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Commenti e Note

IN SEARCH OF THE LEGAL BOUNDARIES OF AN "OPEN SOCIETY". THE CASE OF IMMIGRANT INTEGRATION IN THE EU

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1. The EU as an open and pluralist society: The theoretical and legal premises of European integration

The European Union is a legal order based on a pluralist system of values. As testified by the EU motto, diversity is the epistemic backbone of the entire process of European integration. This holds true first and foremost in horizontal relations among the Member States, which are all equal and whose diversity – in terms of legal and judicial systems, institutional settings and national identities – is expressly recognised, protected and operationalised under EU law.[1] The same holds true for European citizens, whose mutual

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[1] See Art. 4(2) and 19 TEU. On the operationalisation of horizontal diversity in the EU, refer to the proliferation of techniques and instruments of differentiated integration allowing the deepening of EU integration in spite of the increasing heterogeneity of interests, values and capacity. See F. SCHIMMELFENNING, *The Choice for Differentiated Europe: An Intergovernmentalist Theoretical Framework*, in *Comparative European Politics*, 2019, p. 176; E. PISTOIA, *Limiti all'integrazione differenziata dell'Unione europea*, Bari, 2018; R. D. KELEMEN, A. MENON, J. SLAPIN, *Wider and Deeper? Enlargement and Integration in the European Union*, in *Journal of European Public Policy*, 2014, p. 647.

sense of belonging to an "ever closer Union"[2] is not rooted in a pre-determined and monolithic vision of the "common good".[3] On the contrary, it is nurtured by the respect for everyone's freedom, culture and way of life,[4] which is in turn ensured by the capacity of EU law to confer upon individuals "rights which become part of their legal heritage" and which national courts must protect.[5] These constitutive features of the system – accompanied by freedom of movement, the principle of non-discrimination, the rights of democratic participation and political representation – have contributed to strengthening the interconnections among European people and mitigated the lack of a strong, national-type "European identity".[6]

Due to these key features, the European project has been compared by political scientists to the "open society" model[7] elaborated by the philosopher Karl Popper in the aftermath of the second World War.[8] In Popper's views, the open society does not resemble a specific social system, but a society in which freedom, tolerance, justice, and the pursuit of knowledge "may be considered values in themselves".[9] At the same time, freedom and tolerance are not absolute values, making an open society the realm of neutral relativism, where also forms of aggressive irrationalism shall be tolerated.[10] This produces two consequences for the institutional and constitutional setting of an open society: first, that openness cannot blossom in an "ethical state".[11] Liberal democracies, as based on free political competition, are, indeed, the best available "means to the end" of preserving an open society.[12] Second, an open society cannot survive without a founding pact identifying the institutional tools preserving freedom and tolerance against intolerable attacks.[13]

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[2] Art. 1 TEU, for which see Court of Justice, Grand Chamber, judgment of 16 June 2005, *Pupino*, case C-105/03, para. 41: "The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union (…) shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples".

[3] S. PRALONG, *Minima Moralia. Is There an Ethics of the Open Society?*, in I. JARVIE, S. PRALONG (eds.), *Popper's Open Society After Fifty Years. The Continuing Relevance of Karl Popper*, London, 2003, p. 132.

[4] Art. 3(3) TEU, for which see, e.g., Court of Justice, judgment of 22 December 2010, *Ilonka Sayn-Wittgenstein*, case C-208/09. For a comment, refer to: G. DI FEDERICO, *Identifying Constitutional Identities in the Case Law of the Court of Justice of the European Union*, in *Il Diritto dell'Unione europea*, 2014, p. 769.

[5] Court of Justice, judgment of 5 February 1963, *Van Gend en Loos*, case 26-62.

[6] On the role of fundamental rights and the principle of non-discrimination in the formation of European identity, see E. GUILD, *The Legal Elements of European Identity. EU Citizenship and Migration Law*, London, 2004, ch. 11.

[7] See E. GELLNER, *Nations and Nationalism. New Perspectives on the Past*, Oxford, 1983; J. RUPNIK, J. ZIELONKA (eds.), *The Roads to the European Union*, vol. 1, Manchester, 2003.

[8] K. POPPER, *The Open Society and Its Enemies*, Princeton, 2020 (1st ed. 1945).

[9] K. POPPER, *The Erewhonians and the Open Society*, in *ETC: A Review of General Semantics*, 1963, p. 14.

[10] Refer to the very famous "paradox of intolerance", described in ch. 7 of K. POPPER, *The Open Society and Its Enemies*, cit.

[11] *Ibid*., p. 510.

[12] K. POPPER, *The Erewhonians and the Open Society*, cit., p. 14.

[13] R. DAHRENDORF, *Reflections on the Revolution in Europe*, London, 1990, viii. On the right to "self defense" of tolerant societies, see J. RAWLS, *A Theory of Justice*, Harvard, 1971, p. 220. On the value of tolerance in shaping the EU legal order, see J. H. WEILER, *Federalism without Constitutionalism: Europe's*

The Union – as a supranational community of national polities – devises its foundational solidarity and unifying element in the "triangular relationship" between the rule of law, the democratic principle and fundamental rights. These liberal democratic values are, simultaneously, tools of inclusion/exclusion and overarching principles steering the process of European integration. On the one hand, they have to be exhibited by third States to obtain the legal standing of candidate countries, since they qualify as pre-requisites for joining the EU.[14] On the other, their respect and promotion imply and justify mutual trust among the EU Member States[15] and European citizens' confidence in supranational institutions, which are vital to foster the development of "an area of freedom, security and justice without internal frontiers".[16] As a result, the Union's political legitimacy rests on the capacity to share these axiological premises among the European institutions, the Member States, the candidate countries, and the individuals themselves, so that conflicts of values and interests do not generate unilateralism, fear and closure. At the same time, a liberal paradox affects the Union and its Member States: safeguarding internal openness may require higher degrees of closure, especially in turbulent times. This paradox may impact the treatment of aliens and their legal standing within the Union, by thwarting their quest for legal entitlements and democratic participation.

This paper seeks to test the openness of the Union by taking as a case study a specific aspect of the EU migration policy: the integration of ethnically and culturally diverse migrant population into EU Member States' societies. Since it aims to reconsider the legal boundaries of the EU as an "open society", the complex and rich debate on the diversity of integration models at the national level is out of the scope of this analysis, which focuses instead on the two models which have inspired the development of the EU immigrant integration policy. In the vast literature on this policy, the dialectics between these models is predominantly brought back to the limits of EU competence.[17] However, this paper contends that "a more vigorous integration policy" at the EU level can be effectively pursued within the limits of the competences conferred upon the Union in this field and that this shift would help reduce frictions underpinning transnational governance of human mobility towards the EU.

Sonderweg, in K. NICOLAIDIS, R. HOWSE (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford, 2001, p. 65.

[14] Art. 49 TEU and the Copenhagen criteria, for which see S. CARRERA, E. GUILD, N. HERNANZ, *The Triangular Relationship between Fundamental Rights, Democracy and Rule of law in the EU – Towards an EU Copenhagen Mechanism*. Study requested by the LIBE Committee, European Parliament, PE 493.031, 2013, p. 30.

[15] Court of Justice, Full Court, opinion of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opinion 2/13, paras 166-169.

[16] See Arts 3(2) TEU and 67 TFEU.

[17] See, recently, U. BRANDL, *Integration in the New Pact: A Difficult Compromise between a Limited EU Competence and a Successful Policy*, in *EU Immigration and Asylum Law and Policy*, 26 March 2021, eumigrationlawblog.eu. On the nature of this competence, see *amplius* D. THYM, K. HAILBRONNER (eds.), *EU Immigration and Asylum Law: Article-by-Article Commentary*, Oxford-Baden-Baden, 2022, pp. 271-282.

2. The "migration state", the European Union and immigrant integration

In a seminal article of the early twenty-first century, Hollifield maintained that the last two centuries "have seen the emergence of the migration state, where regulation of international migration is as important as providing for the security of the state and the economic well being of the citizenry".[18] This definition captures one of the key paradoxes of liberal democracies: that an open society does not imply open borders[19] and the demarcation line between the recognition of a foreigner as a *hospes* or a *hostis* lies in the sense of insecurity of domestic constituencies.[20]

Even if the EU is a *sui generis* international organisation, which does exercise some prerogatives that are typically associated to statehood, conceptualising the Union within the remit of the "migration state" cannot be a straightforward operation. On the one hand, European integration led to the establishment of an Area of Freedom, Security and Justice (AFSJ), considered as a legal space characterised by the pursuit of common goals. In this legal space, the allocation of responsibilities is mostly competence-driven, while the principle of territoriality is only one of the possible "jurisdictional gateways".[21] On the other, the "production" of a European territorial space has been paralleled by the emergence of securitised external borders, safeguarding the integrity of Schengen cooperation while preserving internal openness.[22]

The structural tensions underpinning the AFSJ have been more evident in those fields of shared competence which are traditionally sensitive to the calls for sovereignty, such as the policies on migration and asylum. As a result, Hollifield's concept of "migration state" has been adjusted to the specificity of the AFSJ as a space where the Member States have retained their right to include and exclude aliens, although its exercise ought to be aligned to the legal trajectories outlined by the normative backbone of the process of European integration.

This has been explicitly recognised by the European Commission in the new European Agenda on Culture,[23] where it stressed the functional nexus that exists between the

[18] J. F. HOLLIFIELD, *The Emerging Migration State*, in *The International Migration Review*, 2004, p. 885.
[19] *Ibid*., p. 887. See also, G. SARTORI, *Pluralismo, multiculturalismo e estranei. Saggio sulla società multietnica*, Milano, 2000.
[20] A. SCIURBA, *Le parole dell'asilo: un diritto di confine*, Torino, 2021.
[21] On the relevance of a "sufficiently close link with the territory" of the EU, see Court of Justice, judgment of 30 April 1996, *Boukhalfa*, case C-214/94, para. 15; on connection criteria based on the production of effects in the EU legal order, see Court of Justice, judgment of 12 June 2014, *Intel v. Commission*, case T-286/09, paras 231-236; on competence-driven responsibility for extraterritorial activities, requiring these activities to be "governed by EU law", see Court of Justice, judgment of 7 March 2017, *X and X*, case C-638/16 PPU, paras 44-48; judgment of 26 April 2018, *Donnellan*, case C-34/17.
[22] On the development of an integrated management system for external borders at the EU level, see D. VITIELLO, *Le frontiere esterne dell'Unione europea*, Bari, 2020; on related challenges, see I. INGRAVALLO, *Il rispetto dei diritti fondamentali nell'azione dell'Agenzia europea della guardia di frontiera e costiera*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (a cura di), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 2022, p. 111.
[23] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New European Agenda for Culture*, of 22 May 2018, COM(2018) 267 final.

"European Union's model of openness and solidarity, based on the rule of law"[24] and the effective integration of groups with a migrant background, depicting this nexus as a pathway to European identity formation.[25]

But integrating migrant populations in the EU is not only a policy option to enhance openness and social cohesion, it has a legal standing in the Lisbon Treaty, where integrating legally residing third country nationals (TCNs) qualifies as a goal of the Union.[26] At the same time, TCN integration constitutes a pivotal challenge for the AFSJ and the Common European Asylum System (CEAS). The legal design of the former portrays it as a legal space in which the "fair treatment" of TCNs shall be granted,[27] the principle of non-discrimination is framed as a cross-cutting right[28] and the search for greater inclusion and social cohesion shall be pursued at all levels of governance. The latter is intended to offer an appropriate *status* to any third-country national requiring international protection, while ensuring compliance of removal decisions affecting TCNs with the principle of *non-refoulement*.[29]

Successful integration of TCNs is correlated to the full achievement of these goals, as a necessary precondition to (and outcome of) effective immigration and asylum policies,[30] which may ensure more sustainable and less coercive border and return policies. However, TCN integration is also one of those competences in which harmonisation of Member States' legislation is excluded by primary law and the role of the EU is limited to support actions. Thus, testing the openness of the Union in relation to TCN integration requires a prior understanding of the rationales for the inclusion/exclusion of aliens, which underpin the development of EU immigrant integration policy[31] (para. 3) and shape the legal boundaries of EU Member States' action in this field (para. 4). This analysis sheds light on the functioning of the principle of non-discrimination within the AFSJ (para. 5), which has similarly impacted the CEAS (para. 6).

Departing from the flaws that have emerged from this analysis, a more vigorous EU commitment to "integration-through-diversity" is advocated. The analysis seeks to demonstrate that such an approach would be consistent with the quest for openness of

[24] In these terms, EU Fundamental Rights Agency, *Speech by Commissioner Jourová – 10 years of the EU Fundamental Rights Agency: A call to action in defence of fundamental rights, democracy and the rule of law*, Vienna, 28 February 2017.
[25] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening European Identity through Education and Culture*, of 14 November 2017, COM(2017) 673 final, p. 3.
[26] See Art. 79(4) TFEU.
[27] Arts 79(1) and 67(2) TFEU, for which see D. THYM, *EU Migration Policy and its Constitutional Rationale*, in *Common Market Law Review*, 2013, p. 723; A. BALDACCINI, E. GUILD, H. TONER (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, 2007.
[28] C. FAVILLI, *La non discriminazione nell'Unione europea*, Bologna, 2008.
[29] Art. 78(1) TFEU, for which see S. PEERS, *Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon*, in *European Journal of Migration and Law*, 2008, p. 232.
[30] S. CARRERA, A. FAURE ATGER, *Integration as a Two-Way Process in the EU? Assessing the Relationship between the European Integration Fund and the Common Basic Principles on Integration*, Centre for European Policy Studies (CEPS) Research Paper, Brussels, 2011.
[31] A seminal book, on which this article draws, is: L. AZOULAI, K. M. DE VRIES (eds.), *EU Migration Law. Legal Complexities and Political Rationales*, Oxford, 2014.

European societies and compatible with the limits of EU competence (para. 7). In addition, since finetuning Schengen cooperation[32] seems consubstantial to relaunching the Union's project, and the failure of EU asylum and migration policy[33] can be considered "one of the many faces of rule of law backsliding",[34] this analysis supplements the ongoing reflection on future trajectories of the AFSJ and the CEAS (paras 8-9).

3. Immigrant integration in the EU: A tale of two approaches

"There is widespread agreement about the importance of potential measures to be taken by the EU to support the integration of immigrants"[35] – as the last Special Eurobarometer on the integration of immigrants in the EU reveals. But what are the respective legal boundaries of national and supranational actions for integrating TCNs in the EU's composite legal order and which rationales/integration modes do they reflect?

The limits of EU competence in the field of TCN integration, as foreseen in the Lisbon Treaty, are the end result of the confrontation between two different approaches to integration.[36] The first one, which has been defined as a "rights-based approach",[37] dates back to the Tampere European Council, whose conclusions put forward the understanding of TCN integration as a two-way process, aimed at bringing legally residing aliens into equal or proximate participation in the host society as European citizens.[38] Within this integration mode, the principle of non-discrimination is conceived of as a "key enabling tool" for inclusion,[39] since it "is intended to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin",[40] thus triggering positive obligations on the Member States.

