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"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

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POLICY-MAKING AS A CRISIS RESOLUTION TOOL: THE NORMALISATION OF EXCEPTIONALITY PROCEDURES AT THE EXPENSE OF THE RIGHTS OF MIGRANTS

Marguerite Arnoux Bellavitis*

SUMMARY: 1. Introduction. – 2. Crisis policy-making and institutional procedures. – 3. Policy-making as a crisis de-escalation tool: Proposal for a Recast Return Directive. – 4. Policy-making as a crisis-avoidance strategy: New Pact on Migration and Asylum and Proposal for a Screening Regulation. – 5. Conclusion.

1. Introduction

In the last 10 years, the EU has been depicted either as in a state of migration crisis or on the verge of a crisis. Since the 2015 so-called migration crisis, conflicts and displacements in third countries have been carefully monitored to prevent potentially uncontrolled arrivals towards the EU and to attempt to contain migration flows outside of the EU's borders.¹ Migration is a polarizing topic, both in public opinion and in political discourses.² While the number of irregular arrivals has decreased from the peak in 2015 (1.04 million in 2015, 255 332 in 2023),³ the term crisis has repeatedly been used to refer to any potential influx of migrants at the EU's external borders,⁴ such as the situation at the border with Poland and Belarus,⁵ even when these events have not disrupted the functioning of the Common European Asylum System (CEAS) and its reception dimension. Any new cyclical wave of arrivals or migration-related events has been

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¹ Council of the European Union, 'Statement on the Situation in Afghanistan', 31 August 2021, <https://www.consilium.europa.eu/en/press/press-releases/2021/08/31/statement-on-the-situation-in-afghanistan/>.

² P. CASTELLI GATTINARA, L. MORALES, *The Politicization and Securitization of Migration in Western Europe: Public Opinion, Political Parties and the Immigration Issue*, in P. BOURBEAU (ed.), *Handbook on Migration and Security*, Cheltenham, 2017, pp. 273-95.

³ Council of the European Union, *Irregular Arrivals to the EU (2008-2023)*, 15.01.2024, <https://www.consilium.europa.eu/en/infographics/irregular-arrivals-since-2008/>.

⁴ L. BAYER, Z. WEISE, *Migration Fears Complicate Europe's Response to Afghanistan Crisis*, in *POLITICO Europe*, 16.08.2021, <https://www.politico.eu/article/afghanistan-crisis-migration-europe-response/>.

⁵ M. GRZEŚKOWIAK, *The "Guardian of the Treaties" Is No More? The European Commission and the 2021 Humanitarian Crisis on Poland-Belarus Border*, in *Refugee Survey Quarterly*, 2023, n. 1, pp. 81-102.

spectacularized and sparked political division among Member States on responsibility and solidarity issues.⁶ One of the main consequences of this crisis narrative was the reintroduction of internal borders by several Member States and the long-lasting dysfunction of the Schengen area.

Subsequent crises put at risk the political stability of the Union, and can often be attributed to internal political factors. Due to the impossibility of compromising on refugee quotas, the 2015 crisis was followed by a political divide between Member States.⁷ Facilitated by the polarised context, far-right anti-immigration parties further politicised migration, thus increasing the attention on the topic and leading other mainstream parties to pick up on it as well and bringing it to the centre of public debates.⁸ At the EU level, this political crisis materialized in the Council where the politicisation of migration by populist governments led to a deadlock in the legislative area.⁹

Crises have deeply influenced the EU governance of migration and have resulted in a multiplication of alternative policy frames and administrative and exceptional policy tools. Although diplomatic crises have impacted the EU legislation making, the Commission has presented several reform attempts of the EU migration and asylum *acquis*, which all have a common aim, in addition to the further integration and harmonization of the policy field, to restore the border-free Schengen area. The most recent reform proposal, the New Pact on Migration and Asylum is likely to be adopted by the European elections of 2024 and end the legislative deadlock. This contribution aims to analyse how this permanent crisis situation shaped the EU migration policy-making, and how it impacted the content of the policies and policy outcomes, particularly related to the human rights of migrants.

Based on an interdisciplinary approach using political science theories and methods, combined with legal analysis, this article first investigates the interlinkage between crisis and EU decision-making, focusing on the Commission's role, to assess their impacts on institutional procedures and working methods. The article then analyses the concrete effects of those dynamics on two legislative proposals currently under negotiation: the proposal for a Recast Return Directive and the proposal for a Screening Regulation. Both proposals have been used to either prevent or de-escalate crises, through different political dynamics. The data were collected through analysis of the texts, and interviews with EU officials conducted in 2022 and 2023.

⁶ S. CARRERA, R. CORTINOVIS, *Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean Sailing Away from Responsibility?*, in *CEPS Paper*, 2019, n. 10.

⁷ N. ZAUN, *States as Gatekeepers in EU Asylum Politics: Explaining the Non-Adoption of a Refugee Quota System: States as Gatekeepers in EU Asylum Politics*, in *Journal of Common Market Studies*, 2018, n. 1, pp. 44-62.

⁸ S. HUTTER, H. KRIESI, *Politicising, Immigration in Times of Crisis*, in *Journal of Ethnic and Migration Studies*, 2022, n. 2, pp. 341-65.

⁹ N. ZAUN, A. RIPOLL SERVENT, *Perpetuating Crisis as a Supply Strategy: The Role of (Nativist) Populist Governments in EU Policymaking on Refugee Distribution*, in *Journal of Common Market Studies*, 2022, n. 3, pp. 653-672.

2. Crisis policy-making and institutional procedures

Political crisis and legislative deadlock.

Since the adoption of the Schengen agreement, and even more after the entry into force of the Treaty of Amsterdam, an extended scholarship has been dedicated to the EU asylum and migration policy-making and the role played by the different EU institutions.¹⁰ Following the communitarisation of the policy area, scholars like Virginie Guiraudon have identified a ‘venue-shopping’, or the strategic use of EU policy-making by Member States to circumvent national veto-players such as courts and NGOs.¹¹ This theory preceded the expansion of the jurisdiction of the Court of Justice of the EU, the adoption of the Charter of Fundamental Rights, and the growing importance of European institutions, and was later substituted with the expectation that EU institutions would act as ‘liberal constraints’ in the decision-making leading to higher protection standards.¹² Institutional strategies govern the EU policy-making procedures. Although co-decision has now been extended to migration and asylum policies, intergovernmental dynamics still influence the policy area, as Member States in the Council of the EU and the European Council continue to be central actors in the policy-shaping. This has been particularly true since 2015 when a political crisis resulting in the impossibility of adopting new legislation resulted in the multiplication of informal agreements, non-legislative acts and administrative governance tools requested and negotiated by Member States or the European Council and implemented by the Commission.¹³

The EU’s inability to adopt new legislation in this specific field is due to the incapacity of the EU Member States to reach agreements within the Council. Through the analysis of the negotiations of the Dublin IV Regulation proposal, Zaun and Ripoll Servent argued that populist governments rejected institutional norms of the legislative decision-making process such as qualified-majority voting, compromise and attempts to find solutions in the EU migration and asylum area, to keep the EU in a state of permanent political crisis. By doing so, they increased their popular support at the national level. Populist governments managed to block the reforms of the Common European Asylum

¹⁰ A. RIPOLL SERVENT, F. TRAUNER, *Justice and Home Affairs Research. Introducing the State of the Art and Avenues for Future Research*, in A. RIPOLL SERVENT and F. TRAUNER (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, Abingdon, 2018, pp. 3-15.

