategies, it was predominantly event-led, paving the way to a crisis response strategy instead of crisis management. It is crucial to remember that prior to the refugee crisis, the EU approach was mainly humanitarian, with a continuation of the status quo – joint Frontex operations and dialogue processes. As the inflow of migrants peaked and 800 lives were lost in Lampedusa, EU leaders promptly convened a special Council meeting, showing support to the EU-led Operation Triton in the Central Mediterranean and other CSDP military operations, while also advancing the launch of the EU Migration Agenda (European Commission, A European Agenda on Migration, 2015). Whilst some considered the possibility of invoking the TPD for the first time, many Member States began to cooperate independently, such as Austria, Slovenia, and the neighbouring countries in the Western Balkans (Collet, Le Coz, 2018). Subsequently, EU countries signed the Joint Action Deal with Turkey. All these key actions, inter alia, indicate that the EU failed to manage the surge in migratory inflows at their roots since the beginning, which as a consequence led to the externalising of its responsibilities to a third country outside the Union. As the dysfunctionalities of the Dublin System became more evident, the EU response was slow, confused, and disorganised. On paper, the Union should have been able to contain the refugee crisis in a continent of 500 million people through crisis management, however, the already de-

stabilised post-Great Recession economies of southern EU countries were overwhelmed by the unbalanced burden of the migration inflows, converting them into buffer and transit zones.

From Mare Nostrum to Operation Themis

Another episode that witnessed a crisis response approach was the launch of a military and humanitarian operation by the Italian Navy immediately after more than 300 individuals lost their lives in Lampedusa (BBC, 2013). On October 18, 2013, the Italian Government under Prime Minister E. Letta decided to upgrade operation Constant Vigilance to Mare Nostrum, or “Our Sea”, to manage the humanitarian emergency resulting from the increasing migratory flows in the Strait of Sicily (Marina Militare, 2014). Mare Nostrum aimed at safeguarding lives at sea and bringing to justice human traffickers and migrant smugglers. It is particularly important to stress that Frontex and the Commission were not aware of Italy’s introduction of Mare Nostrum, which was the first completely unilateral Member State action (Carrera, 2015). The decision was not disclosed in the official agenda of the Italian government nor debated by politicians. Once again, a comprehensive approach was hampered, not just between Member States but also between a country and its executive authority.

Through Mare Nostrum, Italy not only implemented search and rescue (SAR) operations whilst controlling its waters, but it also used security procedures. In addition, the Council’s adoption of the EU Maritime Secu-

urity Strategy (EUMSS) in June 2014 had the objective of dealing with the risks, dangers, and threats connected to migration flows, such as the traffic of human beings, organised crime networks, and criminal activities linked to illicit immigration (Frontini, 2014). Given the repeated complaints concerning a lack of common EU response and solidarity concerning Italy, Mare Nostrum was replaced by Operation Triton on November 1, 2014 (Frontex, 2016). Coordinated by Frontex instead of the Italian Navy, Triton primarily focused on border patrol activities instead of SAR missions. The Council's decision to replace Mare Nostrum amid a migration crisis

came to be publicly recognised as an error by J.C. Juncker, former President of the Commission (Juncker, 2015). Triton suffered from a low budget, organisational gaps, and a small operational area, which led to its replacement by Operation Themis in February 2018. The latter benefited from a larger operational area that stretched across the Central Mediterranean Sea from waters reaching Algeria to Albania. Thanks to the coordination between Frontex, Europol and the Italian authorities Operation Themis identified, seized, and captured fraudulent documents, illicit weapons and drugs, criminal networks, and people smugglers (Frontex, 2018).

THE BELARUSIAN CASE

Today's security environment is persistently changing, which makes it challenging to address new threats such as climate change, cyber and hybrid attacks, and emerging border security breaches. Conditional to exogenous and endogenous circumstances, the EU has to constantly adjust its internal and external borders to respond to crises. The so-called "Fortress Europe" is, in fact, the process of erecting visible or invisible barriers at the external boundaries of the Union. This comes under the framework of "external re-bordering", used by F. Schimmelfennig (2021) to describe the recent demand for boundary reconfiguration, which is followed by an evident politicization of boundaries, as emphasized by the

rise of Eurosceptic parties and pro-rebordering governments that advocate for a renegotiation of EU borders. Schimmelfennig's concept is extremely important when discussing the walls and fences built by EU countries to defend and safeguard their territories and the wider Union. Nonetheless, the existing 2,048 km of border fences at the EU's border (Dumbrava, 2022) raise a significant question of legitimacy and compatibility with EU and international humanitarian law. For instance, the case of Belarus and the consequent construction of walls at its borders with three Member States is emblematic of the need to advance policy recommendations to adjust the existing EU migration and asylum system.