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[32] See the Note from the Permanent Representatives Committee (II) to the Council, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders – General approach*, of 9 June 2022, doc. 9937/22, adopted at the Justice and Home Affairs Council on 9/10 June 2022.

[33] As a possible way-out from the *impasse*, consider the Declaration on Solidarity, adopted by the Interior Ministers of twenty-one EU Member States and Associated Countries on 10 June 2022, which puts forward a solidarity mechanism for the (voluntary) relocation of people rescued at sea. See the Press Release from the Council of the EU, *Asylum and migration: The Council approves negotiating mandates on the Eurodac and screening regulations and 21 states adopt a declaration on solidarity*, of 22 June 2022, 580/22.

[34] L. TSOURDI, *Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?*, in *European Constitutional Law Review*, 2021, p. 1.

[35] European Commission, *Report: Integration of immigrants in the European Union*, Survey requested by the European Commission, Directorate-General for Migration and Home Affairs, and co-ordinated by the Directorate-General for Communication, Special Eurobarometer 469, April 2018, p. 132.

[36] In this sense, see J. NIESSEN, T. HUDDLESTON (eds.), *Legal Frameworks for the Integration of Third-Country Nationals*, Leiden, 2009.

[37] D. THYM, K. HAILBRONNER (eds.), *EU Immigration and Asylum Law*, cit., p. 292.

[38] Presidency Conclusions of the Tampere Council, adopted at the European Council on 15/16 October 1999, paras 18-21.

[39] Court of Justice, judgment of 22 May 2014, *Glatzel*, case C-356/12; and judgment of 9 March 2017, *Milkova*, case C-406/15.

[40] On this rationale of EU anti-discrimination law, see Court of Justice, Grand Chamber, judgment of 16 July 2015, *CHEZ*, case C-83/14, para. 65.

This approach is related to the conceptualisation of diversity as the epistemic backbone of the process of European integration,[41] implying "a more vigorous integration policy",[42] aimed at "transforming mainstream policies to the needs of a diverse society, taking into account the specific challenges and needs of different groups".[43] In this conceptual framework, cultural diversity works as a founding "meta-rule"[44] that buttresses the openness of European society. By acknowledging the existence of a plural system of values, it should provide guidance for domestic policies and shape the European "way of life" as characterised by a set of shared values that allow everyone to freely enjoy their diversity, while shielding the community from all forms of intolerable irrationalism, including racism, xenophobia and ethnic conflict.[45]

The second approach to integration, which has been qualified as "neo-assimilationist",[46] suits the Hague programme and the ensuing rethinking of the AFSJ governance to prioritise the security demand coming from European citizens in the aftermath of 9/11.[47] It keeps the idea of a bi-directional process of mutual adjustment between the immigrant and the host community,[48] but makes it conditional on a markedly unbalanced relationship between the person to be integrated and the host society, in light of which the former's cultural diversity is not a value in itself, nor a recognised right.[49]

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[41] See *supra*, para. 1.

[42] Presidency Conclusions of the Tampere Council, cit., para. 18: "The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. *A more vigorous integration policy* should aim at granting them rights and obligations comparable to those of EU citizens" (emphasis added).

[43] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan on Integration and Inclusion 2021-2027* (hereinafter: "Action Plan 2021-2027"), of 24 November 2020, COM(2020) 758 final, para. 3.

[44] See the European Parliament Resolution, *on minimum standards for minorities in the EU*, of 13 November 2018, 2018/2036(INI), P8_TA(2018)0447, letters N), and R), recalling that respect for diversity is "one of the founding values of the European Union" and that "respect for the rights of persons belonging to minorities is a constituent part of these values". On this point, see B. DE WITTE, *The Value of Cultural Diversity*, in M. AZIZ, S. MILLNS (eds.), *Values in the Constitution of Europe*, Dartmouth, 2007.

[45] Presidency Conclusions of the Tampere Council, cit., para. 19. In this same direction, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan on the integration of third country nationals* (hereinafter: "Action Plan 2016"), of 7 June 2016, COM(2016) 377 final, para. 1: "In times when discrimination, prejudice, racism and xenophobia are rising, there are legal, moral and economic imperatives to upholding the EU's fundamental rights, values and freedoms and continuing to work for a more cohesive society overall. The successful integration of third-country nationals is a matter of common interest to all Member States".

[46] R. BRUBAKER, *The Return of Assimilation?*, in *Ethnic and Racial Studies*, 2001, p. 531; V. MITSILEGAS, *Immigration, Diversity and Integration: The Limits of EU Law*, in P. SHAH (ed.), *Law and Ethnic Plurality. Socio-legal Perspectives*, Leiden, 2007, p. 35.

[47] C. C. MURPHY, D. ACOSTA ARCARAZO, *Rethinking Europe's Freedom, Security and Justice*, in C. C. MURPHY, D. ACOSTA ARCARAZO (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, Oxford, 2014, p. 1.

[48] Justice and Home Affairs Council Conclusions, *Immigrant Integration Policy in the European Union*, adopted by the Council of the EU on 19 November 2004, 14615/04 (Presse 321), p. 17, and Annex, *Common basic principles for immigrant integration policy in the European Union* (hereinafter: "Common Basic Principles"), p. 19, para. 1.

[49] On this point, see G. CAGGIANO, *Introduzione*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento*

Rather, the aliens' cultural identity is pictured as a sensitive issue,[50] as it may hinder processes of identity formation and consolidation.[51] Being a potential barrier in the path towards full commitment to both European values and the laws of the host country,[52] it is protected only insofar as it conforms to national laws and European values.[53]

EU immigrant integration policy has been caught in the dichotomous relationship between these two approaches, affecting both the legal boundaries of EU competence and its practical exercise.[54] The synthesis achieved between the two has led to an integration mode in which respecting the basic values of the European Union is a pre-condition for TCN "civic integration".[55]

The idea of civic integration puts the emphasis on the fact that migrants integrate in the local setting, not in an abstract national environment. Thus, the treatment of aliens is anchored in a broader context of social and cultural factors rather than in the universality of human rights *in abstracto*.[56] Immigrant integration – hence – is assessed by individual Member States departing from integration "codes" based on their domestic laws and traditions.[57] At the same time, the European "way of life" becomes an ambiguous

italiano, Torino, 2014, p. 2; P. FOIS, *Integrazione degli immigrati e rispetto della diversità culturale nel diritto dell'Unione europea*, in this *Journal*, 2019, n. 3, p. 9.

[50] European Court of Human Rights, Plenary, judgment of 23 July 1968, application no. 1474/62 and 5 others, *case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (II)*.

[51] C. SHORE, *"In uno plures" (?) EU Cultural Policy and the Governance of Europe*, in *Cultural Analysis*, 2006, n. 5, p. 21.

[52] See, e.g., Council Directive 2003/86/EC, *on the right to family reunification*, of 22 September 2003, in OJ L251, 3 October 2003, pp. 12-18, recital 11, according to which "The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households". On this specific aspect, see M. C. BARUFFI, *Cittadinanza e diversità culturali, con particolare riferimento alla poligamia*, in G. CAGGIANO (a cura di), *I percorsi giuridici dell'integrazione*, cit., p. 195.

[53] Common Basic Principles, p. 23, para. 8: "The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law".

[54] On the outcomes of the political struggle to establish an EU framework on integration see S. CARRERA, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden-Boston, 2009, pp. 61-109.

[55] M. AMBROSINI, P. BOCCAGNI, *Urban Multiculturalism beyond the "Backlash": New Discourses and Different Practices in Immigrant Policies across European Cities*, in *Journal of Intercultural Studies*, 2015, p. 35.

[56] K. GROENENDIJK, *Legal Concepts of Integration in EU Migration Law*, in *European Journal of Migration and Law*, 2004, p. 111.

[57] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union*, 1 September 2005, COM(2005) 389 final, p. 16: "EU values provide a framework within which individual Member States can develop their own codes based on their national laws and traditions". On the interaction between the goal of integration *ex* Art. 79(4) TFEU and Member States' competence *ex* Art. 79(5) TFEU, see I. MARTÍN, A. VENTURINI, *A Comprehensive Labour Market Approach to EU Labour Migration Policy*, Policy Brief 2015/07, Migration Policy Centre, European University Institute, Florence, May 2015.

concept,[58] which is influenced by the "citizen-denizen divide",[59] intended as the cornerstone of national sovereignty. In this conceptual framework, external borders symbolise the unescapable lines of demarcation of "hard-on-the-outside"[60] conceptions of belonging, while the achievement of stable integration is the end result of multiple trials, testing aliens' "deservingness"[61] of a regular *status*.

This conception of TCN integration presents both light and shadow. On the one hand, it may help concretise migrants' rights by attracting their enjoyment at the local level, while empowering communities, diasporas and cities at the forefront of virtuous integration paths.[62] On the other, it may end up in legitimising a shift from the ideal of liberal universalism, featuring the whole process of European integration, to a functional understanding of openness, which trades EU values for state-led security concerns.[63]

The next three paragraphs explore the interaction of these modes of immigrant integration with the quest for an open and pluralist society, taking into account the "weight" of EU Member States' discretion in relation to the definition of a European agenda on TCN cultural integration, to the establishment of the AFSJ as a legal space pivoting around the principle of non-discrimination and to the representation of the CEAS as an all-encompassing system of international protection.

4. EU Member States' action on immigrant integration and the legal boundaries of cultural pluralism in the EU

The definition of a European agenda on cultural integration of TCNs has been tangibly impacted by the dialectic tension which exists between the above-described approaches. Education and interculturalism are, in fact, the necessary premises to participatory processes of inclusion, setting the stage for any free and open system of social organisation.[64]

As demonstrated by the EU enlargement, preserving cultural differences while promoting the values of interculturalism and exchange among cultures requires a tremendous effort in terms of inter-state cooperation and commitment, especially in the

[58] F. NIELSEN, *"Migration" is Now "Protecting European Way of Life"*, in *EU Observer*, 10 September 2019, euobserver.com.
[59] On this divide, see T. HAMMER (ed.), *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*, Aldershot, 1990. On the specificity of EU citizenship in relation to TCN integration, see U. VILLANI, *Riflessioni su cittadinanza europea e diritti fondamentali*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, cit., p. 21.
[60] L. BOSNIAK, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Oxford, 2008, p. 119.
[61] S. CHAUVIN, B. GARCÉS-MASCAREÑAS, *Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality*, in *International Political Sociology*, 2012, p. 243.
[62] See *infra*, para. 7.
[63] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2020 – A Union that strives for more*, of 29 January 2020, COM(2020) 37 final, para 2.5.
[64] On education as a catalyst for immigrant integration see the in Zaragoza Declaration of the European Ministerial Conference on Integration, adopted by EU Ministers responsible for immigrant integration issues on 15/16 April 2010 and approved at the Justice and Home Affairs Council on 3/4 June 2010.

field of education.[65] Integrating TCNs in a supranational open society is an even more complex exercise, in which "diversity must be the principle of unity"[66] and cultural differences do not trigger exclusion but cultural enrichment.[67] At the same time, the defence of cultural pluralism at the domestic level presupposes a delicate balancing of all values and interests at stake, which national authorities are best placed to determine on a case-by-case basis.[68]

The legal framework of the EU policy on immigrant integration reflects this complexity. On the one hand, its development and implementation has been framed as "the primary responsibility of individual Member States rather than of the Union as a whole";[69] thus, excluding any harmonisation of laws and regulations of the Member States. Hence, the Union has acted mainly through intergovernmental mechanisms, such as the open method of coordination;[70] soft law instruments, such as agendas and action plan;[71] or through EU funds.[72]

On the other hand, the nature of EU competence on immigrant integration has not precluded the adoption of harmonising acts based on other Treaty provisions, but having an impact on TCN integration.[73] For instance, the EU legislator has included integration measures in EU secondary law on TCN long-term residence *status*[74] and family

[65] Inclusive education implies not only providing immigrant population with linguistic skills which are needed to effectively integrate, but also building up processes of education to diversity for host communities as a whole. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on a European strategy for universities*, of 18 January 2022, COM(2022) 16 final. In relation to education and cultural pluralism, see also Court of Justice, Grand Chamber, judgment of 6 October 2020, *European Commission v. Hungary (Enseignement supérieur)*, case C-66/18.

[66] In this terms, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on a European agenda for culture in a globalizing world*, of 10 May 2007, COM(2007) 242 final, p. 2, quoting Denis de Rougemont.

[67] Conclusions of the Council of the EU and the Representatives of the Governments of the Member States, *Integration as a Driver for Development and Social Cohesion*, adopted on 4 May 2010, doc. 9248/10, para. 1.

[68] See further, E. PSYCHOGIOPOULOU, *The Integration of Cultural Considerations in EU Law and Policies*, Leiden-Boston, 2008.

[69] Action Plan 2021-2027, p. 15.

[70] Communication from the Commission to the Council and the European Parliament, *on an Open Method of Coordination for the Community Immigration Policy*, of 11 July 2001, COM(2001) 387 final.

[71] See, for instance, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Agenda for the Integration of Third-Country Nationals*, of 20 July 2011, COM(2011) 455 final.

[72] Regulation (EU) No 516/2014 of the European Parliament and of the Council, *establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC*, of 16 April 2014, in OJ L150, 20 May 2014, pp. 168-194.

[73] See, *mutatis mutandis*, Court of Justice, judgment of 5 October 2000, *Germany v. Council and Parliament*, C-376/98, paras 77-79.

[74] Council Directive 2003/109/EC, *concerning the status of third-country nationals who are long-term residents*, of 25 November 2003, in OJ L16, 23 January 2004, pp. 44-53, in particular the "inclusion principles" set forth in recitals 4-5-6-12. On the personal scope of this act, see Directive 2011/51/EU of the European Parliament and of the Council, *amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, of 11 May 2011, in OJ L132, 19 May 2011, pp. 1-4. See also the Report from the Commission to the European Parliament and the Council, *on the implementation of*

reunification,[75] emphasising that whereas these measures are within the competence of Member States, their implementation is bound to respect the EU *acquis*.[76] In addition, a similar rationale underpins the integration-related clauses which are embedded in EU law on social security[77] and non-discrimination.[78]

This legislative activity, promoting integration of TCNs through the back door, has, however, faced some constraints. First, since immigrant integration rests on integration "codes" based on Member States' laws and traditions, cultural integration has been expressly excluded from the Commission's coordination tasks in the social field.[79]

Second, evaluating immigrants' willingness to "respect the fundamental norms and values of the host society and participate actively in the integration process"[80] is the duty of the Member States, taking into account their systems of cultural values, while ensuring that the *formal* rights of immigrants remain in place[81] is a quite loose obligation on the Member States.