¹¹ V. GUIRAUDON, *European Integration and Migration Policy: Vertical Policy-making as Venue Shopping*, in *Journal of Common Market Studies*, 2000, pp. 251-71.

¹² S. BONJOUR, A. RIPOLL SERVENT, and E. R. THIELEMANN, *Beyond Venue Shopping and Liberal Constraint: A New Research Agenda for EU Migration Policies and Politics*, in *Journal of European Public Policy*, 2018, pp. 409-21.

¹³ M. GATTI, A. OTT, *The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law*, in S. CARRERA, J. SANTOS VARA, and T. STRIK (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham, 2019, pp. 175-200 ; See also S. CARRERA, L. DEN HERTOOG, M. STEFAN, *The EU-Turkey deal: Reversing ‘Lisbonisation’ in EU migration and asylum policies*, in S. CARRERA, J. SANTOS VARA, and T. STRIK (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis*, op. cit., pp. 155 ff.

System, thus forcing the Commission to abandon it and submit an entirely new proposal in the form of the New Pact on Migration and Asylum, which is reaching the final stages of negotiations. While it is not uncommon for mainstream governments to block the adoption of specific policies which are not in line with their position at the national level, populist governments blocked reforms for the sake of obstructing the political process and the institutional system. The perpetuation of a political crisis by populist governments is the main reason why EU Member States could not build a consensus in the field of migration and asylum, blocking progress in the legislative area for a decade.

Crisification policy-making.

The narratives surrounding borders and migration depict a permanent crisis situation.¹⁴ Crises within the European integration process are the object of an extended scholarship in social and legal science, which has been particularly fruitful in the past years with the overlap of different crises, such as the Eurozone crisis, the migration crisis, COVID-19, etc.¹⁵ A crisis is essentially an ‘unexpected occurrence that disrupts the normal functioning of socio-political structures, threatening core social values and the political-institutional order of a community’.¹⁶ It creates a sense of threat to the core values of a community, urgency and uncertainty,¹⁷ and highlights and spectacularises failure. The 2015 migration crisis can be seen as the consequence of the wider failure of the Common European Asylum System, particularly of the Dublin Regulation.

In this context, a ‘crisification’ governance modality has taken over in several areas, and in particular in the EU migration and asylum field.¹⁸ The term crisification, resulting from the “deep-seated impact”¹⁹ that the succession of crises has had on the EU, has been coined by Rhinard,²⁰ and refers to “crisis-oriented modes of thinking, typically articulated in terms of preventing, preparing for, responding to and recovering from critical events in everyday policy-making”. In this sense, crisification governance does not only occur in the context of a crisis, but also to prevent a potential crisis, or to de-escalate an existing crisis. It has a clear impact on the quality of policy-making and the policy outputs. Crises create urgency and tight deadlines, and resort to emergency and fast-track procedures, with limited possibilities to consult stakeholders and relevant institutions. When it comes

¹⁴ N. DE GENOVA, *The Permanent “Crisis” of the Borders of “Europe” – Migration Mobilities Bristol*, 20 April 2021, <https://migration.bristol.ac.uk/2021/04/20/the-permanent-crisis-of-the-borders-of-europe/>.

¹⁵ J. HUPKENS, C. NEUHOLD, and S. VANHOONACKER, *One Crisis Is Not Like Another: Exploring Different Shades of Crisis in the EU*, in *Politics and Governance*, 2023, n. 4, pp. 252-262.

¹⁶ B. VOLTOLINI, M. NATORSKI, and C. HAY, *Introduction: The Politicisation of Permanent Crisis in Europe*, in *Journal of European Integration*, 2020, n. 5, pp. 609-624.

¹⁷ A. BOIN, P. HART AND S. KUIPERS, *The Crisis Approach*, in R. HAVIDÁN, W. DONNER, and J. TRAINOR (eds.), *Handbook of Disaster Research*, Cham, 2018, pp. 23-38.3/13/2024 6:00:00 PM

¹⁸ V. MORENO-LAX, *The “Crisification” of Migration Law: Insights from the EU External Border*, in *SSRN Scholarly Paper*, 2023.

¹⁹ M. RHINARD, *The Crisification of Policy-Making in the European Union*, in *Journal of Common Market Studies*, 2019, n. 3, pp. 616-633.

²⁰ *Ibidem*.

to EU migration law and borders governance, Moreno-lax²¹ found that the “crisis-based paradigm”, focused on the number of irregular arrivals, rather than on the loss of lives at the external borders has become a system of governance of its own, enabling the normalization of exceptional measures towards migration policies.

Crisification policy-making can be applied to political crisis and their prevention. To prevent political crises in the Council, and facilitate consensus and compromises between Member States, the Commission engages in strategies to prevent potential crises or to alleviate existing political crises. Those “crisis-avoidance strategies”²² are key features of ‘crisification’ policy-making as defined by Rhinard.²³ Instead of basing its political proposals on evidence-based preparatory work, and stakeholders’ consultations as it is required to do, the Commission skips this step of the institutional procedures and drafts its proposals based on Member States requests only.

Procedures and exceptionality measures.