First of all, it is important to contextualise what occurred between Belarus and the EU in 2021. One year prior, the Council had implemented additional punitive sanctions against some prominent Belarusian political figures due to their part in manipulating the 2020 Belarusian presidential election that resulted in the fraudulent victory of Lukashenko. Post-election, Lukashenko started to repress civil liberties and imprisoned members of the opposition. The leader of the democratic opposition, Sviatlana Tsikhanouskaya, had to flee the country to avoid being imprisoned like her supporters and her husband. During an insightful discussion at Sciences Po University, Tsikhanouskaya emotionally affirmed that “in Belarus, there is neither trust nor rules as dictators do not follow the rules” (Sciences Po, 2022). Her words referred to the crackdown on Belarusian civil society by Lukashenko, autocratic actions which are unlikely to be reversed in the face of sanctions. The EU sanctions, which began on May 24, 2021, are not only a response to the 2020 rigged presidential elections but also in respect of actions that undermine or threaten the territorial integrity, sovereignty, and independence of Ukraine (European Council, 2022). Belarus, which is de facto occupied and controlled by Moscow as Belarusian opposition politician Pavel Latushka affirmed (Brzozowski, 2022), is involved in the Russian war against Ukraine by allowing the perpetrator to fire ballistic missiles and let Russian tanks and military transporters pass over Belarus into Ukraine (Beaumont, 2022). Hereafter, it is evident how opportunistic, ambiguous, and mutable the relationship between Belarus and Moscow is. Severely damaged by the violent

crackdown that followed the fraudulent 2020 elections, Lukashenko has to copiously depend on Russian support, creating a new reality in which Belarusian society now appears to be extremely polarised (Samorukov, 2022). In response to EU sanctions, in May 2021, the Lukashenko regime loosened its visa procedures to welcome Afghans, Iraqis, Lebanese, Jordanians, and Syrians into the country. Once in Belarus, many of these migrants were forced to cross the EU border illegally, inciting violence against EU border guards as a form of revenge against the EU’s punitive measures. This specific case exemplifies the heavily debated instrumentalisation of migration, or, as specified by the European Commission, the series of events in which “a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third-country nationals to the external borders” (European Commission, 2021). As a consequence of the instrumentalisation of migrants, Latvia imposed a state of emergency in August 2021, due to the high number of illegal migrants trying to enter its territory. Poland and Lithuania would soon follow, adopting the same framework respectively in September and November of the same year. Whilst Lukashenko continues, albeit now to a lower extent, to exert pressure on the Belarus-EU border, Latvia, Lithuania, and Poland have continued to respond with irregular pushbacks and different strategies. This has resulted in behaviours not pursuant to EU obligations or collaboration, but instead, each Member State only reacting once their territories are directly affected and in crisis.

The actions committed by Lukashenko to destabilise the Union at large are considered a real attempt to “weaponize migration”, as affirmed by a Joint Statement of the governments of Lithuania and Poland on October 20, 2021 (the Assembly of the Seimas of the Republic of Lithuania and the Sejm and Senate of the Republic of Poland, 2021). In the same statement, the governments invited the Commission and the Member States to implement new acts to “ensure the protection of the EU external borders, prevent illegal border crossings, and the abuse of the asylum system by non-democratic regimes” (ibidem). As migrants are susceptible to being used as weapons for political and military warfare to achieve a state-sponsored goal, Lukashenko has been using this cruel tactic at the expense of already-distressed people as migrants. To this end, it appears simpler to consider the Belarusian instrumentalisation of migration as an act of coercive migration diplomacy (Tsourapas, 2017), through which the Belarusian leader aims to pursue an agenda that does not fall entirely into migration policy only.

Belarus: status quo

Although the greater objective that Lukashenko is trying to fulfil remains opaque, what is certain is his willingness to inflict fear into European society, set EU countries against each other, and humiliate the EU migration and asylum system. On the one hand, Lukashenko has certainly shaken three EU countries and pressured the already unstable Schengen system, however, his expectations were not met by EU leaders who refused to compromise with the auto-

cratic leader. Despite this, the situation at the EU’s external borders with Belarus has been labelled as “unmanageable” by Lithuania given the number of migrants reaching their borders (Kuznetsov, 2021). Nevertheless, the reality is quite different, and the number of migrants is not as high as one can imagine when hearing the word “unmanageable”. Hence, it is already clear that the conversation within the EU is not focused on how to respond to the crisis, but instead on depicting undocumented migrants as the enemy. The dehumanisation that has followed is evidence that EU countries are not yet prepared to face and collectively manage a migratory crisis.