Third, and linked to the other two limits, cultural integration requirements in EU secondary legislation have been framed as an "empty box",[82] allowing national authorities a wide margin of appreciation in the determination of the conditions under which they

Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, of 29 March 2019, COM(2019) 161 final, pp. 3-8.

[75] See Council Directive 2003/86/EC, cit., which acknowledges that sociocultural stability facilitates integration and promotes social cohesion (recitals 4 and 15), as well as that the general principle of non-discrimination covers the prohibition of linguistic discrimination (recital 5). See also the Report from the Commission to the European Parliament and the Council, *on the implementation of Directive 2003/86/EC on the right to family reunification*, of 29 March 2019, COM(2019) 162 final, p. 7.

[76] Council Conclusions of the Council and the Representatives of the Governments of the Member States, *on the integration of third-country nationals legally residing in the EU*, adopted at the Justice and Home Affairs Council of Luxembourg on 5/6 June 2014, p. 2.

[77] See, e.g., Regulation (EU) No 1231/2010 of the European Parliament and of the Council, *extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality*, of 24 November 2010, in OJ L344, 29 December 2010, pp. 1-3.

[78] Council Directive 2000/43/EC, *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, of 29 June 2000, in OJ L180, 19 July 2000, pp. 22-26; Council Directive 2000/78/EC, *establishing a general framework for equal treatment in employment and occupation*, of 27 November 2000, in OJ L303, 2 December 2000, pp. 16-22.

[79] Court of Justice, judgment of 9 July 1987, *Germany v. Commission*, joined cases 281, 283, 284, 285 and 287/85, paras 22-24.

[80] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Immigration, *Integration and employment*, of 3 June 2003, COM(2003) 336 final, para. 3.1.

[81] *Ibid.*

[82] See, for instance, Art. 7(2) of Council Directive 2003/86/EC, cit., according to which: "Member States may require third country nationals to comply with integration measures, in accordance with national law", whereas, for refugees, integration measures "may only be applied once the persons concerned have been granted family reunification". Similarly, see Arts 5(2) and 15(3) of Council Directive 2003/109/EC, cit., which allows Member States to set integration measures as a precondition to obtain long-term resident *status* and residence rights in a second Member State. See also Art. 12(2)(a)(iv) of Directive 2011/98/EU of the European Parliament and of the Council, *on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*, of 13 December 2011, in OJ L343, 23 December 2011, pp. 1-9, in relation to language requisites to access post-secondary education and vocational training.

can be considered "fair" and fundamental rights-compliant within the meaning of Art. 67 TFEU.[83] This "empty box" approach to immigrant cultural integration, which is obviously also connected to the limits of EU competence in the cultural field,[84] has allowed a well-documented policy shift from migrant-friendly tools into instruments of migration control[85] of "unwanted" immigrants.[86]

By linking the certification of linguistic skills and/or knowledge of the host culture to the enjoyment of social and economic rights, Member States have sought to reach two main goals:[87] first, controlling entry for purposes of family reunification; and second, casualising access to long-term residence and/or to similar *status* under national law. The first goal has been mostly achieved through pre-entry integration tests,[88] whereas the second has been attained through mandatory language courses[89] or unequal integration "contracts" which the individual is obliged to sign with the host State.[90] While the purpose of integration clauses in EU secondary legislation is fostering a "continuous two-way process of mutual accommodation",[91] these policies turn integration into a "one way"

[83] Ph. DE BRUYCKER, *Legislative Harmonization in European Immigration Policy*, in E. MACDONALD, R. CHOLEWINSKI, R. PERRUCHOUD (eds.), *International Migration Law: Developing Paradigms and Key Challenges*, The Hague, 2007, p. 329.

[84] On these limits, see the combined reading of Arts 6 and 167 TFEU, and Art. 22 of the EU Charter of Fundamental Rights (EUCFR).

[85] A. BÖCKER, T. STRIK, *Language and Knowledge Tests for Permanent Residence Rights: Help or Hindrance for Integration?*, in *European Journal for Migration and Law*, 2011, p. 157; I. ADAM, D. THYM, *Integration*, in Ph. DE BRUYCKER, M. DE SOMER, J.-L. DE BROUWER (eds.), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration*, European Policy Centre, Brussels, December 2019, p. 80.

[86] *Contra*, see Art. 17(3) of Directive (EU) 2021/1883 of the European Parliament and of the Council, *on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC*, of 20 October 2021, in OJ L382, 28 October 2021, pp. 1-38, according to which integration conditions can be applied to highly skilled migrants only after they have been granted family reunification. See also Art. 18 on the EU long-term resident *status* for Blue Card holders. For a comment, S. PEERS, *The revised Blue Card Directive: the EU's search for more highly skilled non-EU migrants*, in *EU Law Analysis*, 20 May 2021, eulawanalysis. For a broader analysis, see P. GARGIULO, *Le iniziative dell'Unione europea per attrarre talenti e competenze e la riforma della Direttiva Carta Blu*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (a cura di), *Migrazioni internazionali*, cit., p. 465.

[87] R. WODAK, S. BOUKALA, *(Supra)National Identity and Language: Rethinking National and European Migration Policies and the Linguistic Integration of Migrants*, in *Annual Review of Applied Linguistics*, 2015, p. 259.

[88] According to G. SOLANO, T. HUDDLESTON, *Migrant Integration Policy Index 2020. Measuring policies to integrate migrants across five continents*, Migration Policy Group, Barcelona-Brussels, 2020, p. 24, pre-entry language requirements for purposes on family reunification are not so spread worldwide, however the majority of countries imposing them is located in Europe. In addition, the authors point out that language requirements have been tightened in most EU Member States, "making it as difficult for immigrants to become permanent residents as it is for them to become citizens" (p. 36).

[89] For instance, in the Netherlands, meeting civic integration requirements is a pre-requisite for permanent residence and naturalisation (see: *Ad hoc query 2020/74 on measures regarding civic integration – Part 2*, requested by the European Migration Network National Contact Point Greece on 1 December 2020, p. 28, www.emn.lt).

[90] This is the case of Italy, where a penalty of revocation of residence permit and expulsion is imposed on migrants who do not fulfil language and civic requirements set forth in the integration agreement. See *Ad hoc query 2020/74 on measures regarding civic integration*, cit., p. 21.

[91] Common Basic Principles, p. 1, par. 1.

process making the alien "one of us".[92] The hiatus between this assimilationist rationale and the cultural pluralism underpinning the EU legal order – both as a structural principle and as the key rule steering EU citizenship – is noticeable. In light of the *effet utile* of the integration clauses in EU secondary legislation, the host State should help remove linguistic and cultural barriers to TCN integration by means of integration measures which should be tailored to the specific integration needs of the recipients and aimed at enhancing social cohesion, inclusion and tolerance.[93] On the contrary, in many Member States' implementing practice, the TCNs' scant performance in linguistic or civic tests has become a ground for exclusion; thus, downgrading the right to family unity to a mere interest to be balanced with the State's migration (and cultural) goals, or even distorted to the point of becoming a ground for *status* deprivation, turning "regular" into "irregular" immigrants by leveraging on integration purposes.[94]

This national practice has been challenged in a number of preliminary rulings, in which the Court of Justice has clarified that language tests cannot be framed as a pre-requisite for family reunification,[95] civic integration tests shall not make the exercise of the right to family reunification impossible or excessively difficult,[96] nor constitute an express or hidden condition for maintaining the *status* of long-term resident or exercising the rights associated with it.[97] According to the Court, "[t]he fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights".[98] Therefore, integration conditions imposed by the Member States are legitimate

[92] M. JESSE (ed.), *European Societies, "Otherness", Migration, and the Law*, Cambridge, 2020; W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, Oxford, 2007; A. TRIANDAFYLLIDOU, *National Identity and the "Other"*, in *Ethnic and Racial Studies*, 1998, p. 593.

[93] According to the Association of Language Testers in Europe (ALTE) and the Language Assessment for Migration and Integration (LAMI) Group, the implementation of integration clauses should be guided by a flexible and tailor-made approach, adjusting the required level of proficiency to individual needs. Vice versa, when integration conditions are conceived of as a "gatekeeper", they present uniform format and content, corresponding to pre-fixed proficiency levels. See ALTE, *Language tests for access, integration and citizenship: An outline for policy makers*. Study commissioned by the Council of Europe, Cambridge, January 2016.

[94] See further, M. JESSE, *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, and the United Kingdom*, Leiden, 2017.

[95] Court of Justice, judgment of 10 July 2014, *Dogan*, case C-138/13, para. 39. See also Grand Chamber, judgment of 12 April 2016, *Genc*, case C-561/14, para. 56, where the Court acknowledged that "the objective of ensuring the successful integration of third-country nationals in the Member State concerned (…) may constitute an overriding reason in the public interest". However, it stressed that restrictions on family reunification, motivated by the mere lack of sufficient pre-entry ties between a family member residing in a third country and the host Member State where the sponsor resides, cannot be *per se* justified in the public interest.

[96] Court of Justice, judgment of 9 July 2015, *K and A*, case C-153/14, paras 63-64. See also the order of 10 June 2011, *Imran*, case C-155/11 PPU. The case was dismissed by the Court because a residence permit had been issued just before the hearing; however, it is noteworthy the Commission's stance according to which Art. 7(2) of Directive 2003/86, cit., does not allow Member States to deny entry on the sole ground of failure of a pre-entry civic integration test.

[97] Court of Justice, judgment of 4 June 2015, *P & S*, case C-579/13; see also the Opinion of Advocate General M. SZPUNAR, delivered on 28 January 2015, in the case C-579/13, *P & S*, para. 58.

[98] Court of Justice, Grand Chamber, judgment of 27 June 2006, case C-540/03, *European Parliament v. Council*, para. 70.

as long as they foster "interaction and the development of social relations",[99] but cannot run counter to "the general objective of facilitating the integration of third country nationals", nor make use of "an unspecified concept of integration".[100]

The centrality of the proportionality assessment of national integration measures in light of the *effet utile* of relevant EU secondary legislation has been also tested in those cases in which the Member States made the residence permit conditional on a civic integration examination. The Court underlined that failure in the test cannot automatically trigger a refusal of a residence permit without taking into account both the personal situation of the applicant (including age, level of education, economic situation, health conditions, efforts made to pass the test, etc.) and the accessibility of the test itself (i.e. the basic level and availability without involving payment of excessive fees).[101] It is, therefore, for national courts to ascertain – on a case-by-case basis – that domestic integration requirements do not "go beyond what is necessary to attain the objective of facilitating the integration of the third country nationals concerned".[102]

Hence, streamlining the legal boundaries of EU Member States' action on immigrant integration to the preservation of cultural pluralism seems to require a restrictive interpretation of the Member States' discretion featuring integration clauses in EU secondary law on migration. This would be necessary to avoid them enriching national toolboxes of migration containment mechanisms by means of obligations of results requiring TCNs to demonstrate a certain command of a national language and culture to *obtain* or *retain* the rights to family unity and long-term residence, granted by EU law.[103]

5. A minimalist approach to non-discrimination and the paradox of openness

The establishment of the AFSJ as a legal space in which the principle of equality is framed as a structural principle and a cross-cutting right is one of the main achievements of the process of European integration.[104] Within this area, TCNs can certainly rely upon the general non-discrimination clause, protecting "everyone" from unjustified and disproportionate differential treatment based on personal characteristics.[105]

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[99] Court of Justice, *K and A*, cit., para. 53 *P & S*, cit., para. 47.
[100] Court of Justice, Grand Chamber, *European Parliament v. Council*, cit., para. 70.
[101] Court of Justice, judgment of 7 November 2018, *C and A*, case C-257/17, paras 62-65.
[102] Court of Justice, judgment of 7 November 2018, *K*, case C-484/17, para. 21.
[103] Y. PASCOUAU, H. LABAYLE, *Conditions for Family Reunification under Strain. A Comparative Study in Nine EU Member States*, European Policy Centre, Brussels, November 2011, p. 101. More generally, on the integration of TCNs' family members, see R. PALLADINO, *L'integrazione dei familiari dei cittadini di Paesi terzi regolarmente soggiornati: verso la definizione di nuovi standard a livello europeo?*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, cit., p. 271.
[104] More broadly, on legal equality as the overarching principle steering both intergovernmental and interindividual relations in the EU, see L. S. ROSSI, F. CASOLARI, *The Principle of Equality in EU Law*, Cham, 2017.
[105] See Art. 19 TFEU and Arts 20 and 21(1) EUCFR, which – contrary to Art. 14 of the European Convention on Human Rights (ECHR) – are self-standing provisions. On the general non-discrimination clause, see Court of Justice, judgment of 10 July 2008, *Feryn*, case C-54/07. On the notion of "ethnic origin"

However, the scope of the protection stemming from the principle of equality has been influenced by the rationale of non-discrimination on national basis, which is closely bound to both the configuration of Union's citizenship as the "fundamental *status* of nationals of Member States"[106] and the directly applicable rights of free movement within the single market.[107] This rationale, which has been accepted and acknowledged by the European Court of Human Rights,[108] determines a minimalist approach to non-discrimination towards TCNs, from which three major consequences can be discerned.

First, while the principle of non-discrimination based on nationality is limited to EU citizens only,[109] "fairness" towards TCNs remains a vague "quasi-legal" concept.[110] Thus, the latter seldom translates into positive obligations on Member States, "with corresponding clearly defined individual rights"[111] that migrants may claim before domestic courts. Instead, it often imposes a general duty on national authorities to consider TCNs' interests in the design of domestic migration policies but leaves them a wide margin of appreciation on *how* to cope with this duty.

In this sense, the obligation to grant TCNs long-term residence *status* is illustrative.[112] According to Directive 2003/109/EC, "long-term residents should enjoy *in principle* equality of treatment with citizens of the Member State in a wide range of economic and

for purposes of direct/indirect discrimination based on the country of birth, see Court of Justice, judgment of 6 April 2017, *Jyske Finans*, case C-668/15, para. 33.

[106] Court of Justice, Grand Chamber, judgment of 15 July 2021, *A (Public healthcare)*, case C-535/19, para. 41; judgment of 18 January 2022, *Wiener Landesregierung*, case C-118/20, para. 38.

[107] S. IGLESIAS SÁNCHEZ, *Fundamental Rights Protection for Third Country Nationals and Citizens of the Union*, in *European Journal of Migration and Law*, 2013, p. 149.

[108] See, e.g., European Court of Human Rights, judgment of 18 February 1991, application no. 12313/86, *Moustaquim v. Belgium*, para. 49, and judgment of 21 June 2011, application no. 5335/05, *Ponomaryovi et al. v. Bulgaria*, para. 54, where comparability between EU citizens and legally residing aliens is excluded on account of the fact that "the Union forms a special legal order, which has, moreover, established its own citizenship".