While they are embedded in a humanitarian discourse, the policy responses in migration and asylum all aim at preventing migration to the EU. The sense of urgency and threat perceived during the refugee crisis, as well as its deeply politicised nature, are still leading to further securitized measures, with returns and border management presented as the unique solutions to the crisis. This emergency discourse justified the adoption of exceptional measures leading to a normalization of a state of exception with the creation of new mechanisms such as the hotspots and ad-hoc centres to detain migrants at the external borders of the EU.²⁴ Another consequence of this emergency is the fast-track adoption of policies. Policy-making within the European Commission is regulated by the internal Better Regulation Guidelines.²⁵ This document lays down a set of rules to ensure that the policies adopted by the Commission, including legislative proposals and non-legislative acts, are evidence-based, and rely on rational and scientific analysis, impact assessments and stakeholders’ consultations. Impact assessments are specifically required for initiatives “likely to have significant economic, environmental or social impacts or which entail significant spending”.²⁶ They shall include alternative options for the legislative, thus contributing to evidence-based and fact-based policy-making, promoted by the European Commission in its Better Regulation Guidelines. In the field of migration and asylum, an important part of the proposals to reform the EU *acquis* coming from the Directorate-General (DG) for Home Affairs, from the failed Common European Asylum System to the New Pact of Migration and Asylum, has not

²¹ MORENO-LAX, *The “Crisification” of Migration Law: Insights from the EU External Border*, op. cit.

²² P. BURNHAM, *Depoliticisation: Economic Crisis and Political Management*, in *Policy & Politics*, 2014, n. 2, pp. 189-206.

²³ M. RHINARD, *The Crisisification of Policy-Making in the European Union*, cit.

²⁴ D. DAVITTI, *Biopolitical Borders and the State of Exception in the European Migration “Crisis”*, in *European Journal of International Law*, 2018, n. 4, pp. 1173-1196.

²⁵ Commission Staff Working Document, *Better Regulation Guidelines*, 3.11.2021, SWD(2021) 305 final.

²⁶ *Ibidem*.

been preceded by impact assessment reports and were drafted without proper evidence, mostly because of the haste in which they were prepared to respond to the migration crisis, but also to ensure that the Member States' preferences were reflected in the process.²⁷ This lack of knowledge within the EU policy-making process has an evident impact on the proposals presented by the Commission. Extensive research, including substitute impact assessments²⁸ requested by the European Parliament, or academic scholarship²⁹ refutes the current EU approach centred on the fight against irregular migration, through border management, externalisation of migration policies and a focus on returns, and deems them ineffective. Despite this, the Commission's and Member States' political discourse keeps presenting those policies as the only solution to manage migration.³⁰

3. Policy-making as a crisis de-escalation tool: Proposal for a Recast Return Directive.

The Return Directive.

The Return Directive currently in force was adopted in 2008. It establishes common standards and procedures for returning illegally staying third-country nationals. It was the first migration instrument adopted under the co-decision procedure by the European Parliament and the Council. For its first involvement in the adoption of migration policies, the European Parliament was expected to have high standards in terms of migrants' protection and to enhance their protection. In the end, however, it compromised very quickly in the first reading, preferring to have a text that would be less protective than expected, but still raising the existing standards, rather than risking not reaching an agreement.³¹ The Return Directive was one of the most controversial immigration

²⁷ G. CORNELISSE, M. RENEMAN, *Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?*, in *European Law Journal*, 2020, n. 3-4, pp.181-198.

²⁸ ECORYS., G. CORNELISSE, and G. CAMPESI, *The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment*, European Parliament Research Service, August 2021; E. BROUWER ET AL., *The European Commission's Legislative Proposals in the New Pact on Migration and Asylum*, Study Requested by the LIBE Committee, July 2021.

²⁹ I. MAJCHER, T. STRIK, *Legislating without Evidence: The Recast of the EU Return Directive*, in *European Journal of Migration and Law*, 2021, n. 2, pp. 103-26.

³⁰ U. VON DER LEYEN, *Speech by President von Der Leyen at the European Parliament Plenary on the Preparation of the Special European Council Meeting of February, in Particular the Need to Develop Sustainable Solutions in the Area of Asylum and Migration*, 1.02.2023, https://ec.europa.eu/commission/presscorner/detail/en/speech_23_526.

³¹ D. ACOSTA ARCARAZO, *The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)*, in *European Journal of Migration and Law*, 2009, n. 1, pp. 19-39; A. RIPOLL SERVENT, *Co-Decision in the European Parliament: Comparing Rationalist and Constructivist Explanations of the Returns Directive*, in *Journal of Contemporary European Research*, 2011, n. 1, pp. 3-22.

instruments adopted by the EU.³² After its adoption, it has been subject to a lot of criticism by refugee and human rights organisations for issues concerning procedural safeguards, detention, as well as the respect of the principle of *non-refoulement*.³³ However, the 2008 Directive turned out to have an “unexpected protective effect for irregular third-country nationals”³⁴ by prioritizing voluntary departures over forced departures and reducing pre-removing detention. The interpretation of the directive by national and European courts has helped set high standards of human rights protection on these issues³⁵ in the context of returns, but also to prevent from *refoulement*, and decriminalize irregular stay or entry.³⁶ The Court of Justice of the EU (CJEU) jurisprudence also helped clarify procedural rights such as the suspensive effect of appeal, the right to be heard and mandatory judicial review during the return procedure.³⁷ In a 2013 evaluation of the application of the directive, the Commission recognised the positive effect of the directive on the harmonization of national practices.³⁸

The text was nevertheless not considered effective enough, based on the low return rate (21% in 2022 according to Eurostat), although deficiencies have been spotted in the collection and analysis of such data.³⁹ For a long time, the Commission focused on the enforcement of the 2008 Directive. The political pressure to improve efficiency and obtain results in terms of returns was strong and repeatedly reiterated in European Council’s conclusions and Commission’s communications. This pressure intensified significantly in the last years, following the surge of arrivals of 2015 and 2016 and was reiterated in the European Council’s conclusions, to ensure that irregular migrants, including asylum applicants who did not qualify for international protection, would be

³² D. ACOSTA ARCARAZO, *The Returns Directive: Possible Limits and Interpretation*, in K. ZWAAN (ed.), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen, 2011.

³³ European Council on Refugees and Exiles, *Information Note on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 2009, <https://www.refworld.org/docid/496c61e42.html>.

³⁴ M. MORARU, *EU Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?*, in E. TSOURDI, P. DE BUYCKER, *Research Handbook on EU Migration and Asylum Law*, Cheltenham, 2022.

³⁵ D. ACOSTA ARCARAZO, *The Charter, Detention and Possible Regularization of Migrants in an Irregular Situation under the Returns Directive: Mahdi*, in *Common Market Law Review*, 2015, n. 5, pp. 1361-1378; M. BASILIEN-GAINCHE, *Immigration Detention under the Return Directive: The CJEU Shadowed Lights*, in *European Journal of Migration and Law*, 2015, pp. 104-126.