During the EU informal meeting of defence ministers on September 1st and 2nd, 2021, the Estonian Minister of Defence, K. Laanet, affirmed that Belarus has been using migrants as a political weapon and hybrid threat, as reported by Dr. C. Toci (2021). Similarly, on September 15, 2021, during the State of the Union address, President von der Leyen referred to the Belarusian regime as a country that “has put people on planes and literally pushed them towards Europe’s borders” to destabilise Europe (von der Leyen, 2021). Lukashenko mirrored Putin’s tactic against the Nordic states in 2015 and, after his fraudulent presidential victory in 2020, he has strongly cracked down on internal opposition groups whilst playing with human lives at its borders, thereby not only fostering domestic repression. The scale of these hybrid attacks against Latvia, Lithuania, and Poland is unprecedented and has put the EU’s migration and asylum system on the brink once again. Clearly, despite what happened 6 years prior,

EU countries have not learned their lesson and have kept using a crisis response approach rather than crisis management. Once again, the EU's existing asylum acquis is incapable of providing an adequate response. The lack of a common strategy has created confusion and panic across the European population and has paved the way for behaviours that are not properly aligned with international law in primis and EU obligations.

Belarus undeniably benefits from a unique strategic position between Russian resources and European goods and services, by virtue of geography. After the 2020 presidential elections, Lukashenko has increasingly isolated his country from the West, whilst decreasing his distance to the Kremlin in the aftermath of the Russian war in Ukraine. Undoubtedly, the reality saw the EU being an important player in distancing Lukashenko away from its sphere once he triggered destabilisation within the Belarusian society. This provoked an alignment between Minsk and Moscow, with the latter fully supporting the crackdown on Belarusian protestors from 2020. Although the two countries have always been close given their historical past, ideological alignment, and geographical closeness, Lukashenko opposed, for almost three decades, Russia's efforts to obtain the two major oil refineries in Novopolotsk and Mozyr that have been crucial in financing his regime and, most importantly, in preventing Russia from annexing Belarus.

The topic of oil refineries and the Russo-Belarusian relations in this field are much more complex and ambiguous. Not only Moscow replaced the export duty with a production

tax on Belarus' oil rents more than a decade ago (Samorukov, 2022), but it also became the only market available as soon as EU sanctions hit Lukashenko's regime whilst losing at the same time access to the Ukrainian market. Additionally, as Moscow's refineries benefit from a state subsidy, called "the damper", when comparing them to Belarusian oil refineries, the latter are less competitive on the Russian market (ibidem). The by-product of this uncomfortable position is, inter alia, a tax agreement signed between the two countries in October 2022, whereby Belarus, in exchange for a continuation of the extension of the Russian damper for Russian oil imports, has to coordinate changes in indirect taxes and excise duties solely with Russia (Belta, 2022). Hence, the Kremlin ended up manoeuvring Belarus as a proxy pawn even more than it did before – also evidenced by Belarus's "neutral status", albeit a status closely aligned with Russia, in its war against Ukraine.

Pushbacks and physical barriers in the EU

The last two sections have been focused on analysing Lukashenko's behaviour, specifically, the attempt to instrumentalise human lives and use migrants as weapons. Although the primary responsibility for these actions lies with the Belarusian President, EU countries are not exempt from criticism. All EU Member States must safeguard freedom of movement within the Schengen area, while also ensuring that all the rights regarding the crossing of the external borders of the Union, that are not part of the Schengen area according to Articles 3(2) TEU and 77

TFEU are respected. Curiously, whilst the Member States have faced several exogenous and endogenous phenomena that brought migratory crisis, they often prioritise border controls over migrants' human rights, as evidenced by the episodes that cost human lives in Lampedusa. It is thus unsurprising that Latvia, Lithuania, and Poland implemented tremendously strict border controls and violently pushed back undocumented migrants in response to Belarus's actions. The Member States have the duty to protect their territory and safeguard the external borders of the EU, however, national constitutions, international law and the Schengen Treaty clearly state that in the management of the common EU external borders, the Member States must comply with international refugee protection, human rights standards and EU obligations at large. Therefore, under both international and EU law, violent pushing back migrants is completely forbidden. Although the term "push-back" does not have an internationally agreed definition in the legal field of migration and asylum, these actions are in clear violation of the principle of non-refoulement and other fundamental rights.