[109] Art. 18 TFEU and Art. 21(2) EUCFR. The limited personal scope of the principle of non-discrimination on national basis has been expressly recognised by the Court of Justice, judgment of 4 June 2009, *Vatsouras and Koupatantze*, joined cases C-22/08 and C-23/08, para. 52; and, even if less explicitly, judgment of 13 June 2013, *Hadj Ahmed*, case C-45/12, para. 41. For further reading, see E. BROUWER, K. DE VRIES, *Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach*, in M. VAN DEN BRINK, S. BURRI, J. GOLDSCHMIDT (eds.), *Equality and Human Rights: Nothing but Trouble? Liber Amicorum Titia Loenen*, Utrecht, 2015, p. 123.

[110] In this sense, see, e.g., European Court of Human Rights, judgement of 25 March 2014, application no. 38590/10, *Biao v. Denmark*, para. 79.

[111] Court of Justice, judgment of 4 March 2010, *Chakroun*, case C-578/08, para. 41. Similarly, Grand Chamber, *European Parliament v. Council*, cit., paras 60-62, with reference to Art. 4(1) of Council Directive 2003/86/EC, cit. For an appraisal of Member States' discretion pursuant to this act, see Court of Justice, judgment of 17 July 2014, *Noorzia*, case C-338/13, paras 14-16. For further reading, D. THYM, K. HAILBRONNER (eds.), *EU Immigration and Asylum Law*, cit., p. 275.

[112] On the limits of Council Directive 2003/109/CE, cit., from the perspective of TCNs' treatment, see L. DANIELE, *Immigrazione e integrazione. Il contributo dell'Unione europea*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, cit., p. 67; P. DE PASQUALE, *L'accesso degli immigrati irregolari ai servizi pubblici*, *ibidem*, p. 621 ff. For further reading on the recast proposal of Directive 2003/109/EC, see A. DI STASI, *La prevista riforma della direttiva sul soggiornante di lungo periodo: limiti applicativi e sviluppi giurisprudenziali*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (a cura di), *Migrazioni internazionali*, cit., p. 435.

social matters",[113] together with free movement rights. Permanent residence is in fact a key trigger to integration[114] and the *status* associated to it is the first formal achievement in a process of creation of the genuine links[115] that may lead to naturalisation and citizenship.[116] However, the same directive allows Member States to limit the enjoyment of "equality on paper" in the field of social assistance to "core benefits",[117] leaving to national courts the balancing exercise of the proportionality of the constraint in light of TCNs' basic needs.[118] This also applies to TCNs' access to the labour market, which is embedded in a contradictory and fragmented legal framework: on the one hand, it is recognised as a major catalyst for integration;[119] on the other, its enjoyment depends on national authorisation regimes designed to attain immigration goals.[120] The hiatus between "equality on paper" at the EU level, and expanding differential treatments in domestic practice, generates socio-economic vulnerability and precarisation, often setting aside the goal of integration.[121]

The second consequence of the EU's minimalist approach to non-discrimination towards TCNs is to allow differences in treatment that may arise from the determination of their legal *status*.[122] In fact, European anti-discrimination law covers the enjoyment of

[113] Council Directive 2003/109/EC, cit., recital 12.
[114] Court of Justice, judgment of 26 April 2012, *Commission v. Netherlands*, case C-508/10, para. 66, for which: "the principal purpose of that directive [2003/109] is the integration of third-country nationals who are settled on a long-term basis in the Member States".
[115] Court of Justice, judgment of 18 October 2012, *Singh*, case C-502/10, para. 46: "it is the duration of the legal and continuous residence of 5 years which shows that the person concerned has put down roots in the country". Similarly, judgment of 20 January 2022, *ZK (Loss of long-term resident status)*, case C-432/20, in which the Court of Justice affirmed that once long-term resident *status* is acquired, the holder is not required to have his or her habitual residence or centre of interests in the EU in order to keep it.
[116] Court of Justice, judgment of 14 January 2015, *Demirci et al*., case C-171/13, para. 54, where the Court stated that "the acquisition of the nationality of the host Member State represents, in principle, the most accomplished level of integration"; and Grand Chamber, judgment of 14 November 2017, *Lounes*, case C-165/16, para. 58, where it reiterated that naturalisation means "to become more deeply integrated in the society of that State". For a sound analysis, refer to A. DI STASI, *Cittadinanza e altri status personali nello spazio europeo dei diritti fondamentali: a proposito dell'implementazione della direttiva 2003/109 relativa ai cittadini di paesi terzi che siano soggiornanti di lungo periodo*, in M. C. BARUFFI, I. QUADRANTI (a cura di), *Libera circolazione e diritti dei cittadini europei*, Napoli, 2012, p. 31.
[117] Art. 11(4) of Council Directive 2003/109/EC, cit.
[118] Court of Justice, Grand Chamber, judgment of 24 April 2011, *Kamberaj*, case C-571/10, paras 90-92. On discretionary powers enjoyed by the Member States to determine the rights associated to TCN legal residence in the EU, see A. ADINOLFI, *La circolazione tra gli Stati membri dell'Unione degli stranieri in condizione regolare*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, cit., p. 137.
[119] Action Plan 2021-2027, p. 5. For a critical appraisal, K. DE VRIES, *Towards Integration and Equality for Third Country Nationals? Reflections on Kamberaj*, in *European Law Review*, 2013, p. 248.
[120] S. CARRERA, L. VOSYLIŪTĖ, Z. VANKOVA, N. LAURENTSYEVA, M. FERNANDES, J. DENNISON, J. GUERIN, *The Cost of Non-Europe in the Area of Legal Migration*, CEPS Papers in Liberty and Security in Europe, No. 2019-01, March 2019. See also A. DI PASCALE, *L'accesso al mercato del lavoro*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, cit., p. 585.
[121] See, for instance, OECD/EU, *Settling in 2018: Indicators of Immigrant Integration*, Paris, 2018. Refer also to C. NAVARRA, M. FERNANDES, *Study on legal migration policy and law. European added value assessment*, European Parliamentary Research Service, PE 694.211, September 2021.
[122] This is expressly foreseen in Art. 3(2) of both Council Directive 2000/43/EC, cit., and Council Directive 2000/78/EC, cit. Similarly, Court of Justice, Grand Chamber, *Kamberaj*, cit., para. 49. For a critical reading, E. BRIBOSIA, *Les politiques d'intégration de l'Union européenne et des États Membres à l'épreuve du*

individual rights deriving from legal residence[123] (or legal presence)[124], but does not apply to national rules on TCN entry and stay.[125] As a result, differential treatment based on the "immigration *status*" may be compatible with the general non-discrimination clause, since this clause does not affect the conditions needed to obtain a certain *status*.[126] This reading has been upheld by the European Court of Human Rights, according to which the decision to emigrate "is subject to an element of choice",[127] which renders it incomparable with the immutable characteristics of the person, such as race and ethnic origin.[128]

A third consequence of the EU minimalist approach to non-discrimination towards TCNs is thus linked to the issue of comparability. Difficulties in establishing a valid comparator may complicate detecting discrimination against TCNs, namely when a comparator to assess an unfavourable group-related treatment is absent or very abstract and general.[129] The differentiation among different groups of migrants, especially when justified on the basis of the solidity and duration of the "ties",[130] has also been accepted

principe de non-discrimination, in Y. PASCOUAU, T. STRIK (eds.), *Which Integration Policies for Migrants? Interaction between the EU and its Member States*, Nijmegen, 2012, p. 64.

[123] Court of Justice, Grand Chamber, *Kamberaj*, cit., paras 76-81.

[124] Court of Justice, Grand Chamber, judgment of 16 November 2021, *Commission v. Hungary (Incrimination de l'aide aux demandeurs d'asile)*, case C-821/19, paras 136-137, on the right to remain pending *status* determination procedures for asylum seekers.

[125] See, e.g., European Court of Human Rights, judgment of 30 November 2021, application no. 40240/19, *Avci v. Denmark*, on proportionality of a permanent re-entry ban issued to a well-settled migrant for serious drug offences. The Court did not check the proportionality of the permanent re-entry ban against the solidity of the applicant's "ties" with the host country, because – contrary to its consolidate case law (see, e.g., Grand Chamber, judgment of 23 June 2008, application no. 1638/03, *Maslov v. Austria*) – this decision concerned re-entry.

[126] It is worth recalling, though, that in the opinion of Advocate General E. SHARPSTON, delivered on 10 December 2009, in the case C-578/08, *Chakroun*, paras 40-43, a Dutch law, creating double standard for family reunification based on whether the family tie arose before the sponsor's entry in the Netherlands, was deemed incompatible with the EU general principle of non-discrimination. In its judgment, the Court of Justice concluded seemingly (*Chakroun*, cit., para. 64), but without mentioning the principle of non-discrimination. Compare with Court of justice, Grand Chamber, judgement 25 July 2008, *Blaise Baheten Metock*, case C-127/08, para. 58.

[127] European Court of Human Rights, Plenary, judgment of 28 May 1985, application no. 9214/80 and 2 others, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, paras 85-86, and judgment of 27 November 2011, application no. 56328/07, *Bah v. the United Kingdom*, para. 47. See also the decision of 15 September 2015, application no. 10154/04, *Bonger v. the Netherlands*, where, by declaring inadmissible the case of a stateless who had been refused residence permit for many years, the European Court of Human Rights confirmed the wide margin of appreciation left to state authorities in the determination of immigrant legal *status*. For a comment, M.-B. DEMBOUR, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford, 2015, p. 442.

[128] See the landmark decision by the UK Supreme Court, *Taiwo v Olaigbe and Onu v Akwiwu*) [2016] UKSC 31, on appeal from [2014] EWCA Civ 279, in which it stated that mistreatment of employees because of their immigration *status* does not amount to direct discrimination because migration cannot be equated to a protected characteristic under the UK Equality Act.

[129] On "relatedness" of unfavorable treatment and group membership, see Court of Justice, Grand Chamber, *CHEZ*, cit., and *Feryn*, cit. For further reading, M.-B. DEMBOUR, *Still Silencing the Racism Suffered by Migrants…*, in *European Journal of Migration and Law*, 2009, p. 221.

[130] See, for instance, Art. 17 of Council Directive 2003/86/EC, cit., requiring a case-by-case assessment of the duration and solidity of family, cultural and social ties with the host country when deciding on TCN removal.

by the Strasbourg Court, although a general and stable trend cannot be deduced from its case law.[131]

Of no less importance, since EU migration law applies solely to TCNs, their legal condition is *in principle* incomparable with that of the other "foreigners" who are citizens of the Member States or TCN members of their families.[132] It's true that the Court of Justice has attempted to frame the issue of comparability through the proportionality lens. More precisely, it has used the treatment of EU citizens as a comparator to establish that TCNs' treatment was "*per se* disproportionate and liable to create an obstacle to the exercise of the rights conferred by" EU law.[133] Nonetheless, the Luxembourg Court did not renounce to draw a line between the residence condition of TCNs who have a family link with a European citizen and that of TCNs who have lost such a link for reasons which are not imputable to them, emphasising that any difference in treatment arising from these two situations is not in breach of the principle of equality as enshrined in Art. 20 of the EU Charter of Fundamental Rights (EUCFR).[134]

At the same time, the European Court of Human Rights has granted national authorities a wide margin of appreciation in relation to the proportionality of TCNs' differential treatments under Art. 14 of the European Convention on Human Rights (ECHR). Yet, it has seemingly required differential treatment to be based on "very weighty reasons"[135] and emphasised the increasing relevance of some factors, such as the length of residence,[136] the peculiar vulnerability of the alien,[137] and the bearing of certain rights at stake.[138]

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[131] European Court of Human Rights, *Biao v. Denmark*, cit., para 94. Similarly, Grand Chamber, judgment of 18 October 2006, application no. 46410/99, *Üner v. the Netherlands*, para 58 and *Maslov v. Austria*, cit., para 71. *Contra*, judgment of 6 November 2012, application no. 22341/09, *Hode and Abdi v. the United Kingdom*. See also, *infra*, fn. 138. For an analysis of this case law, see E. BRIBOSIA, *Les politiques d'intégration de l'Union européenne*, cit., pp. 55-61.

[132] This has been stated by the Court of Justice, *P & S*, cit., para. 43, on personal scope of civic integration obligations for long-term residents pursuant to Art. 11(1) of Council Directive 2003/109, cit. For further reading, D. THYM, *Towards a Contextual Conception of Social Integration in EU Immigration Law. Comments on P & S and K & A*, in *European Journal of Migration and Law*, 2016, pp. 91-94.

[133] Court of Justice, *Commission v. Netherlands*, cit., para. 78.

[134] Court of Justice, judgment of 2 September 2021, *Belgian State (Right of residence in the event of domestic violence)*, case C-930/19. For further reading, S. ROBIN-OLIVIER, *Du marché intérieur au droit de l'immigration: Le long et aride chemin du principe de non-discrimination à raison de la nationalité*, in C. LEMAIRE, F. MARTUCCI (cur.), *Laurence Idot Liber Amicorum. Concurrence et Europe*, vol. II, Paris, 2022, p. 455. More generally, S. MORANO FOADI, M. MALENA (eds.) *Integration for Third Country Nationals in the European Union: The Equality Challenge*, Cheltenham-Northampton, 2012.

[135] European Court of Human Rights, judgment of 23 May 1996, application no. 17371/90, *Gaygusuz v. Austria*, para. 42.

[136] European Court of Human Rights, *Bah v. the United Kingdom*, cit., para. 50.

[137] European Court of Human Rights, Grand Chamber, judgment of 21 January 2011, application no. 30696/09, *M.S.S. v. Belgium and Greece*, paras 251-264.

[138] European Court of Human Rights, *Ponomaryovi et al. v. Bulgaria*, cit., paras 32-54, on exclusion from secondary education of TCN minors due to unpaid school fees. See also the judgment of 8 April 2014, application no. 17120/09, *Dhahbi v. Italy*, para. 53, where the European Court declared an Italian family allowance scheme, which treated TCNs less favourably than EU workers, incompatible with the combined reading of Arts 8 and 14 ECHR.

At any rate, the European Courts' attempt to cope with the EU's minimalist approach to non-discrimination does not "escape the fundamental contradiction, which lays at the heart of liberal theory, between the preaching of universality and the practice of closure".[139] This contradiction mirrors one of the key setbacks connected to the "paradox of openness":[140] the so called "neutrality trap".[141] By imposing the sacrifice of cultural diversity in the name of a formalistic understanding of aliens' rights,[142] neutrality is inherently bound to a minimalist approach to non-discrimination. This approach magnifies the tensions embedded in the legal design of the AFSJ, by expanding the gap between equality "on paper" and non-discrimination "in practice", while minimising the correlation between the successful integration of TCNs and effective immigration/asylum policies.