³⁶ EU Court of Justice, First Chamber, judgement 28.04.2011, *El Dridi*, case C-61/11, ECLI:EU:C:2011:268, para. 52; EU Court of Justice, Grand Chamber, judgement 6.12.2011, *Achughbabian*, case C-329/11, ECLI:EU:C:2011:807, para. 33; EU Court of Justice, First Chamber, judgement 6.12.2012, *Md Sagor*, case C-430/11, ECLI:EU:C:2012:777, para. 47 ; see also M. MORARU, *EU Return Directive: a cause for shame or an unexpectedly protective framework?*, op. cit.

³⁷ EU Court of Justice, Grand Chamber, judgement 18.12.2014, *Abdida*, case C-562/13, ECLI:EU:C:2014:2453, paras 45, 64; EU Court of Justice, First Chamber, judgement 30.09.2020, *LM*, case C-402/19, ECLI:EU:C:2020:759, para. 39; EU Court of Justice, First Chamber, judgement 30.09.2020, *B.*, case C-233/19, ECLI:EU:C:2020:757, para. 68.

³⁸ European Commission – DG Home Affairs, *Evaluation on the Application of the Return Directive (2008/115/EC) – Final Report*, 2013.

³⁹ P. STUTZ, F. TRAUNER, *The EU’s ‘return rate’ with third countries: Why readmission agreements do not make much difference*, in *International Migration*, 2022, n. 60, pp.154-172.

sent back to their countries of origin and transit.⁴⁰ Return policy is considered the main solution to the crisis.⁴¹ The EU focused on strengthening cooperation with third countries to improve cooperation on return and readmission and increased its externalisation agenda to tackle the root causes of irregular migration.⁴² The Commission initially provided new tools and guidance on how to implement the directive and increase the return rate, by presenting an action plan⁴³ and handbook on return⁴⁴ in 2015, both later revised in 2017,⁴⁵ and a Recommendation on ‘making returns more effective’ when implementing the Return Directive.⁴⁶

Political crisis and policy-making.

The political context has been influenced by the aftermaths of the adoption of the Council’s relocation decisions of September 2015 by qualified majority voting under the Luxembourg Council’s Presidency.⁴⁷ Those decisions were the first ones adopted by qualified majority voting in the migration and asylum policy area, where unanimity and consensus are favoured, although several Member States opposed it.⁴⁸ While Central and Eastern Europe Member States (Poland, Hungary, Czechia and Slovakia) were by far the most vocal on the topic, other Member States were reluctant to receive a mandatory quota of refugees from frontline Member States.⁴⁹ The adoption of the relocation decision created a division in the Council over the question of solidarity, which later influenced the negotiation of other legislative proposals in this policy area, including the Common European Asylum System reform which was presented by the Commission in 2016.⁵⁰

⁴⁰ European Council, *Conclusions on the Future of the Return Policy*, Press Release 711/15, 8.10.2015.

⁴¹ D. DEBONO, *Returning and Deporting Irregular Migrants: Not a Solution to the “Refugee Crisis”*, in *Human Geography*, 2016, n. 2, pp. 101-112.

⁴² Valletta Summit on Migration, *Joint Valletta Action Plan*, 11.11.2015.

⁴³ Communication to the European Parliament and the Council, *EU Action Plan on Return*, 9.9.2015, COM/2015/0453 final.

⁴⁴ European Commission, *Return Handbook*, 9.9.2015.

⁴⁵ Commission Recommendation (EU) 2017/2338 *Establishing a Common “Return Handbook” to Be Used by Member States’ Competent Authorities When Carrying out Return-Related Tasks*, 19.12.2017, OJ L 339, pp. 83-159 ; *Communication on a More Effective Return Policy in the European Union - A Renewed Action Plan*, 2.3.2017, COM/2017/0200 final.

⁴⁶ Commission Recommendation (EU) 2017/ 432 *on Making Returns More Effective When Implementing the Directive 2008/115/EC of the European Parliament and of the Council*, 11.3.2017, OJ L 66.

⁴⁷ Council Decision (EU) 2015/1523 *Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece*, 15.09.2015, OJ L 239; Council Decision (EU) 2015/1601 *Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece*, 24.9.2015, OJ L 248.

⁴⁸ C. ROOS, *Opposition or Consensus in the Justice and Home Affairs Council? The How and Why of Increasing Member State Contestation over EU Policy*, in *Journal of European Integration*, 2019, n. 5, pp. 569-86.

⁴⁹ E. GUILD, C. COSTELLO, and V. MORENO-LAX, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece*, Study Requested by the LIBE Committee, 2017.

⁵⁰ C. RIZCALLAH, *Facing the Refugee Challenge in Europe: A Litmus Test for the European Union: A Critical Appraisal of the Common European Asylum System through the Lens of Solidarity and Human Rights*, in *European Journal of Migration and Law*, 2019, n. 2, pp. 238-260.

The recast Return Directive proposal was presented in September 2018, in a divided political context. It was prepared during the summer of 2018, after a diplomatic crisis over the reception of migrants saved during search and rescue operations by NGO ships in the Central Mediterranean.⁵¹ Disputes over migration revived tensions on the safeguard of the Schengen area⁵². The successive reintroduction of border control within the EU, in response to the previous years' migration crisis, was questioning the existence and validity of the border-free zone, and threatening the trust between the Member States. One of the solutions discussed by the European Council and pushed by Austria was to establish controlled centres on EU territory⁵³ and regional disembarkation platform. The revision of the Directive was announced at the European Council in June 2018.⁵⁴ It was meant to be a signal for the Member States to unlock the negotiations of the Common European Asylum System, presented in 2016 (extract from interview). The proposal was also meant to acknowledge the requests of some Member States to reinforce external border management and ensure faster and better returns. The recast Return Directive was presented together with the reform of the European Border Coast Guards, adopted in 2019.⁵⁵ The legislative package was a political response to the situation, to rebuild mutual trust between Member States (extract from interview).

The recast Return Directive proposal was prepared in two months, to be presented at the European Council in Salzburg in 2018, as a “contribution from the European Commission to the Leaders’ meeting”⁵⁶. Because of the tight deadlines, and the urgency that was perceived at that time at the political level, the Commission had to use faster procedures (extract from interview). The proposal was not preceded by an impact assessment report or a consultation with the stakeholders required by the Better Regulation Guidelines. The lack of an impact assessment is justified in the explanatory memorandum of the proposal by the urgency, but also because “an in-depth assessment of the key issues in the field of return has been accomplished”,⁵⁷ referring to the Action

⁵¹ BBC News, *Italy Warns EU Partners on Migrant Deal Ahead of Summit*, 21.06.2018, <https://www.bbc.com/news/world-europe-44561959>.