On October 7, 2021, the European Parliament, through a "resolution on the situation in Belarus after one year of protests and their violent repression" (2021/2881(RSP)), reiterated the importance to protect the external borders of the Union in compliance with the norms of international and EU law, including the EU Charter of Fundamental Rights (European Parliament, 2021). However, since every state has the sovereign right to control the entry and continued presence of non-nationals on its territory, practices of pushing back

migrants require an immediate and concrete response from the EU. Additionally, physical barriers such as fences and walls obstruct the entrance of migrants seeking international protection. These obstacles remain under-regulated as the CJEU has not yet expressed its views on the legality of border fences. Hence, it appears that both pushbacks and physical barriers implicitly emphasise queries regarding the unauthorised behaviours of EU countries concerning migrants coming from Belarus.

The cases of Latvia and Lithuania

Given the increased number of illegal crossings, Latvia introduced a state of emergency on August 10, 2021 (Amnesty International, 2022). Consequently, Latvian authorities suspended the right to seek asylum in their territory, and together with special "commandos" began to forcibly return migrants to the Belarusian border. Recently, Latvia has extended the state of emergency until February 10, 2022, while continuing the construction of the Belarus-Latvia border fence, which will include a 134 km barbed-wire fencing system as per the report by Amnesty International (ibidem). Similarly, in July 2021, Lithuania had already declared what was happening at its 679 km-long borders with Belarus as an "extraordinary situation", and thereupon adopted its first-ever state of emergency on November 9, 2021 (Amnesty International, 2022). In the same period, upon official request of the Lithuanian government, Frontex offered its support in border surveillance and migrant screening to the Lithuanian authorities through the Rapid Border Intervention at the border with Belarus (Frontex Launch-

es Rapid Intervention in Lithuania, 2021). Frontex would provide additional support through Joint Operation Terra 2022, which supported Lithuania and other 12 Member States in detecting cross-border crimes (Frontex, 2022). As of September 2022, only 381 people had been admitted to Lithuania whilst 15,082 undocumented migrants were pushed back to Belarus since August 2021, when the Seimas – the Lithuanian parliament – amended the Law on Foreigners and suspended the right to apply for asylum as Latvia did (Bleona, 2022).

Once again following Latvia's steps, Lithuania started construction on a new four-meter-high fence with razor wire along its border with Belarus. Completed in the summer of 2022, the physical barrier aims at reducing the number of migrants reaching Lithuania. Nonetheless, it is important to consider that a 71.5 km-long fence had already been built on the Belarus-Lithuania border prior to Lithuania's accession to the EU in 2004 (Dumbrava, 2022). Whilst Lithuania built the new wall, its border guards continued to employ pushback policies, breaching international and EU law. In this context, Frontex has gone out of its way to avoid being involved in any illicit actions. Already in December 2021, Frontex's Fundamental Rights Office (FRO), recommended a substantial change in the Lithuanian policy of pushbacks (Stankevičius, 2021). Yet despite these protests, Frontex has continued to help Lithuanian authorities, raising a substantial question of legitimacy and misalignment to EU law that not only concerns Lithuania but also Frontex and the EU Commission. The Commission has indeed the duty to initiate infringement proceedings against the Member

States failing to align with EU laws (Article 17 TEU). However, it has not approved any formal procedure that sheds light on the conduct of Lithuanian and Latvian governments. The only formal procedures taken against Lithuania and Latvia came from the CJEU on June 30, 2022. In this case, the CJEU ruled on the countries' derogations from EU obligations in respect of the denial of the right of asylum to migrants at their border. Affirming that the procedures implemented by Lithuania under the state of emergency were incompatible with EU law, the Court also condemned the state of emergency imposed specifically by Latvia as it prevented compliance to asylum procedures by denying the entry of irregular migrants (C72/22 PPU, Court of Justice of the European Union, Judgment of the Court (First Chamber), 2022). Apart from the ruling of the CJEU, no further investigation has been carried out at the EU level neither on pushbacks nor on border walls.

The case of Poland

Along the Latvian and Lithuanian lines, Polish President A. Duda issued a regulation on September 2, 2021, regarding the entry into force of a state of emergency to defend Poland's security and sovereignty (The safety of Poland comes first – state of emergency near the border with Belarus, Gov.pol, 2021). Thereafter, between October and November 2021, Poland implemented new legal tools – incompatible with EU obligations – that established a new framework regarding entry measures into the country. According to this legislation, Polish authorities can immediately return anyone who crosses the border illegally, even in the case that they are entitled to

international protection (Gera, 2021). Additionally, Polish border guards have repeatedly employed illegal methods to prevent entry into the country, spanning from firing weapons in the air to the use of tasers, as evidenced by Amnesty International (2022). Prior to this legal scheme, anyone who entered Poland seeking international protection would have been regarded as an asylum seeker and received legal protection. Polish authorities are not only violating the rights of asylum-seekers, but they are also using violent pushbacks against migrants, which stands in stark contrast to the warm welcome given to Ukrainian war refugees.