6. The "ever closer Union" and its enemies: Defending openness in times of crisis

European identity is a "weak identity" compared to national-type identities forged by historical belonging and wars. Indeed, the political project of an "ever closer Union" rests on the capacity of the EU legal system of creating (and preserving) inter-individual solidarity and inter-state responsibility-sharing mechanisms: a goal that becomes harder to achieve in times of crisis.[143] Global insecurity, alongside with the revamp of power politics and illiberalism, openly contesting the EU shared values and the rule of law,[144]

[139] M.-B. DEMBOUR, *Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda*, in *Human Rights Law Review*, 2012, p. 689.
[140] J. F. HOLLIFIELD, *The Emerging Migration State*, cit., p. 887: "Hence the liberal paradox: the economic logic of liberalism is one of openness, but the political and legal logic is one of closure".
[141] N. ZEKIC, *An Open and Diverse European Union*?, in *Tilburg Law Review*, 2017, p. 260.
[142] See, for instance, Court of Justice, Grand Chamber, judgment of 14 March 2017, *Achbita*, case C-157/15, where the Court held that the prohibition on wearing an Islamic headscarf, imposed on employees by a private employer, in order to ensure neutrality towards customers, did not constitute direct discrimination in light of Council Directive 2000/78, cit. Similarly, Grand Chamber, judgment of 15 July 2021, *WABE*, joined cases C-804/18 e C-341/19. See E. JACKSON, *Cases C-804/18 and C-341/19 – The False Neutrality of Anti-Intersectional Interpretation*, in *Trinity College Law Review Online*, trinitycollegelawreview.org; E. SPAVENTA, *What is the Point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case*, in *EU law analysis*, 21 March 2017, eulawanalysis.
[143] Action Plan 2016, para. 3. For further reading, M. IGNATIEFF, S. ROCH (eds.), *Rethinking Open Society. New Adversaries and New Opportunities*, Budapest-New York, 2018.
[144] See, on the one hand, the open contestation of EU values by the s.c. "illiberal democracies" – Hungary and Poland – and, on the other, the self-legitimation of Brexiting United Kingdom in open opposition to the political project of an "ever closer Union". On illiberalism and its impact on the EU legal system, see G. DE BÚRCA, *Poland and Hungary's EU membership: On not Confronting Authoritarian Governments*, in *International Journal of Constitutional Law*, 2022; T. DRINÓCZI, A. BIEŃ-KACAŁA (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union*, Abingdon-New York, 2021. On Brexit and the "ever closer Union", see V. MILLER, *"Ever Closer Union" in the EU Treaties and Court of Justice Case Law – Research Briefing*, House of Common Library, London, 16 November 2015.

have eroded the legal boundaries of the Union as an open and pluralist polity to the point that protecting openness seems to require ever higher levels of closure.[145]

This paradox[146] – affecting many mature liberal democracies around the world – is lucidly epitomised by the downward trend of the Common European Asylum System. The CEAS was envisaged as the "vanguard of international protection" in the Western World – the most advanced protection system a group of States ever managed to agree upon and to smoothly implement for some decades.[147] Although affected by the unresolved contradictions deriving from the limits to harmonisation and the recourse to mutual trust for rights-restricting purposes,[148] the establishment of the CEAS has indirectly contributed to the streamlining of national processes of inclusion of the refugee population, while raising awareness on the structural nature of forced mobility.[149]

Nonetheless, the outbreak of the so-called "refugee crisis" in 2015 led to the proliferation of national policies re-emphasising "the importance of the elusive national borders for the most vulnerable group of the population – the migrants and residents without EU citizenship".[150] This triggered the casualisation of asylum in Europe through the adoption of crisis-management instruments, having the effect to postpone, dilute or deny access to rights by migrants holding a legal entitlement to "remain" on EU territory.[151] The mastering of deterrence-driven modes of migration management at the national level has been linked to hyper-selective[152] and securitised migration policies at

[145] See the Bratislava Declaration, adopted at the Informal Meeting of 27 Heads of State or Government on 16 September 2016 in Bratislava and calling for a higher degree of closure to strengthen the "Security Union" and enhance internal openness.

[146] On this paradox, see D. GOODHART, *Solidarity, Diversity and the Open Society*, in M. WIND-COWIE, B. KAROL BURKS (eds.), *The Open Society Cannot Be Relied Upon to Defend Itself... Open Dialogue*, London, 2011, p. 57.

[147] E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, S. CARRERA, *Enhancing the Common European Asylum System and Alternatives to Dublin*. Study requested by the LIBE Committee, European Parliament, PE 519.234, July 2015.

[148] V. MORENO-LAX, *Mutual (Dis-)Trust in EU Migration and Asylum Law: The Exceptionalisation of Fundamental Rights*, in S. IGLESIAS SANCHEZ, M. GONZALEZ PASCUAL (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge, 2021, p. 77. On the issue of access to justice, see C. FAVILLI, *The Standard of Fundamental Rights Protection in the Field of Asylum: The Case of the Right to an Effective Remedy between EU law and the Italian Constitution*, in *Review of European Administrative Law*, 2019, p. 167.

[149] E. TSOURDI, *The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System*, in F. BIGNAMI (ed.), *EU Law in Populist Times: Crises and Prospects*, Cambridge, 2020, p. 191.

[150] D. KOCHENOV, M. VAN DEN BRINK, *Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU*, Working Papers, Law 2015/07, European University Institute, Florence, p. 23.

[151] V. MORENO-LAX, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford, 2017; T. GAMMELTOFT-HANSEN, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge, 2011.

[152] Commission Staff Working Document, *Executive Summary of the Fitness Check on EU Legislation on Legal Migration*, of 29 March 2019, SWD(2019) 1056 final, p. 1, where hyper-selective and red-carpet policies for highly-skilled migrants are advocated to reorient EU migration policy "from setting common minimum standards on rights, admission and residence conditions for all third-country nationals, to attracting the third-country nationals that the EU economy 'needs' ".

the EU level,[153] *de facto* equating the fight against irregular migration to the "war on terror",[154] while qualifying unauthorised movements of forced migrants and *prima facie* refugees as a "hybrid threat".[155]

Accordingly, in the wake of the s.c. 2015 refugee crisis, the arrival of significant numbers of *prima facie* refugees has been presented by EU institutions not only as a threat to European security, but also as a "stress test" for the Union's fundamental values.[156] This argument – rooted in the perception that "migration undermines the foundations of community and society"[157] and that "(w)hile the right to protection is not limited, the capacity to offer protection is" – [158] has led to asylum-restricting-policies, aimed at ensuring greater administrative sustainability.

The shift from the protection rationale of the CEAS – grounding on international obligations and on broad formulation of the right to asylum in the EUCFR –[159] to a more pragmatic and realistic understanding of international protection responsibilities, has deeply affected the reception of this group of aliens.[160] The focus on border management concerns[161] and the need to curb asylum litigation have led to a generalised presumption

[153] On the nexus between national and EU's deterrence-driven modes of migration management, see D. VITIELLO, *Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond*, in V. MITSILEGAS, V. MORENO-LAX, N. VAVOULA (eds.), *Securitising Asylum Flows. Deflection, Criminalisation and Challenges for Human Rights*, Leiden-Boston, 2020, p. 145.

[154] This equation seems embedded into the recourse to a military tool for anti-smuggling purposes within the framework of the Operation *Sophia*, first, and *Irini*, after. For further reading, C. KIRTZMAN, *SOPHIA to IRINI: A Shift in EU Mediterranean Operations*, in *A Path for Europe*, 5 November 2020; S. PEERS, *The EU's Planned War on Smugglers*, in *Statewatch.org*, May 2015; I. INGRAVALLO, *L'operazione militare EUNAVFOR MED*, in *Sud in Europa*, settembre 2015 (*online*).

[155] Proposal for a Council Decision, *on provisional emergency measures for the benefit of Latvia, Lithuania and Poland*, of 1 December 2021, COM(2021) 752 final, recital 2, qualifying the "instrumentalisation" of mass displacement by third countries of transit as a "hybrid threat" resulting in an unprecedented increase in irregular border crossings. *Contra*, see recital 26 of Regulation (EU) 2016/399 of the European Parliament and of the Council, *on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, of 9 March 2016, in OJ L77, 23 March 2016, pp. 1-52, according to which: "Migration and the crossing of the external borders by a large number of TCNs should not, per se, be considered to be a threat to public policy of internal security". On the "instrumentalisation" of migrants, see S. MARINAI, *L'Unione europea risponde alla strumentalizzazione dei migranti: ma a quale prezzo?*, in *ADiM Blog*, December 2021.

[156] Note from the Presidency to the Permanent Representatives Committee/Council of the European Union, *Presidency non-paper for the Council (General Affairs) on 24 May 2016 – Rule of law dialogue*, of 13 May 2016, doc. 8774/16.

[157] *Ibid*., p. 7.

[158] *Ibidem.*

[159] M.-T. GIL-BAZO, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*, in *Refugee Survey Quarterly*, 2008, p. 46. On the relevance of the EUCFR for TCN integration, see *amplius* F. IPPOLITO, *La Carta dei diritti fondamentali quale strumento per l'integrazione dei cittadini comunitari ed extracomunitari: un primo bilancio*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, cit., p. 91.

[160] See, e.g., European Court of Human Rights, Grand Chamber, *M.S.S. v. Belgium and Greece*, cit., paras 251-264.

[161] On the increasing relevance of concerns relating to administrative sustainability of external border management in Strasbourg case law on aliens' rights, see European Court of Human Rights, Grand Chamber, judgment of 13 February 2020, applications nos. 8675/15 and 8697/15, *N.D. and N.T. v. Spain*, para. 231. This case law has been consolidated and expanded in the judgment of 5 April 2022, application

of "abusiveness" of *prima facie* refugees, impacting on their legal condition, both pending *status* determination and after the recognition of the *status*.[162] The strengthening of border procedures with a limited access to justice,[163] the curtailment of material reception conditions (especially for persons transferred through Dublin procedures),[164] alongside the proliferation of transit zones[165] and hotspots for swift identification and removal,[166] are some of the trends affecting the functioning of the CEAS. These trends, aggravated by the "crisis", led to the mushrooming of "free zones" in the proximity of the internal/external borders, which are ruled by a special border regime applicable to forced migrants and *prima facie* refugees only, and characterised by the legal fiction of non-entry.[167]

By fictionally keeping *prima facie* refugees out of Member States' jurisdiction, this special regime impedes or complicates the exercise of the right to make an asylum request[168] and, consequently, hinders access to basic shelter, together with the possibility

no. 55798/16 and 4 others, *AA and Others v. North Macedonia*, para. 123, for which see D. SCHMALZ, *Enlarging the Hole in the Fence of Migrants' Rights. A.A. and others v. North Macedonia*, in *Verfassungblog*, 6 April 2022; V. WRIEDT, *Expanding Exceptions? AA and others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways*, in *EU Immigration and Asylum Law and Policy*, 30 May 2022, eumigrationlawblog.eu.

[162] See V. FEDERICO, S. BAGLIONI (eds.), *Migrants, Refugees and Asylum Seekers Integration in European Labour Markets: A Comparative Approach on Legal Barriers and Enablers*, Cham, 2021.

[163] On the gaps emerging from the establishment of border procedures in the Member States, see European Parliament Resolution, *Implementation report on Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection*, of 10 February 2021, 2020/2047(INI).

[164] On the treatment of Dublin transferees during the time-lapse that spans from the determination of the competent Member States to the material transfer, see, P. AMARAL, *Protection Interrupted: The Dublin Regulation's Impact on Asylum seekers' Protection (The DIASP project)*, Jesuit Refugee Service, Brussels, June 2013. On the obligations on Member States to share responsibility for reception of Dublin transferees, see Court of Justice, judgment of 27 September 2012, *Cimade and Gisti,* case C-179/11; judgment of 27 February 2014, *Saciri and Others*, case C-79/13.

[165] On the condition of asylum seekers in transit zones, see European Court of Human Rights, Grand Chamber, judgment of 21 November 2019, application no. 47287/15, *Ilias and Ahmed v. Hungary*, paras 215 and 225, where the Court emphasised that: "the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty imputable to the State, since in such cases the State authorities have undertaken vis-à-vis the individual no other steps than reacting to his or her *wish to enter* by carrying out the necessary verifications" (emphasis added). *Contra*, see Court of Justice, Grand Chamber, judgment of 14 May 2020, *FMS and Others*, joined cases C-924/19 and 925/19 PPU, paras 223-230.

[166] D. NEVILLE, *On the Frontline: The Hotspot Approach to Managing Migration*. Study requested by the LIBE Committee, European Parliament, PE 556.942, May 2016, p. 28. On return procedures and related obligations on the Member States, see e.g. Court of Justice, judgment of 23 April 2015, *Zaizoune*, case C-38/14.

[167] Refer, for instance, to cooperation on informal readmission between Italy, Slovenia and Croatia, leading to chain push-backs on the Balkan route. This cooperation has been based on the fictional premise that pushed-back asylum seekers had not exited the "sovereignty sphere" of the neighbouring Member State/third country. On this practice, see M. ASTUTI *et al.*, *«Per quanto voi vi crediate assolti siete per sempre coinvolti». I diritti umani fondamentali alla prova delle frontiere esterne ed esterne dell'Unione europea*, in *Diritto, immigrazione e cittadinanza*, 2022, n. 1.

[168] On the nature of this right, see Court of Justice, judgment of 25 June 2020, *Ministerio Fiscal*, case C-36/20 PPU.

to address asylum seekers' vulnerability. This thwarts their integration potential once (and only if) authorisation to entry is eventually granted.[169]

These trends add to a structural feature of most asylum systems worldwide: the lack of integration means promoting a sense of belonging and participation in the host community's life from the very first days of their stay in the host country. Within the CEAS, this lack is justified by the precariousness of asylum seekers' condition as determined by the enjoyment of the right to "remain" *ex* Art. 9 of the Procedures Directive.[170] While the recognition of this right is binding on Member States, the *status* it confers is framed as a diminished condition, which cannot be equated to the entitlement to a residence permit, nor does it allow access to the labour market. As a result, after the formal lodging of an asylum application, the dichotomy between measures of "first reception" – of which asylum seekers are passive recipients – and active means of integration and inclusion – which follow the acquisition of a permanent residence *status* – may frustrate the prospects of integration for successful applicants.