⁵² BBC News, *Europe Migrants: Italy Warns Schengen Is “at Risk”*, 24.06.2018, <https://www.bbc.com/news/world-europe-44594003>.

⁵³ N. BULCKAERT, “*Controlled Centres*” for Migrants – Not “Hotspots”, Say EU Leaders, www.euractiv.com, 2.06.2018, <https://www.euractiv.com/section/future-eu/news/controlled-centres-for-migrants-not-hotspots-say-eu-leaders/>.

⁵⁴ European Council Conclusions, EUCO 9/18, 28.06.2018.

⁵⁵ Regulation (2019/1896) of the European Parliament and of the Council *on the European Border and Coast Guard and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, 14.11.2019, OJ L 295.

⁵⁶ Commission Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast). A Contribution from the European Commission to the Leaders’ Meeting in Salzburg on 19-20 September 2018., COM(2018) 634 final.

⁵⁷ *Ibidem*.

Plans on Return,⁵⁸ the Recommendation of making returns more effective,⁵⁹ the Return Handbooks,⁶⁰ and Schengen evaluations on return. Based on those, the Commission stated that “the revision of the existing Directive [was] the most appropriate option both in terms of substance and timing”.⁶¹

The legislative proposal did not resolve the political crisis, as the Commission intended it to. The Return Directive was “more a political impetus than a strict necessity”, meant to reassure the Member States and unblock the situation (extracts from interviews). The directive proposal is more restrictive than the one currently in force, to comply with Member States’ requests and does not offer concrete solutions to the challenges to the implementation of return decisions. The 2016 Common European Asylum System proposal was abandoned and later substituted with the 2020 New Pact on Migration and Asylum. Several Member States still hold onto their internal borders, despite a recent judgement by the CJEU stating that internal border controls could be prolonged only under strict conditions, not currently met.⁶²

When the European Parliament received the proposal, the appointed Rapporteur Judith Sargentini (Greens/EFA) and shadow rapporteurs, and her successor following the 2019 European elections, Tineke Strik (Greens/EFA) proceeded to introduce additional pieces of evidence in the form of a substitute impact assessment⁶³ and other analysis.⁶⁴ The absence of an impact assessment was also highlighted by other stakeholders including the European Economic and Social Committee (EESC), the EU Agency for Fundamental Rights, as well as the civil society due to the potential impact on the fundamental rights of migrants.⁶⁵ The EESC criticized the lack of data and estimates on the application of the directive currently in force, and the absence of an explanation for the low return rate.

⁵⁸ Communication to the European Parliament and the Council on an EU Action Plan on Return ; Communication to the European Parliament and the Council on a More Effective Return Policy in the European Union - A Renewed Action Plan.

⁵⁹ Commission Recommendation (EU) 2017/ 432 *on Making Returns More Effective When Implementing the Directive 2008/115/EC of the European Parliament and of the Council.*

⁶⁰ Commission Return Handbook; Commission Recommendation (EU) 2017/2338 *Establishing a Common “Return Handbook” to Be Used by Member States’ Competent Authorities When Carrying out Return-Related Tasks.*

⁶¹ Commission Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast). A Contribution from the European Commission to the Leaders’ Meeting in Salzburg on 19-20 September 2018.

⁶² EU Court of Justice, Grand Chamber, judgement 26.04.2022, cases C-368/20; C-369/20.

⁶³ K. EISELE ET AL., *The Proposed Return Directive (Recast): Substitute Impact Assessment.* Study – European Parliament Research Service, 2019.

⁶⁴ I. MAJCHER, T. STRIK, *Legislating without Evidence*, op. cit.

⁶⁵ European Economic and Social Committee, *Opinion on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast).* SOC/608, 23.01.2019; European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, 2018; European Union Agency for Fundamental Rights, *The Recast Return Directive and Its Fundamental Rights Implications* (Luxembourg: Publications Office of the European Union, 2019).

Return Directive and Fundamental Rights.

The lack of research and evidence in policy-making impacts the effectiveness of the policy, which focuses on symbolic measures rather than properly addressing the shortcomings of the existing directive. The challenges to the implementation of return decisions identified by the Commission and the European Migration Network⁶⁶ include fragmentation of national practices in the implementation of the Directive, particularly regarding the interpretation of the risk of absconding or the use of detention, and the lack of cooperation by third-country nationals to be returned, and from their countries of origin, to comply with the EU readmission agreements and arrangements. The main revisions introduced by the 2018 Recast of the Directive regard nine articles inducing the following changes: introduction of a list of criteria to determine the existence of a risk of absconding (art. 6), obligation for the third-country nationals to cooperate with national authorities during the return procedure (art. 7), obligation for the Member States to immediately issue a return decision following the decision of termination of the legal stay, including for a negative asylum decision (art. 8), introduction of a list of cases in which it is mandatory not to grant a period for voluntary departures (art. 9), although the CJEU made it a mandatory provision in *Z.Zh and I.O*⁶⁷ with restricted exceptions. The proposal introduces in addition the possibility for Member States to impose entry bans without issuing a return decision, and to issue an entry ban during border checks (art. 13), and the obligation for Member States to set up a national return management system to process the information for the implementation of the directive, linked to the central system established as part of the European Border Coast Guard Directive (art. 14). The directive includes several modifications regarding remedies and appeals. In particular, it establishes that only one level of judicial remedy shall be available to appeal against a return decision resulting from a negative international protection decision, and introduces a five days limit to lodge it (art. 16). Article 16(3) of the proposed directive says that the enforcement of the return decision shall not be suspended when the third-country national introduces an appeal against a first or subsequent appeal, unless a court decides otherwise. Regarding detention, the directive introduces an additional ground for threats to public and national security, as well as a minimum period of detention of three months (art. 18). However, detention on those grounds cannot be based on the Return Directive according to the *Kadzoev* ruling of the CJEU.⁶⁸ Lastly, the directive establishes a return border procedure, linked to the asylum border procedure introduced by the Asylum Procedures

⁶⁶ European Migration Network, *The Effectiveness of Return in EU Member States: Challenges and Good Practices Linked to EU Rules and Standards – Synthesis Report.*, 2017, <https://www.emn.at/wp-content/uploads/2017/12/EMN-Synthesis-Report-2017-The-effectiveness-of-return-in-EU-Member-States.pdf>.

⁶⁷ EU Court of Justice, Third Chamber, judgement 11.06.2015, *Z. Zh and O*, case C-554/13, ECLI:EU:C:2015:377, para. 76.

⁶⁸ EU Court of Justice, Grand Chamber, judgement 30.11.2009, *Kadzoev*, case C-357/09, ECLI:EU:C:2009:741, para. 70.