Furthermore, Poland also erected a five-meter-high steel border wall along 186 km of its northern frontier with Belarus (Aljazeera, 2022) completed a couple of months ago, to protect its population from the attempted entries of irregular migrants, which at the end of 2021 reached 40.000 (Euractiv, 2022). The wall reflects an attempt to militarise the border, with Poland installing along the wall new surveillance technology alongside motion sensors and cameras to prevent crossings of any kind. Although the Member States must prevent and deter unauthorised border crossings as per the SBC, the latter does not explicitly recognise the use of fences for this

purpose. Whilst Articles 25-28 SBC regulate the temporary reintroduction of border control at internal borders of the Union in case of “threats to public policy or internal security”, the SBC does not foresee a physical barrier as a measure of protection and safeguard the EU external border. It thus follows that the actions of Poland in this case, but also those of Latvia and Lithuania, are not pursuant to EU rules. Once again, this fosters serious questions of proportionality and implications on the free movement of people.

By “legalising” pushbacks through the 2021 legal amendments, Polish border guards are practically employing these in violation of international and EU laws, thereby not respecting the principle of non-refoulement. As both the principle of non-refoulement and the right to seek asylum are non-derogable rights and cannot be waived even in times of emergency, Poland is directly following an unlawful and unjustified agenda. Simultaneously, due to a lack of response from the Commission, it appears that the latter is blatantly pandering to the actions perpetrated by Poland. Unquestionably, as for Latvia and Lithuania, the Commission should start infringement proceedings as soon as possible against Poland to align the country to EU and international human rights and refugee law.

The ambiguity of EU responses

In 2015, the EU condemned the Polish government for failing to fulfil its obligations under EU law to resettle asylum seekers relocated from Greece and Italy. Poland had promised to relocate people to its territory, but it alongside Czechia and Hungary never honoured

their commitments. Consequently, on April 2, 2020, the CJEU ruled against these three Member States (Judgment in Joined Cases C-715/17, C-718/17, and C-719/17, 2020). Although the Union denounced the Polish actions for not aligning with EU obligations

back in 2015, it has not taken a rigid position against the country's unlawful actions in 2021. Whilst EU countries must safeguard and protect the external borders of the EU with actions pursuant to EU law, no infringement procedure has yet been started against Latvia, Lithuania, and Poland for breaking EU laws.

On October 21 and 22 2021, the Council Conclusions stressed that the EU does not accept “any attempt by third countries to instrumentalise migrants for political purposes” whilst pledging “to ensure effective control of its external borders” (European Council, 2021). Similarly, Poland affirms that its actions are promoted by its sovereign right to control its borders and the EU external border as confirmed by L. Majetschak and L. Riemer (2021). Nonetheless, this does not imply that behaviours against the EU *acquis* are acceptable.

The ambivalence of the EU in its responses to this migration crisis can also be found in a disagreement between the Council and the Commission in a letter written by the Interior Ministries of eight Member States – Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Greece, Hungary, and Slovakia – on October 7, 2021 (Letter to Margaritis Schinas Vice-President, European Commission, Ylva Johansson Commissioner for Home Affairs, European Commission, Adaptation of the EU legal framework to new realities, 2021). In this letter, the eight Member States expressed their support towards the actions employed by Latvia, Lithuania, and Poland in the face of the Belarusian instrumentalisation of migration, and in a formal request to reform the Schengen *acquis*, proposed a project

involving the use of “physical barriers”, i.e., border walls and fences, fully financed by the EU budget, to protect the external borders of the Union. In this context, whilst the European Council President C. Michel supported the idea and affirmed that “based on an opinion of the Legal Service of the Council, it's legally possible” (Bayer, 2021.), however, the Commission strongly opposes using EU money to finance walls and fences (European Commission, 2018). President von der Leyen has publicly supported the stance of the Commission, affirming that no barbed wire or walls will be financed by the latter (Boffey, 2021).