In practice, pending "temporary asylum" under Art. 9 of the Procedures Directive, the integration process is virtually suspended to be resumed once a positive outcome on the asylum request is attained. However, since procedures may last several months, especially in case of large mixed flows, this dichotomy may lead to situations of "mere tolerance", if not abandonment, triggering secondary movements and absconding. These risks emerged in all their magnitude in the aftermath of the 2015 refugee crisis, furthering marginalisation and exclusion, with durable consequences on the whole integration process of successful applicants, while increasing the social and economic costs of refugee integration.[171]

The lack of "early integration" means,[172] enabling integration "from day 1",[173] has been expressly acknowledged by the European Parliament as the missing link in the management of large movements of *prima facie* refugees.[174] Similarly, the need to reform the CEAS, in order to proclaim the paramount importance of refugees' early integration,

[169] On the right to make an asylum application – as the trigger for the effective observance of the applicant's rights – see Court of Justice, Grand Chamber, judgment of 17 December 2020, *Commission v. Hungary*, case C-808/18, para. 102.
[170] Directive 2013/32/EU of the European Parliament and of the Council, *on common procedures for granting and withdrawing international protection*, of 26 June 2013, in OJ L180, 29 June 2013, pp. 60-95.
[171] Regarding the impact of restrictive asylum policies on integration see OECD, *Les clés de l'intégration: Les réfugiés et autres groupes nécessitant une protection*, Paris, 2016.
[172] On "early integration" as a pre-requisite for effective integration paths, see OECD, *Making Integration Work: Refugees and others in need of protection*, Paris, 2016.
[173] PICUM-ECRE, *The Future EU Action Plan on Integration and Inclusion: Ensuring an Approach Inclusive of All. Policy Paper*, Brussels, October 2020, p. 6.
[174] European Parliament Resolution, *The Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration*, of 12 April 2016, 2015/2095(INI). In particular, the Parliament deemed early access to labour market of paramount importance for the successful inclusion of *prima facie* refugees, especially when their application is likely to be well-founded. See European Parliament Resolution, *Refugees: social inclusion and integration into the labour market*, of 5 July 2016, 2015/2321(INI).

was recognised by the European Commission in the aftermath of the 2015 crisis.[175] In this sense, the crisis became the creative turning point for the overall reframing of the EU approach to immigrant integration. By proposing the conceptualisation of cultural and linguistic integration as a legal entitlement (corresponding to a migrant-friendly commitment on national authorities),[176] promoting more effective coordination among all actors involved in the integration process (including those operating at the local level)[177] and projecting a more strategic approach on EU funding for integration,[178] European institutions have started envisaging an alternative to the neo-assimilationist approach to immigrant integration.

It is also worth mentioning that the Commission put forward a proposal to broaden the scope of the right to remain with a view to allowing access to the labour market before the recognition date for well-founded applicants.[179] However, this proposal has not been translated into positive law yet, while its prospects of being finally endorsed by the EU legislators have been tied to the (still uncertain) destiny of the New Pact on Migration and Asylum.[180] Thus, refugee integration has remained caught up in the contradictory premises that asylum seekers "cannot, in principle, be regarded as staying illegally on the territory of the Member State" in which they submitted an asylum request,[181] but neither can they be regarded as legally residing TCNs for purposes of integration.

From the standpoint of the open society paradigm, the persistence of this old-fashioned approach to refugee integration is problematic inasmuch as it conflates security-driven concerns linked to both mass movements of people across borders, and to the shrinking capacity of domestic welfare systems, with rights-restricting responses, which however are unequipped to mitigate the concerns justifying their adoption. In other words, limiting access to rights and shelter for asylum seekers would not automatically shield host

[175] Communication from the Commission to the European Parliament and the Council, *Towards A Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, of 6 April 2016, COM(2016) 197 final, para. 2.
[176] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New Skills Agenda For Europe*, of 10 June 2016, COM(2016) 381 final.
[177] European Economic and Social Committee Opinion, *on Integration of refugees in the EU*, of 20 July 2016, SOC/532; Committee of the Regions Opinion, *Action Plan on the integration of third country nationals*, of 7 December 2016, CIVEX-VI/015.
[178] Council Conclusions, *The integration of third-country nationals legally residing in the EU*, of 9 December 2016, doc. 15312/16.
[179] Proposal for a Directive of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection (recast)*, of 13 July 2016, COM(2016) 465 final, Art. 15.
[180] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on a New Pact on Migration and Asylum*, of 23 September 2020, COM(2020) 609 final (hereinafter: "New Pact"). The relevant proposal within the New Pact is: Proposal for a Regulation of the European Parliament and of the Council, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, of 23 September 2020, COM(2020) 610 final, which restricts the right to remain in order to limit abuses of the right to asylum.
[181] See, to that effect, Court of Justice, Grand Chamber, judgment of 19 June 2018, *Gnandi*, case C-181/16, para. 40; *FMS and Others*, cit., para. 209.

communities from migration-related crimes or deviation from EU values, nor trigger the expansion of social rights and job opportunities for the local population.[182]

Establishing whether an integration policy is equipped to foster inclusivity and social cohesion entails, instead, the identification of the limits beyond which rights-restricting instruments and mechanisms – justified by alleged needs to preserve openness – are by contrast at odds with key features of the "open society" model: *i.e.* democracy, pluralism and cultural diversity. Such an assessment involves a balancing exercise calling into question the extent to which state interference with the enjoyment of rights and liberties is acceptable and justifiable in an open society.[183] The case law of the Court of Justice does not provide a clear-cut assessment of the limit to restrictive migration policies which can be deemed compatible with the goal of refugee integration, though it reveals the Court's tendency to perform sounder scrutiny of restrictive measures having a redistributive rationale,[184] rather than of integration measures *stricto sensu*.

In *Alo and Osso*, for instance, the Court found in contrast with the so-called Qualification Directive[185] the imposition of a place-of-residence condition on beneficiaries of subsidiary protection for purposes of social assistance, but did not reach the same conclusion with reference to the limitation of free movement rights of beneficiaries of subsidiary protection for integration purposes.[186] From the perspective of an open society, the Court's leeway regarding domestic measures indirectly targeting members of cultural-specific groups by means of integration condition may contribute to displace the quest for equal treatment into a reality of disguised assimilation.[187]

If tolerance of diversity is made conditional on the achievement of national migration goals, then EU integration policy is reduced to a patchy picture of many shades of

[182] Paraphrasing Popper's argument against Marxists, taking money from the rich would not *ipso facto* improve the situation of the poor. Nor widening the room for assimilationism and selectivity would respond to EU citizens' security concerns, should the latter be based on inaccurate perceptions of what security is in today's gloomy times of economic, social and political instability.

[183] For the interpretation of the requisite of the "necessity in a democratic society" *ex* Art.15 ECHR in Strasbourg case law, see, e.g., European Court of Human Rights, Grand Chamber, judgment of 16 December 2010, application no. 25579/05, *A, B and C v. Ireland*, para. 229.

[184] See, e.g., Court of Justice, judgment of 28 Oct 2021, *ASGI and Others*, case C-462/20, in which the Court found the exclusion of TCNs from an allowance scheme established for individuals who cannot provide for personal and family basic needs in contrast with Art. 29 of Directive 2011/95/EU of the European Parliament and of the Council, *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, of 13 December 2011, in OJ L337, 20 December 2011, pp. 9-26. Similarly, Court of Justice, judgment of 5 November 2014, *Tümer*, case C-311/13, paras 32-43, where the Court held that exclusion of irregular TCNs from protection for employer's insolvency cannot be justified by referring to the exclusion of irregular migrants from the personal scope of Council Directive 2003/109/CE, cit. Thus, it suggested that TCNs cannot be divested of all socio-economic rights merely due to the precariousness of their condition.

[185] Directive 2011/95/EU, cit.

[186] Court of Justice, Grand Chamber, judgment of 1 March 2016, *Alo and Osso*, joined cases C-443/14 and C-444/14.

[187] On the relation between the principles of non-discrimination and non-assimilation, see P. Fois, *Il principio di non assimilazione e la protezione delle minoranze nel diritto internazionale*, in A.A.V.V., *Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti*, vol. I, Milano, 1999, p. 187.

fairness, furthering legal ambiguity and *status* casualisation. In light of this, it will be interesting to see whether the Court interprets the assimilation process as a ground for international protection under Art. 10(1)(d) of the Qualification Directive, in response to the preliminary question posed in *K. & L.*[188] The referring judge asks, in fact, whether TCNs who have forged their identity while staying in the territory of a Member State, by adopting western norms and values, are to be regarded – for purposes of *status* recognition – as belonging to a particular social group having "a common background that cannot be changed or characteristics that are so fundamental to identity that a person should not be forced to renounce them".[189]

A Court's response in the affirmative may uphold the idea that the requirement of "Westernisation", embedded in many national integration policies, may expedite the recognition of international protection under the CEAS, presenting asylum seekers with the afflicting alternative to trade their original identity with (alleged) better prospects of *status* recognition. Such an outcome would be difficult to square with the "rationale of international protection", which should guide the exercise of the margin of discretion left to the Member States by the CEAS. As the Court of Justice has recently acknowledged, this rationale should inform national measures deviating from EU asylum law under the "more favourable national provisions" clause, additionally with a view to enhancing refugee protection and family unity by extending the scope of international protection "on a derivative basis".[190]

7. Rethinking integration as a "triple win": Insights from the EU response to the displacement of Ukrainian citizens

Diversity and cultural pluralism have never been considered as shared values giving rise to enforceable rights within the remit of the EU immigrant integration policy. Rather, their translation into binding norms has been very limited and mostly purposed to the elimination of linguistic barriers to the attainment of employability standards determined at the domestic level.[191] In this process, language proficiency is framed as a test of political loyalty towards the host State and a powerful gatekeeper, which surrounds those who fail with a sense of disjointedness. More generally, TCN integration has been made conditional on the emerging morality of "deservingness", framing aliens' engagement in

[188] Court of Justice, request for a preliminary ruling of 25 October 2021, *K. & L.*, case C-646/21.
[189] *Ibid.*
[190] Court of Justice, Grand Chamber, judgment of 9 November 2021, *L.W. (Maintien de l'unité familiale)*, case C-91/20, concerning the decision to grant refugee *status* "on a derivative basis" to a refugee's child who was born on the territory of a Member State, but acquired the nationality of the other parent, who was a TCN coming from a third country where – in case of expulsion – the child would not have been exposed to persecution or serious harm. In general, on the protection of migrant families, see S. MARINAI, *La protezione giuridica della famiglia migrante*, in A. M. CALAMIA, M. GESTRI, M. DI FILIPPO, S. MARINAI, F. CASOLARI, *Lineamenti di diritto internazionale ed europeo delle migrazioni*, Milano, 2021, p. 359.
[191] M. KRZYŻANOWSKI, R. WODAK, *Political Strategies and Language Policies: The "Rise and Fall" of the EU Lisbon Strategy and its Implications for the Union's Multilingualism Policy*, in *Language Policy*, 2011, p. 115.

socio-spatial interactions as an element of mitigation of their civic precariousness *in practice*.[192]

At the same time, restricting access to asylum through selection and containment did not prompt the expected result of putting secondary movements under close watch, nor did it reduce the factors of attraction deriving from the European welfare state. Rather, it thwarted the integration process of those affected by rights-restricting measures, while jeopardising the very same idea of Europe as an open society.

Recent developments at the Eastern European borders, with over five million refugees from Ukraine recorded across Europe,[193] have clearly shown that the enemies of Popper's open society are powerful and threatening. The clash between authoritarianism and liberal democracy, which resurfaces from an evanescent "iron curtain", warns that the preservation of the European identity is a common responsibility, which also passes through the welcoming attitude of Europe towards those who flee violence and persecution.[194]

The EU response to this wave of refugees has been remarkable and unconventional. For the very first time since its adoption, the EU has activated the Temporary Protection Directive,[195] channelling a large number of *prima facie* refugees towards an immediate protection *status*[196] with a view to preserving the functioning of the CEAS[197] and relieving pressure on Ukraine's neighbouring EU Member States.[198]

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[192] P. MAHON, *La politique d'intégration de la Suisse et du canton de Neuchâtel*, in *Bulletin d'information du service de la cohésion multiculturelle*, COSM-Info, Août 2020, p. 7: "La notion d'intégration devient de plus en plus stricte et les critères posés de plus en plus exigeants. (…) Il y a une inflation des normes qui définissent l'intégration dans le sens plutôt du devoir de s'intégrer avant de pouvoir obtenir quelque chose, voire de devoir s'intégrer si l'on ne veut pas perdre des droits".

[193] UNHCR, *Ukraine refugee situation. Operational data portal (last updated 6 July 2022)*, data.unhcr.org.

[194] In these terms, Commissioner Johansson's Speech, *on the developing situation regarding refugees as a consequence of Russian aggression against Ukraine*, 8 March 2022.

[195] Council Directive 2001/55/EC, *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, of 20 July 2001, in OJ L212, 7 August 2001, pp. 12-23. The Directive was activated through the Council Implementing Decision (EU) 2022/382, *establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection*, of 4 March 2022, in OJ L71, 4 March 2022, pp. 1-6.

[196] On the idea to formally grant a *prima facie* refugee *status*, *in lieu* of temporary protection, in situations of mass displacement, see European Parliament Draft Report, *on the Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum*, of 23 November 2021, COM(2020)0613 – C9-0308/2020 – 2020/0277(COD).

[197] On the proposal to replace "temporary protection" with a new *status* of "immediate protection" in the New Pact, see M. INELI-CIGER, *Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?*, in D. THYM (ed.), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Baden-Baden, 2022, p. 149; R. PALLADINO, *Il nuovo status di protezione immediata ai sensi della proposta di regolamento concernente le situazioni di crisi e di forza maggiore: luci ed ombre*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali*, cit., p. 593.

[198] Communication from the Commission, *on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection*, C(2022) 1806, in OJ C126I, 21 March 2022, pp. 1-16.

Such a decision is remarkable, because it opens a window of opportunity to think outside the box in the recast of asylum/migration policies, disproving all the factors (e.g. the numbers, the pull factor argument, the socio-economic burden, etc.), which have been raised in the past decades to back the s.c. "cooperative containment" approach.[199] It is unconventional because it relinks asylum to mobility rights, bolstering the relaxation of border controls and the non-penalisation of unauthorised crossings of the external borders for purposes of access to protection,[200] while allowing Ukrainian refugees free circulation across Schengen internal borders to spontaneously relocate to the Member State of their choice.[201]

From the viewpoint of immigrant integration, the implementation of the decision to welcome Ukrainian refugees becomes the perfect testbed for "a more vigorous integration policy" at the EU level. Its ingredients are the dismissal of the consolidated minimalist approach to non-discrimination to fully embrace the idea that preserving pluralism and openness implies a more inclusive agenda on social cohesion and cultural integration. Such a shift towards a more credible commitment to "integration-through-diversity" was already advocated by the Commission prior to the Ukraine refugee crisis, within the Action Plan on Integration and Inclusion 2021-2027,[202] and has nonetheless gained new momentum due to the urgent need to provide integration means to the over two million people – the vast majority of whom are minors and women – who have already registered for protection in the EU.[203]

The core of the ambitious plan for the reception and integration of Ukrainian refugees is represented by a set of measures which include the following: First, the establishment of a centralised solidarity platform,[204] allowing exchange of real-time information on registered persons to facilitate their access to rights in all Member States, while avoiding

[199] V. MORENO-LAX, J. ALLSOPP, E. TSOURDI, Ph. DE BRUYCKER, *The EU Approach on Migration in the Mediterranean*. Study requested by the LIBE Committee, European Parliament, PE 694.413, June 2021, p. 46.