Regulation⁶⁹. The procedure laid down in Article 22 of the Recast Return Directive establishes that following an asylum border procedure conducted at the external borders of the EU, Member States shall issue a return decision in a simplified form to the third country national, already detained as part of their asylum procedure, without a flexible period for voluntary return, and shorter time limit to lodge an appeal.

The European Parliament substitute impact assessment and other civil society comments highlighted that the Recast Return Directive would have an impact on several social and human rights of migrants, enshrined in the Charter of Fundamental Rights (CFR).⁷⁰ Article 16 on appeal and remedies is considered to particularly endanger the fundamental rights of migrants, because of the non-suspension of the enforcement of a return decision following a first appeal, which might be a breach of the principle of *non-refoulement* (Article 19 CFR), and potentially of the right to health if applied to applicants with serious illnesses. In general, the right to an effective remedy (Article 47 CFR) is likely to be breached because of the five-day limit, which might, overall reduce the quantity and quality of appeals. The addition of criteria for determining the risk of absconding and the risk of detention might result in the violation of the right to liberty (Article 6 CFR). The additions of grounds of detention might increase the risk of arbitrary detention, and thus result in more detention, including of family and children, and the introduction of a minimum period of detention of three months risks being disproportionate and might affect the rights to education (article 14 CFR), health, private and family life (Article 7 CFR), as well as the best interest of the child (article 24 CFR). The proposal does not exclude child detention, which is a regular practice in several Member States.⁷¹ The directive fails to take into consideration the situation of non-removable migrants, who find themselves in a legal loophole being irregular on the EU territory, but unable to be returned thus ending up in precarious situations.⁷² Indeed, some EU Member States have implemented practices which keep third-country nationals from falling into “chronically irregular situations”, which could have been mentioned by the Commission.⁷³

⁶⁹ Commission Amended proposal for a Regulation of the European Parliament and of the Council *establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, 23.09.2020, COM/2020/611 final.

⁷⁰ K. EISELE ET AL., *The Proposed Return Directive (Recast)*, op. cit.; European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*; European Union Agency for Fundamental Rights, *The Recast Return Directive and Its Fundamental Rights Implications*.

⁷¹ A. KARATZAS, *Bringing Child Immigration Detention to an End: The Case of EU Return Procedures*, European Policy Centre, 2022.

⁷² F. LUTZ, *Non-Removable Returnees under Union Law: Status Quo and Possible Developments*, in *European Journal of Migration and Law*, 2018, n. 1, pp. 28-52.

⁷³ European Economic and Social Committee, *Opinion on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)*. SOC/608.

More than a decade after the adoption of the 2008 Directive, the jurisprudence of the CJEU keeps underlining its transposition gap.⁷⁴ Nevertheless, the new proposal focuses on the deterrence aspects of EU policy by introducing and basing its effectiveness on further securitized measures like increased detention and faster procedures, instead of investigating other approaches or pushing for the implementation and transposition of the 2008 Directive in national legislations. The Rapporteurs Sargentini⁷⁵ (until 2019) and Strik⁷⁶ (2019-2024) adopted a less restrictive approach by deleting the border procedure and adding references to the Global Compacts and additional safeguards regarding the best interests of children and detention, as well as removing the single remedies and maintaining the suspensive effects in case of appeal. The draft report by Rapporteur Strik has however not yet been adopted by the Committee on Civil Liberties, Justice and Home Affairs. The Council adopted a partial general approach⁷⁷ in 2019 which includes a conditionality clause for third countries to comply with return and readmission agreements linked to the Visa Code, and which enables returns to any third countries. The Partial general approach also deletes the single level of jurisdiction.

The recast Return Directive was proposed before the presentation of the New Pact on Migration and Asylum, however, it has been included in the roadmap agreed to by the European Parliament and the Council presidencies, to be adopted before the 2024 European elections with the New Pact legislative package. Returns are mainstreamed in all the proposals of the legislative package. The Asylum Procedures Regulation and the Screening Regulation both entail a border procedure, including a return border procedure thus highlighting the two main priorities for the EU in terms of migration policy: return of irregular migrants and external borders management.

4. Policy-making as a crisis-avoidance strategy: New Pact on Migration and Asylum and Proposal for a Screening Regulation

2015 Migration Crisis.

⁷⁴ EU Court of Justice, Sixth Chamber, judgement 8.10.2020, *MO (Zaizoune II)*, case C-568/19, ECLI:EU:C:2020:807, para 33.

⁷⁵ J. SARGENTINI, *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)*(COM(2018)0634 – C8-0407/2018 – 2018/0329(COD)), European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 16.01.2019).

⁷⁶ T. STRIK, *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)* (COM(2018)0634 – C8-0407/2018 – 2018/0329(COD)), European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 21.02.2020.

⁷⁷ Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast) - Partial General Approach*, 7.06.2019.

In 2015, during the crisis, the mechanism regulating the management of the external borders was deemed to be deficient.⁷⁸ In addition to the increase of arrivals, one of the central issues was the secondary movement flows, along the main migratory routes from Greece and Italy, and the reintroduction of internal borders to try and stop those flows, which is one of the main effects of the migration crisis.

In 2015 and 2016 the priority was to reinforce external borders management in frontline Member States, to ensure that the Schengen area remained functioning. The European Agenda on Migration adopted by the Commission laid down the basis for the ‘hotspot approach’ to support frontline Member States, through the deployment of EU agencies, including Frontex, the European Asylum Support Office and Europol, in the management of the external borders, to cope with migratory pressure, and helping with fingerprinting and identification procedures. The ‘hotspot approach’⁷⁹ which the Commission proposed to consolidate in the Screening Regulation, entailed tailored temporary measures to provide operational support to frontline Member States to manage their external borders. It was implemented in the South of Italy and the Greek Islands. The support includes the registration and identification of irregular migrants by Frontex through a screening interview, during which the person can apply for international protection, or after which the person can be returned, but also investigative work on smuggling and trafficking networks, asylum support through the European Asylum Support Office, and help with returns.

The implementation of the hotspot approach has been under tight scrutiny by human rights organizations and the Fundamental Rights Agency of the EU (FRA) and has received a lot of scholarly and judicial attention.⁸⁰ Deficiencies were repeatedly identified, such as systematic delays in asylum procedures, safety issues in the hotspots, including for children and vulnerable persons, and excessive recourse to detention as a border management technique.⁸¹ The situation in the hotspots has been described as inhumane where fundamental rights violations were likely to occur, and poorly monitored.⁸² Italy was condemned by the European Court of Human Rights in *J.A and*

⁷⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A European Agenda on Migration*, COM/2015/0240 final, 13.05.2015.