The Commission's proposal

In its 2021 resolution, the European Parliament affirmed that the Schengen system is no longer fit for purpose and needs adjustments and reforms (European Parliament, 2021). The Schengen Zone has been tested multiple times, highlighting its deficiencies in the 2015 refugee crisis and its crisis response approach during the pandemic and in other specific cases, as shown in previously discussed crises. Whilst some of the Member States responded by introducing strict internal border controls according to the SBC rules, the measures implemented to protect their external borders have become more controversial, and no longer appear to be temporary precautionary actions. As previously mentioned, there exist discrepancies in applying the external borders' measures, which undermine the trust between the Member States, EU countries, and non-EU citizens. On top of this, the scale of the response to the Belarusian instrumentalisation of migration has outlined the incapacity

of the Union to safeguard its external borders through a common strategy. As a matter of fact, the adoption of the state of emergency, the construction of walls and fences, and the new legal frameworks that allowed for illicit pushbacks have evidenced that even when affected by the same crisis, EU countries are unable to display a united front. On account of this, the Commission has proposed some strategies to cope with the instrumentalisation of migrants by Belarus. The latter, indeed, is one of the most significant challenges to the external borders of the EU and requires the appropriate attention from leaders and authorities.

In July 2021, based on Article 78(3), the Commission granted €36 million to Lithuania and added €200 million to the Border Management and Visa Instrument (BMVI) (COM, 2021). Among the proposals presented by the Commission in December 2021, the regulation proposal of December 14 addresses the situations of interest of this report, whereby an instrumentalisation in the field of migration and asylum is present (COM, 2021). The regulation proposal¹⁴ aims at framing specific normative tools for the Member States targeted by state-sponsored migratory flows, whilst enhancing the mechanism of crisis management should it occur in the future (ibidem). Through this regulation, the Member States' objectives of stopping artificial migration flows could deviate from the existing legal framework concerning migration and asylum. These EU countries could limit the flow of undocumented migrants by reducing the number of checkpoints at their border,

whilst implementing the so-called "border procedure", whereby entry to their territory remains unauthorised when assessing asylum applications. The proposal, *inter alia*, allows the Member States in dire situations to extend the deadline for registering applications for international protection by up to four weeks for those migrants found in the proximity of the external border of a non-EU country.

Because the Belarusian instrumentalisation of migration since 2021 has exposed significant and persistent gaps in the Schengen system, the Commission has proposed a revision of the SBC, which offers a safeguard mechanism to create a common response in situations that negatively affect the Member States. This includes the possibility to "directly transfer irregular migrants apprehended at the internal borders back to the competent authorities in the EU country from which it is assumed they just came, without individual assessment" (ibidem). In this context, the transfer of irregular migrants must always follow EU law. Thus, the violent pushbacks perpetrated by Latvia, Lithuania, and Poland would still be considered not pursuant to the SBC even in the event the regulation proposal would be accepted. Notwithstanding, probably the most significant challenge behind the regulation proposal concerns the definition of "instrumentalisation of migrants". According to the Commission's proposal, the latter occurs when non-EU countries instigate migratory flows towards the external borders of the Union to unsettle the EU or a Member State, thereby putting at risk primary State functions, like its territorial integrity or pro-

14. The proposal is based on the reinforcement of the rules included in the New Pact on Migration and Asylum, resulting in an "emergency migration and asylum management procedure in relation to third-country nationals and stateless persons apprehended or found in the proximity of the border with a third country instrumentalising migrants after an unauthorised crossing or after having presented themselves at border crossing points" (ibidem).

tection of national security. Although this definition might appear specific, there exist some grey areas. For instance, there is no indication of how the EU institutions and the Member States should evaluate the actions and intentions of third states. Additionally, there are no details specifying how to define territorial integrity or to what extent territorial integrity must be affected before being considered endangered.

Implications

Although the proposed regulation marks a step forward in the advancement of a more stable and responsive Schengen system, it also raises considerable questions about the future of EU migration and asylum policies and the compatibility of the actions of Member States with international and EU rules. First of all, the lack of a concrete response from the Institutional Triangle may encourage other non-EU countries to instrumentalise migration flows, given the EU's inability to efficiently manage the mass migration phenomena. Additionally, as EU leaders are prone to strongly protect their borders, they have engaged in unlawful practices of pushbacks (which they subsequently would legalize). These actions, alongside the construction of barriers, raise a substantial question of incompatibility with fundamental rights and the Rule of Law system, breaching Article 18 of the EU Charter of Fundamental Rights, the construction and

practical use of border walls remains under-regulated in the EU.

On the one hand, the actions of returning undocumented migrants to Belarus have been harshly condemned by the European Parliament and gained the attention of the CJEU, however, no concrete measure has been implemented against the violation of these crucial rights. As Carrera (2021) properly points out, “the use of border fences or physical barriers to achieve this, do not exempt Latvia, Lithuania, and Poland from their obligations and liability”. Whereas these Member States have failed to comply with the principle of non-refoulement, the Commission's proposal correctly re-affirms that undocumented migrants can be transferred to the EU country from which they presumably came. Additionally, the return mechanism is also guaranteed for those migrants coming from where the instrumentalisation originates, which allows the affected Member States to engage in return operations if necessary. This process implies high-level support from EU agencies to the Member States facing instrumentalisation of migrants. However, as state-sponsored migration might generate a domino effect influencing several EU countries, the support requested from EU agencies would be major. To this end, agencies such as Frontex or the EUAA should increase their operational workforce to assist the Member States, complementing already existing national measures.