[200] Communication from the Commission, *Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders*, C(2022) 1404, in OJ C104I, 4 March 2022, pp. 1-6.

[201] On the setback of the rationale of the CEAS – as an asylum system premised upon a non-mobility regime – see the Statement on non-application of Art. 11 of Council Directive 2001/55/EC, cit., attached to Council Implementing Decision 2022/382, cit., through which the Member States incidentally renounced to implement take-back procedures in the event of protection holders' secondary movements. For further reading, D. VITIELLO, *The Nansen Passport and the EU Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe*, in *European Papers*, 2022, n. 7, p. 15.

[202] See *supra*, fn. 43. More generally, for the relation between the Refugee Convention and temporary protection in the EU, see F. MUNARI, *Lo status di rifugiato e di richiedente protezione temporanea. La visione europea del "diritto di Ginevra"*, in S. AMADEO, F. SPITALERI (a cura di), *Le garanzie fondamentali dell'immigrato in Europa*, Torino, 2015, p. 47.

[203] EU Agency for Asylum, *2.3 million Ukrainians have registered for protection in the EU*, Press Release of 27 April 2022.

[204] European Commission, *Solidarity with Ukraine: Commission launches an EU platform for registration of people*, Press Release of 31 May 2022, MEX/22/3384.

possible abuses. Second, the adoption of a "whole-of-society approach"[205] to refugee reception and integration, lessening the related responsibility on Member States by promoting private solidarity and sponsorship[206] – a goal which has already been set out in the New Pact[207] and operationalised through the renewal of the European Partnership on Integration.[208] Third, a diversified portfolio of funding opportunities, made immediately available to national and regional authorities and allowing for flexible access to funding for all sorts of "operations addressing the migratory challenges as a result of the military aggression by the Russian Federation", [209] including for those categories of refugees to whom the Member States may extend forms of "adequate protection" on a discretionary basis.[210]

On top of these short-term responses to the crisis, the Commission has envisaged structural reforms of EU policy on legal migration, including specific actions to facilitate integration of those fleeing Russia's invasion of Ukraine.[211] The new package moves from the assumption that "legal migration has a positive impact all round", which should be boosted by "improving rights for residents and their family members", while attracting new talents.[212] It is formed by two main pillars: a legislative pillar, including two proposals for the recast of the Single Permit Directive[213] and the Long-Term Residence Directive,[214] and an operational pillar, putting forward two new instruments for the attraction of skills

[205] On this approach, which gained momentum in the aftermath of the UN Global Compact for Migration, see J. K. APPLEBY, *Implementation of the Global Compact on Safe, Orderly, and Regular Migration: A Whole-of-Society Approach*, in *Journal on Migration and Human Security*, 2020, p. 214.
[206] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European solidarity with refugees and those fleeing war in Ukraine*, of 8 March 2022, COM(2022) 107 final, p. 8.
[207] New Pact, para. 6.6.
[208] The European Partnership on Integration has been established in 2017 by the Commission with socio-economic partners in many Member States, with the aim to fostering a "whole-of-society approach" to labour market integration for refugees. It was relaunched through the Joint Statement by the European Commission and Economic and Social Partners, *Renewal of the European Partnership for Integration, offering opportunities for refugees to integrate in the European labour market*, Press Release of 7 September 2020, IP/20/1561.
[209] Regulation (EU) 2022/562 of the European Parliament and of the Council, *amending Regulations (EU) No 1303/2013 and (EU) No 223/2014 as regards Cohesion's Action for Refugees in Europe (CARE)*, of 6 April 2022, in OJ L109, 8 April 2022, pp. 1-5.
[210] Council Implementing Decision 2022/382, cit., Art. 2(3).
[211] Refer to the Pilot EU Talent Pool for people fleeing the Russian war of aggression against Ukraine, illustrated in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Attracting skills and talent to the EU*, of 27 April 2022, COM(2022) 657 final, para. 3.2.
[212] European Commission, *Legal migration: Attracting skills and talent to the EU*, Press Release of 27 April 2022, IP/22/2654.
[213] Proposal for a Directive of the European Parliament and of the Council, *on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast)*, of 27 April 2022, COM(2022) 655 final.
[214] Proposal for a Directive of the European Parliament and of the Council, *concerning the status of third-country nationals who are long-term residents (recast)*, of 27 April 2022, COM(2022) 650 final. For a first appraisal, see S. PEERS, *Long-term resident non-EU citizens: The EU Commission's new proposal (part 1)*, in *EU Law Analysis*, 13 May 2022, eulawanalysis.

and talent: the Talent Partnerships with third countries and the EU Talent Pool, to better match EU employers with the talents they need.[215]

The combined reading of these proposals signals a different attitude towards immigrant integration in the EU, enhancing immigrant contribution to the demographic, societal and economic wellbeing of the host country. Thus, even if there is a widespread perception that the measures adopted for Ukrainian refugees are likely to remain a *lex specialis* with no prospects of generalisation, it is equally undeniable that the Ukraine refugee crisis has sparked new projects of durable change in the management of mass displacement within the EU. Even more importantly, it has showed that the only possible alternative to this change is abdicating the openness and pluralism of European societies in favour of a further (and illusory) securitisation of the AFSJ and the CEAS.[216]

Therefore, a more vigorous approach to immigrant integration, rerouting the EU social inclusion agenda to the goal of "social inclusion for all", seems the only possible way to address the challenges of mass displacement consistently with the theoretical and legal premises of a European open society. The attainment of this goal could be helped by some key features of the current "crisis", converging around a conception of integration as a relational process involving not only the migrant and the host community, but also the country of origin.[217] Indeed, since people fleeing Ukraine have been granted immediate protection triggering mobility rights, or at least enjoy free circulation as a result of visa waiver commitments (in the case of Ukrainian nationals), they are in principle free to go back and forth between their country of origin and the host Member State, becoming "architects of political repair and reconstitution back home and abroad".[218]

Keeping the promise of "triple wins" for the host communities, the home society and the refugees themselves would however require abandoning the old conception of transnational migration embedded in temporary labour migration schemes (such as the *Gastarbeiterprogramm* developed in Germany from the 1960's onwards),[219] while mitigating the fragmentation of circular migration schemes within the EU.[220]

This entails first and foremost the releasing of immigrant and refugee "integration potential", by taking their rights seriously instead of using integration prospects as an

[215] See *supra*, fn. 211, para. 3.
[216] K. F. ZIMMERMANN, *Refugee and Migrant Labor Market Integration: Europe in Need of a New Policy Agenda*, in R. BAUBÖCK, M. TRIPKOVIC (eds.), *The Integration of Migrants and Refugees. An EUI Forum on Migration, Citizenship and Demography*, European University Institute, Florence, 2017, p. 88.
[217] This conception of integration was first launched in the Communication from the Commission, *European Agenda for the Integration of Third-Country Nationals*, cit., emphasising the role of countries of origin in making integration a way of realising the potential of migration. Then, it was detailed in the Commission Final Report, *European Modules on Migrant Integration*, February 2014, identifying three areas for further implementation: education/language, receptive host communities, migrant agency.
[218] A. VASANTHAKUMAR, *How Refugees Strengthen Democracy and Solidarity*, in *The New Statement*, 18 March 2022.
[219] The consequences of this programme were epitomised by the famous aphorism by the Swiss writer Max Frisch (1965): "Wir riefen Arbeitskräfte, und es kamen Menschen" ("we called for workers and human beings arrived").
[220] See Z. VANKOVA, *Circular Migration and the Rights of Migrant Workers in Central and Eastern Europe. The EU Promise of a Triple Win Solution*, Cham, 2020.

indicator of (un)suitability for admission through legal pathways.[221] Taking immigrant and refugee rights seriously also means recognising their cultural identity and their right to diversity, as a necessary premise to facilitate their settlement and develop their agency. This was acknowledged by the European Parliament back in 2009, when it adopted a resolution supporting migrants' cultural integration as a process based on inter-cultural and inter-faith dialogues and the encounter between the cultures of both the country of origin and the host country.[222] This goal was restated and expanded in the aftermath of the 2015 refugee crisis, when the Parliament called for immigrant networks' involvement in local cultural life and full participation in cultural decisions, as a means to promote "respect between cultures, increases diversity and respect for democracy, liberty, human rights as well as tolerance for universal and culture specific values".[223] From this perspective, education may have "a double reciprocal effect", meaning that States should provide means of education to migrants as well as educating host communities in the value of cultural diversity.[224]

The second major challenge needing to be addressed to make immigrant and refugee integration a "triple win" solution is empowering communities. The response to the Ukraine refugee crisis clearly showed that inter-individual solidarity is a valuable asset for both the countries of residence and of origin, significantly contributing to the reconstruction and resilience of networks of belongings.[225] It also confirmed the urgency to develop an EU-wide integration programme, channelling this solidarity towards the construction of open, pluralistic and inclusive societies,[226] while reducing the fragmentation deriving from the proliferation of domestic policy schemes.[227]

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[221] This option has been developed within the EU Resettlement Framework proposal (Proposal for a Regulation of the European Parliament and of the Council, *establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council*, of 13 July 2016, COM(2016) 468 final), allowing the Member States to frame as a criterion for fast-tracking TCN admission their "social or cultural links, or other characteristics that can facilitate integration" (Art. 10(1)(b) of the s.c. "ordinary procedure for resettlement"). As pointed out by K. BAMBERG, *The EU Resettlement Framework: From a Humanitarian Pathway to a Migration Management Tool? Discussion Paper*, European Policy Centre, 26 June 2018, p. 8, by adopting this criterion "the EU would be in a position to condition the access to protection (…) on integration potential. Including this as a criterion could give preference to certain individuals over some of the most vulnerable in resettlement processing, especially since it is not clearly defined in the Commission proposal how this would relate to vulnerability and other eligibility criteria".

[222] European Parliament Resolution, *on a Common Immigration Policy for Europe: Principles, actions and tools*, of 22 April 2009, 2008/2331(INI), P6_TA(2009)0257, para. 22.

[223] European Parliament Resolution, *on the role of intercultural dialogue, cultural diversity and education in promoting EU fundamental values*, of 19 January 2016, 2015/2139(INI), P8 TA(2016)0005, para. 6.

[224] ICMC, *Comments on the EU Action Plan on the integration of third country nationals*, 9 February 2017, www.eurodiaconia.org.

[225] On the value and potential of civic solidarity, see S. SONG, *Three Models of Civic Solidarity*, in R. M. SMITH (ed.), *Citizenship, Borders, and Human Needs*, Philadelphia, 2011, p. 192.

[226] An interesting pilot project for such an EU-wide civic integration programme, based on peer-to-peer dialogues, has been carried out in the framework of the EU-funded project "Euroregions, Migration and Integration" (EUMINT), for which see R. MEDDA-WINDISCHER, A. CARLÀ, *European Civic Integration and Common Values: The Experience of a Board Game*, in *Peace Human Rights Governance*, 2021, p. 9.

[227] On the fragmentation of domestic schemes, see (among many), Centre for Strategy and Evaluation Services, *Study on Practices of Integration of Third-Country Nationals at Local and Regional Level in the*

Thus, a more vigorous approach to immigrant integration at the EU level should improve complementarity among all integration-related action fields (including, but not limited to, education, social protection, housing, employment).[228] In addition, it should support active local migration policies and expand "the key role played by local and regional authorities, trade unions, migrant organisations, professional federations and associations in the integration of migrants",[229] by means of direct financial support to private entities and diasporas as well.[230] The design of this EU-wide civic integration programme may complement the Commission's commitment to set up a "European model" of community sponsorship – as established in the New Pact –[231] thus stepping up the European policy on legal pathways, while easing access in case of spontaneous arrival of refugees and forced migrants.

The last ingredient for a "triple win" strategy in immigrant and refugee integration in Europe is linked to the flexibility of the legal framework governing it. Avoiding a "one size fits all" approach to integration, while adopting an EU-shared reference framework for domestic initiatives, seems key to foster the engagement of cities and suburbs, which are the prime *loci* of immigrant and refugee integration and those most exposed to the consequences of its failure.[232] In a world in which a large majority of the population lives in urban areas, empowering cities[233] means boosting urban diversity, intended as "a context of social, economic, cultural and political relations", which takes form "via exchanges at a local scale – for example, in a neighbourhood – among transnational

European Union, European Union, April 2013; EU Committee of the Regions, *Regulatory Framework on Employment and Funding for Migration and Integration Policies in the EU*, European Union, 2016.

[228] Communication from the Commission, *on Guidance for access to the labour market, vocational education and training and adult learning of people fleeing Russia's war of aggression against Ukraine*, of 14 June 2022, C(2022) 4050 final, p. 3.

[229] European Parliament Resolution, *on a Common Immigration Policy for Europe*, cit., para. 28. Similarly, see Council of Europe, Parliamentary Assembly Resolution, *on educational and cultural networks of migrants and diaspora communities*, of 23 June 2016, 2124(2016).

[230] Direct transfer of EU funds to private entities might also help mitigate the impact of the rule of law conditionality on communities engaged in solidarity and pro-immigrant/refugee actions, which could risk being indirectly penalised in case of suspensions or cut-offs of EU funds to their Member State of nationality. On the rule of law conditionality, see Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council, *on a general regime of conditionality for the protection of the Union budget*, of 16 December 2020, in OJ L433I, 22 December 2020, pp. 1-10. For further reading, J. ŁACNY, *The Rule of Law Conditionality Under Regulation No 2092/2020. Is it all About the Money?*, in *Hague Journal on the Rule of Law*, 2021, p. 79.

[231] New Pact, para. 6.6. See also Commission Recommendation, *on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways*, of 23 September 2020, C(2020) 6467 final. See N. F. TAN, *Community Sponsorship, the Pact and the Compact: Towards Protection Principles*, in *ASILE Forum on the new EU Pact on Migration and Asylum in light of the UN GCR*, September 2020, asileproject.eu. In addition, for an analysis of pros and cons of a resettlement scheme based on the criterion of vulnerability, see M. SAVINO, *Refashioning Resettlement: from Border Externalization to Legal Pathways for Asylum*, in S. CARRERA, L. DEN HERTOG, M. PANIZZON, D. KOSTAKOPOULOU (eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Leiden-Boston, 2018, p. 81.

[232] J. VIGNON (ed.), *Migrations, asile, mobilité et intégration en Europe: indissociables valeurs communes*, Institut Jacques Delors, 2021, p. 27.