⁷⁹ European Commission, *Explanatory Note on the “Hotspot” Approach*, 2015, <https://www.statewatch.org/media/documents/news/2015/jul/eu-com-hotspots.pdf>.

⁸⁰ M. PICHOU, *Reception or Detention Centres? The detention of migrants and the EU ‘Hotspot’ Approach in the light of the European Convention on Human Rights*, in *Critical Quarterly for Legislation and Law*, 2016, n. 2, pp. 114-131.

⁸¹ European Union Agency for Fundamental Rights, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on Fundamental Rights in the ‘Hotspots’ Set up in Greece and Italy: February 2019*. (LU: Publications Office, 2019); M. PICHOU, *Reception or Detention Centres? The detention of migrants and the EU ‘Hotspot’ Approach in the light of the European Convention on Human Rights*, cit.; I. MAJCHER, *The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty*, in *Border Criminologies*, 2018.

⁸² S. TAS, *Fundamental Rights Violations in the Hotspots: Who Is Watching over Them?*, in L. TSOURDI, A. OTT, and Z. VANKOVA, *The EU’s Shifting Borders Reconsidered: Externalisation, Constitutionalisation and Administrative Integration*, in *European Papers*, 2022, n. 7, pp. 215-237.

others,⁸³ for implementing the hotspot approach without a clear legal framework, and for inhuman and degrading treatment (art. 3 European Convention of Human Rights – ECHR), and arbitrary deprivation of liberty and detention in the absence of a reasoned decision in the Lampedusa Hotspot (art. 5§1,2,4 ECHR) and for collective expulsion of the applicants to Tunisia, who “had been subjected to a deferred refusal of entry” without having the possibility to challenge it, thus evidencing the undermining and bypassing of procedural guarantees in the hotspots.⁸⁴ In addition to fundamental rights violations, academic research underlined how the hotspot approach had a counter-productive effect by leading to the “clandestinisation” of migrants.⁸⁵ The hotspot approach has contributed to a categorisation of third-country nationals based on their nationality, distinguishing *a priori* the individuals between ‘legitimate’ refugees, and economic migrants, to be returned, introducing a de-facto discrimination.⁸⁶

The functioning of the hotspots differs in Greece and Italy based on national settings (Standard Operational Procedures) the nature of the migratory route and the geographical context. The hotspot approach in Greece following the conclusion of the EU-Turkey Statement of 2016, enabled the generalisation of the border procedure in the islands, where asylum applications are examined directly at the external borders, often in closed facilities and through rapid procedures, pending potential return to Turkey, considered as a safe third country. While border procedures are present in other Member States’ national legislations,⁸⁷ the border procedure applied at the Greek external borders is the blueprint for the management of the external borders.⁸⁸

The European Agenda on Migration, despite focusing on the fight against irregular migration and strengthening the external borders, also proposed a more humane approach to the situation through the relocation of asylum seekers from Italy and Greece to other Member States. This had a twofold objective: to release frontline Member States from the migratory pressure which was weighing on their asylum and reception systems, thus preventing overcrowding in reception centres, and prevent secondary movements by regulating the movement and distribution of asylum seekers in Europe. This mandatory

⁸³ K. Z. GALICZ, *L’approccio hotspot davanti alla Corte Europea dei Diritti dell’Uomo: commento a margine della sentenza nella causa J.A. e altri contro Italia (ricorso n. 21329/18)*, in *Diritti Comparati, Comparare i Diritti Fondamentali in Europa*, blogpost, 2.05.2023. <https://www.diritticomparati.it/lapproccio-hotspot-davanti-alla-corte-europea-dei-diritti-delluomo-commento-a-margine-della-sentenza-nella-causa-j-a-e-altri-contro-italia-ricorso-n-21329-18/>.

⁸⁴ European Court of Human Rights, First section, Judgement 30.06.2023, application no. 21329/18, paras. 94-96, 115-116.

⁸⁵ A. SCIURBA, *Hotspot System as a New Device of Clandestinisation: View from Sicily*, *Opendemocracy.Net*, 25.02.2016.

⁸⁶ R. PALLADINO, A. FESTA, *Migration, Rule of Law, and European Values: an Introduction*, in A. DI STASI, R. PALLADINO, and A. FESTA (eds.), *Migrations Rule of Law and European Values*, Napoli, 2023.

⁸⁷ European Council on Refugees and Exiles, *Border Procedures: Not a Panacea. ECRE’s Assessment of Proposals for Increasing or Mandatory Use of Border Procedures*, 2019.

⁸⁸ 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 Asylum and Migration, 23.09.2020, COM/2020/609 final; M. INELI-CIGER, O. ULUSOY, *Why the EU-Turkey Statement Should Never Serve as a Blueprint*, *Asile* (blog), 8.10.2020, <https://www.asileproject.eu/why-the-eu-turkey-statement-should-never-serve-as-a-blueprint/>.

distribution of asylum seekers was later part of the Dublin IV Regulation proposal included in the Common European Asylum System reform, presented in 2016,⁸⁹ but was strongly opposed by a group of Member States. This tension within the Council forced the Commission to abandon solidarity proposals in the form of a corrective relocation mechanism.⁹⁰ Following this, the policy approach took a securitised turn, to focus exclusively on irregular migration and external border control.

After the terrorist attacks perpetrated in France in November 2015, more Member States reinstated internal border controls, which, for some are still in place.⁹¹ The coexistence of the migratory factor and the terrorism threat resulted in several amendments of the Schengen Borders Code, to increase security checks and verification at the external borders, including through verifications against databases.⁹² The Screening Regulation Proposal presented as part of the New Pact on Migration and Asylum finds its legal basis in the Schengen Border Code.

The New Pact on Migration and Asylum: preventing political crisis with legislative reforms.

The New Pact on Migration and Asylum was presented in September 2020. It came after the failed reform of the 2016 Common European Asylum System package was abandoned. The intention to present a reform of migration and asylum law was included in Ursula von der Leyen's political guidelines⁹³ and announced to the Council at the start of her mandate.⁹⁴ President von der Leyen emphasised the need to better protect the

⁸⁹ Commission Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), 4.05.2016, COM(2016) 270 final.

⁹⁰ M. DUSZCZYK, K. PODGÓRSKA, D. PSZCZÓLKOWSKA, *From Mandatory to Voluntary. Impact of V4 on the EU Relocation Scheme*, in *European Politics and Society*, 2020, n. 4, pp. 470-87.