RECOMMENDATIONS AND FINAL REMARKS

The alarming situation that unfolded in 2021 at the EU's external borders with Belarus is a malign sign indicating that the EU issues with migration and asylum have not yet been resolved. Since the early 2000s, the Union began a process of rebordering, whereas its external perimeters experienced stricter controls and border checks. Whilst exogenous phenomena were shaking the Union from the outside, internally the Member States started to become more ideologically fractured concerning migration and asylum stances. Together with the rise of Eurosceptics and pro-rebordering political parties, what occurred during the 2015 refugee crisis can be abridged in one word: chaos. EU countries, particularly those at the border with non-EU territories, were ill-prepared for the massive inflow of migrants transitioning from countries at war. This resulted in a lack of coordination and responsiveness from the EU and its Member States.

Most importantly, during the refugee crisis, the Schengen system, coming from decades of adjustments and disagreements, was unquestionably fragile. This hindered the EU and its Member States from creating a common strategy or working together to find solutions. Given that the number of countries severely affected by the refugee crisis in the Union was not significant, many of the Member States decided to “free ride” and circumvent practices of solidarity. In this context, the Visegrad states were the major opponents to a solidaristic Union and did not respect their commitments to relocate migrants to their territories. Remarkably, this not only shows the begin-

ning of a pattern in which the Member States deviate from EU law but also engages with the significance of strengthening EU crisis responses soon.

Henceforth, a central takeaway from this extensive analysis concerns the fact that the EU does not lack the appropriate tools to face a crisis in the migration and asylum fields, but rather it is stuck with policies that do not allow it to create an adequate crisis management mechanism. Whilst the Union remains anchored to a system that is in place since the 1990s, new exogenous and endogenous phenomena have affected countries in a disproportionate manner, which in turn created domino effects, resulting in a fragmented landscape. Certainly, a confusing and crisis-response approach hurts a constructive collaboration in the EU. Thereupon, almost eight years after the first refugee crisis, the Union is witnessing with a certain degree of difficulty massive flows of Ukrainians fleeing their country because of the Russian invasion. By activating the TPD for the first time as a symbol of solidarity, unity, and support for the Ukrainian people, now EU countries do not plan to extend it for 12 months as mentioned in these past few months, but rather for additional 6 months only. Could this indicate another sign of rupture regarding the well-known and sought-after solidarity practices in the Union?

On the other hand, not long after the Union adopted the New Pact on Migration and Asylum, the EU found itself amid a new migratory, albeit artificially created crisis coming

from Belarus. Critically, the three affected Member States engaged in unlawful practices of pushbacks, mistreating irregular migrants, and erecting physical barriers. While these practices do not respect international law and the EU *acquis*, they gained little or no response from the Union in *primis*, which has not yet started infringement procedures. Undoubtedly, this shows additional gaps in the EU migration and asylum system at large, which could be used as a pretext to start a process of adjustments and progress. For instance, the following recommendations should be considered the first steps toward a more unified and stronger approach to the Union's migration and asylum policies.

Ensuring continuity and longevity concerning the solidarity mechanism:

As there exists no universal method to effectively prevent or react to massive migratory flows, the solution for the Union lies in a change of strategy, one focused on the roots of the issue. This would lead the EU to strengthen its reception system and reach two goals: (1) ensure that the rights of migrants are respected in *primis*, and (2) build an effective solidarity mechanism. In this case, being solidarity a mandatory yet flexible tool, the trust and collaboration within the Union might be undermined from the inside. Additionally, the system of flexible contributions from the Member States adopted through the New Pact on Migration and Asylum raises the question of fair sharing within the Union and translates into the necessity for permanent solidarity in the area of migration and, most importantly, asylum. Whilst leaving the soli-

arity mechanism as a voluntary choice allows the Member States to express their preferences regarding the nature and the number of their contributions, it also allows some EU countries to avoid contributing. Furthermore, another challenge in the voluntary solidarity mechanism concerns the reappearance of intergovernmentalism in fields that clearly fall under EU competence. As stressed by F. Maiani (2019), responsibility-sharing and solidarity should be a safe guarantee between all the Member States to minimise the negative effects of an unbalanced distribution of migrants.