[233] On cities' empowerment in Europe, refer to the European Committee of the Regions' integration initiative "Cities and Regions for Integration of Migrants", cor.europa.eu.

networks of migrants, (…) state authorities and globalized elites".[234] It is through these exchanges that local actors and discourse may activate transformative dynamics, capable of overcoming structural hurdles to integration, whether they depend on the institutional framework or on socio-economic conditions.[235]

8. Streamlining the New Pact on Migration and Asylum to the goal of immigrant integration

Immigrant integration is the obvious elephant in the room of EU migration and asylum policy reform. Nonetheless, it still seems to be the missing piece in the recast of the governance of human mobility heading towards the European Union. Its centrality has long been displaced by mainstream narratives building upon the security-externalisation *continuum*,[236] strengthening the exclusionary function of external borders to the point of impacting on the freedom of movement even for EU citizens and permanent residents in the Union.[237]

The marginalisation of the EU integration policy is often connected to the limits of EU competence in this realm, impeding the adoption of harmonising acts.[238] However, this argument underestimates the possibility for a vigorous supranational approach towards immigrant integration to be achieved through alternative means, which have been identified and analysed in the previous paragraphs.

First, if the commitment to adjust the EU immigrant integration policy "to the needs of a diverse society" – as advanced in the Action Plan on Integration and Inclusion 2021-2027 –[239] is to be truly honoured, then a different approach to the implementation of the integration clauses set forth in EU secondary legislation should be developed. More precisely, Member States' discretion should be bound to an interpretation of these clauses which is consistent with the teleological premises of European integration as a process funding a pluralistic system of values, in which cultural diversity cannot be effectively respected in one field (e.g. EU citizenship) if it is neglected in others (e.g. EU immigration and asylum law). Reducing deviation of Member States' practice from the *effet utile* of

[234] See the booklet of the CERC Migration Annual Conference 2022, titled "Migration and the City", chrr.info. See also M. AMBROSINI, *Superdiversity, Multiculturalism and Local Policies: A Study on European Cities*, in *Policy & Politics*, 2016, p. 1; A. PISAREVSKAYA, P. SCHOLTEN, Z. KAŞLI, *Classifying the Diversity of Urban Diversities: An Inductive Analysis of European Cities*, in *Journal of International Migration and Integration*, 2021, p. 655.
[235] H. SCHAMMANN *et al.*, *Defining and Transforming Local Migration Policies: A Conceptual Approach Backed by Evidence from Germany*, in *Journal of Ethnic and Migration Studies*, 2021, p. 2897.
[236] On this *continuum*, see S. CARRERA, J. SANTOS VARA, T. STRIK (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*, Northampton, 2019.
[237] On the temporary reintroduction of border controls at the internal borders of the Schengen area, affecting also EU citizens, see M. DE SOMER, *Schengen and Internal Border Controls*, in Ph. DE BRUYCKER, M. DE SOMER, J.-L. DE BROUWER (eds.), *From Tampere 20 to Tampere 2.0*, cit., p. 119.
[238] See, *supra*, fn. 17.
[239] Action Plan 2021-2027, para. 3.

integration clauses in EU secondary law should be a primary commitment of the Court of Justice. It should rethink its reasoning in cases such as *Alo and Osso*[240] in light of a systemic interpretation of the discretion conferred upon the Member States by integration clauses, taking into due account their purpose of removing barriers to inclusion.

Second, considering "the specific challenges faced by different groups"[241] means abandoning a minimalist approach to non-discrimination towards TCNs, since it is capable of hindering *ab initio* migrant and refugee prospects of integration.[242] Issues associated with the legal *status* of non-citizens should be freed from the trap of their categorisation under the opposing paradigms of "axiological universalism or statist-nationalist particularism",[243] to be resolved in connection with the formation of the European way of life as an inclusive one – a goal which has been envisaged by the Action Plan 2021-2027, in line with the European Pillar of Social Rights.[244]

Within the Plan, emphasis on inclusiveness is supported by the express reference to the centrepiece of the 2030 Agenda for Sustainable Development: the principle that no one shall be left behind.[245] This principle seems intrinsical to the European way of life and to the common European values on which it is rooted, "including democracy, the rule of law, the freedom of speech and religion, as well as the rights to equality and non-discrimination".[246] What is more, the Action Plan extends the personal scope of the EU agenda on social inclusion to cover both TCNs who are migrants or refugees and EU citizens with a migrant background,[247] so acknowledging that by precarising the legal *status* of TCNs, the old-fashioned approach to integration risks downgrading the very same rights of EU citizens. Thus, it creates – at least on paper – the conditions for a fairer approach to integration and inclusion, an approach that should be developed in coordination with national systems and, in particular, through the active role of local actors and domestic judges.[248]

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[240] The case is illustrated *supra*, para. 6.

[241] Action Plan 2021-2027, para. 3.

[242] On the potential for the general principle of non-discrimination, along with the relevant provisions of the EUCFR, to foster an extensive interpretation of the notion of "nationality" embedded in the Treaties, see C. FAVILLI, *L'applicazione ai cittadini di Paesi terzi del divieto di discriminazione per motivi di nazionalità*, in G. CAGGIANO (a cura di), *I percorsi giuridici dell'integrazione*, cit., p. 115. In general, J. CROON-GESTEFELD, *Reconceptualising European Equality Law. A Comparative Institutional Analysis*, Oxford, 2017.

[243] On these paradigms, see R. RUBIO-MARÍN, *Integration in Immigrant Europe: Human Rights at a Crossroads*, in R. RUBIO-MARÍN (ed.), *Human Rights and Immigration*, Oxford, 2014, p. 73. See further, S. CARRERA, A. WIESBROCK, *Civic Integration of Third-Country Nationals. Nationalism versus Europeanisation in the Common EU Immigration Policy*, CEPS Policy Paper, October 2009.

[244] On the synergy between the EU immigrant integration policy and the European Pillar of Social Rights, see the Action Plan 2021-2027, para. 3.

[245] On this principle, see the dedicated webpage of the UN Sustainable Development Group: unsdg.un.org.

[246] Action Plan 2021-2027, para. 1.

[247] *Ibid*.

[248] On the relevance of domestic litigation in this field, refer – among many instances – to the landmark decision of the Conseil constitutionnel français on the application of the principle of *fraternité* to set aside the mechanism of automatic criminalisation of humanitarian assistance to refugees and migrants who are "*sans papiers*" (Decision of 6 July 2018, *Mr. Cédric H. et al.*, no. 2018-717/718 QPC, para. 13). See also the input provided by the Italian Court of Cassation on the nexus existing between vulnerability and social

An example of the key role domestic courts may play, in dialogue with the Court of Justice, has recently been provided by a decision of the Italian Constitutional Court[249] on two referral orders from the Italian Court of Cassation, asking it to strike down, on constitutional grounds, a social security provision excluding from a family unit allowance those TCNs legally residing and working in Italy, when the members of the family unit do not, in reality, reside in Italy.[250] The Italian Constitutional Court fully aligned to the decision of the Court of Justice in *INPS* cases,[251] in which it ruled that both the Long-Term Residence Directive and the Single Permit Directive[252] require Member States to automatically extend social security allowances to TCNs who work and reside legally. Thus, the Constitutional Court ordered the Supreme Court of Cassation to disapply the Italian provision in contrast with EU law.[253]

The last point to address in the recasting of the EU approach to immigrant and refugee integration is that soft law, coordination and funding matter and could be the key to building up the operational pillar of the EU policy on immigrant and refugee integration.[254] Synergetic action coordinated by the European Commission through guidelines and funding opportunities could be very effective in incorporating the lessons learnt from the refugee crisis, namely that early-integration can make the difference in turning failed into successful integration. This action would promote the spread of best

integration, in the ruling n. 4455/2018 (C. FAVILLI, *La protezione umanitaria per motivi di integrazione sociale. Prime riflessioni a margine della sentenza della Corte di cassazione n. 4455/2018*, in *Questione Giustizia*, 14 March 2018, questionegiustizia.it). Vice versa, on the role of local actors in promoting strategic litigation before national courts and at the European Court of Human Rights, refer, e.g., to the Austrian experience, as illustrated by I. ATAÇ, *Gaygusuz v. Austria: Advancing the Rights of Non-Citizens through Litigation*, in *Austrian Journal of Political Science*, 2017, p. 21.

[249] On this aspect, see more broadly A. LAMBERTI, *"Sostenere l'integrazione per società più inclusive": immigrazione e diritti sociali nella recente giurisprudenza costituzionale*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (a cura di), *Migrazioni internazionali*, p. 521.

[250] Italian Constitutional Court, judgment of 11 March 2022, n. 67 (English translation available here: www.cortecostituzionale.it).

[251] Court of Justice, judgment of 25 November 2020, *INPS (Prestations familiales pour les titulaires d'un permis unique)*, case C-302/19; judgment of 25 November 2020, *INPS (Prestations familiales pour les résidents de longue durée)*, case C-303/19.

[252] More precisely, the Italian Constitutional Court's ruling, cit., *supra*, fn. 250, refers to Art. 11(1)(d) of Council Directive 2003/109/EC, cit., and to Art. 12(1)(e) of Directive 2011/98/EU, cit.

[253] For further examples of potentially fruitful dialogues among courts, see Court of Appeal of Milan, order of 30 May 2022, regarding a referral to the Italian Constitutional Court on the constitutionality of an Italian provision limiting the right to a guaranteed minimum income for persons who have been legally residing in Italy for ten years (the text in Italian is available here: www.asgi.it). According to the referring court, the requisite of 10-year residence violates the principle of proportionality, as it does not consider the effective degree of TCN integration and would be unjustified in light of the Italian Constitutional Court's judgment of 10 January 2022, n. 19, since the Constitutional Court did not set a temporal requirement to prove stability of sojourn as a precondition for the enjoyment of the right to a guaranteed minimum income. In addition, according to the Court of Appeal of Milan, the requisite of 10-year residence constitutes indirect discrimination against TCNs, as defined by the EU Court of Justice in its consolidate case law (e.g., Grand Chamber, judgment of 18 July 2006, *De Cuyper*, case C-406/04, para. 40; Grand Chamber, judgment of 23 October 2007, *Morgan and Bucher*, joined cases C-11/06 and C-12/06, para. 33).

[254] On the relevance of EU funding in this specific field of competence, see A. WOLFFHARDT, *Making the Most of EU Funds to Support a Comprehensive Approach to Migrant Integration*, ReSOMA Policy Option Briefs, January 2020.

practices developed at the local and national level,[255] such as " 'civic integration encounters' where refugees, asylum seekers, migrants and members of the local population freely discuss key values of the European Union".[256] At the same time, it should foster inclusivity of civil society in local, national and supranational decision making processes on civic integration. From this standpoint, the institution of an "Expert Group on the views of migrants", composed of migrants and organisations representing their interests and operating as a consultative body of the Commission, seems an important step in the right direction.[257] This Expert Group will have a say in the design and implementation of future EU policies in the field of migration, asylum and integration, with an expected beneficial impact on the overall agency of people "on the move" within the EU.

Alongside the incorporation of migrant and refugee agency in the decision-making process, the Action Plan strengthens the monitoring, evaluation and democratic oversight of the implementation of EU policy on immigrant integration,[258] while promoting an evidence-based debate in the field of integration, based on reliable data and knowledge.[259] The involvement of EU agencies and research institutions could be key to the achievement of this goal, which might also be relevant to reorienting the dominant narratives on migrations and their consequences.[260]

9. The way ahead

This analysis demonstrates that the self-restraint of the European Union in the field of immigrant and refugee integration has been a political choice more than a consequence of competence limitation. TCN integration is in fact a complex process, whose regulation cannot be confined within the narrow remit of a sectoral competence. The existence of a dedicated EU immigrant integration policy, and its limited nature, do not in fact, exclude a more comprehensive understanding of integration, entrenching this Union's goal in all policies pertaining to the AFSJ and the CEAS.

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[255] For a stocktaking of these practices, see Commission Staff Working Document, *Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Integration and Inclusion 2021-2027*, of 24 November 2020, SWD(2020) 290 final.

[256] R. MEDDA-WINDISCHER, A. CARLÀ, *European Civic Integration and Common Values*, cit., p. 9.

[257] The Expert Group has been set up within the Directorate-General for Migration and Home Affairs of the European Commission (DG HOME) and had its kick-off meeting on 12 November 2020. For further information, refer to European Commission, *Report on the Consultation on the Integration and Inclusion of Migrants and People with a Migrant Background*, November 2020, p. 11.

[258] Action Plan 2021-2027, para. 6.

[259] *Ibid*., para. 5. On potential (and related risks) of data collection and use for evidence-based policies, see J. CRISP, *Beware the Notion That Better Data Lead to Better Outcomes for Refugees and Migrants*. Expert Comment, *Chatham House*, 9 March 2018, www.chathamhouse.org.

[260] Towards this aim, the development of an interactive platform, to be hosted on the European Website on Integration, will ensure transparency of monitoring activities and allow participation from a wider range of partners and stakeholders. See the Action Plan 2021-2027, para. 6.

At this juncture, both the proportion of the challenges ahead and their prospective impact on EU common values seem to make this option more politically viable for the Union and its Member States. Indeed, a "low-profile" EU policy in this field of action would stretch the tension embedded in the legal design of the AFSJ and the CEAS even further, by minimising the correlation between successful integration paths and effective immigration and asylum policies – an outcome which would appear at odds with the pursuit of the Union's goals and would thwart its self-representation as an "open society".

Vice versa, streamlining the New Pact on Migration and Asylum to the goal of immigrant and refugee "integration-through-diversity" is the only feasible "way of realising the potential of migration".[261] As it is acknowledged in the Pact itself,

> "Successful integration benefits both the individuals concerned, and the local communities into which they integrate. It fosters social cohesion and economic dynamism. It sets positive examples for how Europe can manage the impacts of migration and diversity by building open and resilient societies. (…) While integration policy is primarily a Member State responsibility, the EU has stepped up its support to Member States and other relevant stakeholders since the adoption of the 2016 Action Plan. (…) This work now needs to be deepened, to ensure that meaningful opportunities are provided for all to participate to our economy and society (…) [a]s part of the priority on promoting our European way of life".[262]

ABSTRACT: Diversity and pluralism are embedded in the political project of the Union as based on the archetype of a liberal "open society". At the same time, the preservation and promotion of these values is being increasingly challenged, especially in the fields of EU competence which are traditionally more sensitive to the calls for sovereignty, such as on migration and asylum policies. This article takes the EU immigrant integration policy as a case study to test the legal boundaries of the European open society. It departs from the limits of the EU competence in this field of action to demonstrate that the self-restraint of the European Union in the development of "a more vigorous integration policy" has been first and foremost a political option. This option has magnified the tension embedded in the legal design of the AFSJ and the CEAS, minimising the correlation between successful integration paths and effective immigration and asylum policies. This evidence should induce the Union – within the remit of its own competence – to greater activism in support of TCN integration and inclusion in the European open society.

KEYWORDS: Open Society – Integration Clauses – Civic Integration – Non-Discrimination – EU Competence.

[261] Already in these terms, Communication from the Commission, *European Agenda for the Integration of Third-Country Nationals*, cit., p. 2.
[262] New Pact, para. 8.