Enhanced control of the external borders of the Union:

Whilst the Commission's proposal of December 14, 2021, raised the need for more specific rules for internal borders¹⁵, the guidelines for the protection of external borders are still too weak and vulnerable to exogenous phenomena. For instance, a way forward should entail the implementation of the Instrumentalisation Regulation together with tangible adjustments.

First, as specified in section 4.3.1., the term "instrumentalisation" appears unsound and considers migrants as victims, thereby indicating the need for a clarification of this term. Secondly, since the regulation would allow the states to derogate from the current EU migration and asylum framework in the aftermath of a state-sponsored migration flow, this would further undermine the fundamental rights that migrants and asylum seekers possess. Hence, the regulation should first be directed towards the

¹⁵. Especially when dealing with threats to public health, internal security, or public policy affecting a majority of Member States.

perpetrators of such instrumentalisation to close the gates on those that foster artificial migratory flows instead of targeting already distressed migrants. Thirdly, because the states could derogate from the CEAS in the event in which the regulation is adopted, it is fundamental that a threshold above which the Member States cannot derogate anymore is created. Fourthly, as the objective of the instrumentalisation of migration is always to pressure the external border of a country or a set of countries, the Member States should not be focused on erecting border walls with barbed wire, rather they should prepare their migration management system and reception capacities to face these artificial and challenging phenomena. In this way, EU countries should commit to greater respect for human rights, whilst the Institutional Triangle, EU agencies, and authorities should be ready, if necessary, to respond to humanitarian or legal breaches with infringement procedures.

Enhanced border controls at the external borders of the Union would allow its countries to prevent practices of pushbacks, which should never be legalised as Commissioner Y. Johansson emphasised in October 2021 (European Commission, 2021). Similarly, border barriers disproportionately act against the rule of law and human rights, inhibiting requests for international protection. Whilst the EU should not fund the construction of such fences, the Member States should be furtherly supported by EU agencies in their efforts to control their borders. Additionally, EU agencies should supervise the Member States so that they do not engage in unlawful practices. In this context,

Frontex and EASO should be given a certain degree of independence to conduct investigations on what has occurred on the Latvian, Lithuanian, and Polish borders with Belarus. Critically, mechanisms for monitoring and evaluation should be implemented in the aftermath of the operational support offered by EU agencies, as their indirect role in the violations of fundamental rights remains of crucial importance. In this regard, the European Parliament should pause all EU financial support to the activities carried out by EU agencies. As legal accountability is vital when dealing with breaches of international and EU law, all policies or actions which run against the Union's principles must be immediately counterbalanced.

Hereafter, it is crucial to emphasise that these recommendations serve as a starting point for further adjustments to already existing, albeit defective mechanisms within the EU. Certainly, the migration and asylum fields are complex ones, where national and supra-national rules easily clash, while the Member States engage in unlawful practices to protect their borders and territorial sovereignty. Nevertheless, EU authorities must safeguard the principles and values upon which the Union is built. In this context, the actions perpetrated by the Belarusian regime have put some of the Member States under strain whilst the rest of the Union did not properly react. Undoubtedly, as the practices of using migrants as hybrid weapons become more common, the Union must equip itself with a solid and responsive system in the fields of migration and asylum.

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- Promoting interoperability and cooperation of armies, while seeking to bring together concepts, doctrines and procedures;
- Contributing to a common European understanding of land defence issues. Finabel focuses on doctrines, trainings, and the joint environment.

Finabel aims to be a multinational-, independent-, and apolitical actor for the European Armies of the EU Member States. The Finabel informal forum is based on consensus and equality of member states. Finabel favours fruitful contact among member states' officers and Chiefs of Staff in a spirit of open and mutual understanding via annual meetings.

Finabel contributes to reinforce interoperability among its member states in the framework of the North Atlantic Treaty Organisation (NATO), the EU, and *ad hoc* coalition; Finabel neither competes nor duplicates NATO or EU military structures but contributes to these organisations in its unique way. Initially focused on cooperation in armament's programmes, Finabel quickly shifted to the harmonisation of land doctrines. Consequently, before hoping to reach a shared capability approach and common equipment, a shared vision of force-engagement on the terrain should be obtained.

In the current setting, Finabel allows its member states to form Expert Task Groups for situations that require short-term solutions. In addition, Finabel is also a think tank that elaborates on current events concerning the operations of the land forces and provides comments by creating "Food for Thought papers" to address the topics. Finabel studies and Food for Thoughts are recommendations freely applied by its member, whose aim is to facilitate interoperability and improve the daily tasks of preparation, training, exercises, and engagement.



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