⁹¹ S. MELCHIOR ET AL., *Dismantling Schengen — Six Months at a Time*, in *EUobserver*, 9.09.2022, <https://euobserver.com/eu-political/156002>; E. GUILD, *Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19*, in *European Journal of Migration and Law*, 2021, n. 4, pp. 385-404.

⁹² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) 23.3.2016, OJ L 77, pp. 1-52; Council of the European Union, *Schengen Borders Code: Council Adopts Regulation to Reinforce Checks at External Borders*, 7.03.2017, <https://www.consilium.europa.eu/en/press/press-releases/2017/03/07/regulation-reinforce-checks-external-borders/>.

⁹³ U. VON DER LEYEN, *A Union That Strives for More. My Agenda for Europe By Candidate for President of the European Commission Ursula von Der Leyen. Political Guidelines for the next European Commission 2019-2024.*, 2019, https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf.

⁹⁴ Council of the European Union, Justice and Home Affairs Council, 2-3.12.2019, <https://www.consilium.europa.eu/en/meetings/jha/2019/12/02-03/>.

external borders and to ensure solidarity. The externalisation of migration policy was presented as the main approach to reach this objective.⁹⁵

However, none of the usual preparatory work was conducted. The New Pact, like the Recast Return Directive and other legislative proposals in the asylum and migration area, was not preceded by an impact assessment report, and by the evidence-based preparatory work required by the Better Regulation Guidelines. The Commission conducted the stakeholders' consultation, but, unlike the Recast Return Directive, the Pact did not go through the usual inter-service consultation at the Commission's level, to ensure that all DGs are consulted before the adoption of the text by the College of Commissioners. Instead, Commissioner Johansson for Home Affairs, and Vice President Schinas, who share the migration portfolio, did a tour of the capitals⁹⁶ to consult with the national governments. Those consultations which took place over two rounds aimed at addressing issues and identifying potential compromises.⁹⁷ The goal of this New Pact indeed was to present a legislative package that would satisfy the Member States before the negotiations, to facilitate consensus upstream, and thus to acknowledge and include the requirements of Member States with opposite migratory needs.⁹⁸

The New Pact is aimed at being “crisis-proof”⁹⁹ and is presented as the solution to heal “the wounds of 2016”¹⁰⁰ referring to the conflict regarding the CEAS Reform and the mandatory relocation of asylum seekers. In its speech on the New Pact on Migration and Asylum, VP Schinas stated that the New Pact aimed at rectifying the mistakes of 2016, namely, to present a strong “solidarity framework” without the “corresponding responsibility elements in the form of border and screening procedures”.¹⁰¹ The preparatory work on the Pact relies on the inclusion of “early concessions” to Member States and ministers of the interiors to prevent the continuous deadlock and political crisis which had been taking place in the policy area since 2016. The Pact is accompanied by a Staff Working Document only, which reports on the identified challenges based on the consultations with Member States, and to a certain extent with the civil society, and on public data and statistics. In addition to the fragmented approach in migration management policies, the Commission underlines the low return rate, the lack of

⁹⁵ U. VON DER LEYEN, *A Union That Strives for More. My Agenda for Europe By Candidate for President of the European Commission Ursula von Der Leyen. Political Guidelines for the next European Commission 2019-2024.*

⁹⁶ Y. JOHANSSON, Ylva Johansson on X: “Update on my tour of capitals for a new pact on #migration and #asylum: After meeting with FI, CY, PT, LV, EE here at #JHA in Zagreb, I have now held direct face to face concrete dialogues with 15 EU Member States. I am listening closely and we are steadily making progress. <https://t.co/73TZ5hbCuh>”, 24.01.2020, <https://twitter.com/YlvaJohansson/status/1220689889466945538>.

⁹⁷ E. BROUWER ET AL., *The European Commission's Legislative Proposals in the New Pact on Migration and Asylum.*

⁹⁸ B. DE MIGUEL, *Ylva Johansson: “La Crisis de Siria Nos Enseñó Que Ningún País Puede Gestionar La Migración Por Sí Solo”*, in *El País*, 17 February 2020, https://elpais.com/internacional/2020/02/15/actualidad/1581792619_152062.html?event_log=oklogin.

⁹⁹ Commission Roadmap - New Pact on Migration and Asylum, Ref. Ares(2020)4017751 30.07.2020.

¹⁰⁰ M. SCHINAS, *Speech by Vice-President Schinas on the New Pact on Migration and Asylum*, 23.09.2020, https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1736.

¹⁰¹ *Ibidem.*

implementation of the border procedure at the national level and the lack of effective solidarity mechanisms to ensure a fair burden-sharing.¹⁰²

The substitute impact assessment required by the European Parliament underlines the dubious interpretation of data within the Staff Working Documents.¹⁰³ The numbers on mixed migration flows, on secondary movements or returns in particular do not take into consideration several factors such as the speculative nature of secondary movement data which are not easily quantifiable, or the refusal to take into consideration independent studies on return which demonstrate that for the most part, the low return rate is out of the Member States' and third country nationals' control. In this sense, the focus on return is disproportionate and unrealistic.

The Pact is a result of the crisis which is currently ruling the migration and asylum policy area. The efficiency of the proposals is not supported by evidence, and thus fails to address the existing problems, and in particular, the low implementation of the EU asylum and migration *acquis*.¹⁰⁴ One of the results is the restrictive and securitised approach to migration through a focus on the management of external borders and the generalisation of border procedures, due to the requests of Member States, at the expense of the rights of migrants.

Screening and Fundamental Rights.

The proposal for a Screening Regulation¹⁰⁵ enshrines the hotspot approach in EU law.¹⁰⁶ It establishes a pre-entry screening applicable to all third-country nationals either crossing the EU external borders irregularly or following search and rescue operations. Screening also applies to third-country nationals who apply for international protection in transit zone and border crossing points but who do not fulfill the entry conditions laid down in the Schengen Borders Code (art. 3). The screening can also be applied to third-country nationals within the national territory if they might have crossed the external borders irregularly (art. 5). The screening is aimed at identifying the third country national and run a series of health checks (art. 9) and verifications against security databases (art.

¹⁰² Commission Staff Working Document Accompanying the document 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]', 23.09.2020, SWD/2020/207 final.

¹⁰³ E. BROUWER ET AL., *The European Commission's Legislative Proposals in the New Pact on Migration and Asylum*, op. cit.

¹⁰⁴ G. CORNELISSE, M. RENEMAN, *Border Procedures in the Commission's New Pact on Migration and Asylum*, op. cit.

¹⁰⁵ Commission Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, 23.09.2020, COM(2020) 612 final.

¹⁰⁶ G. CAMPESI, *The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" for Migration Management*, in S. CARRERA, A. GEDDES (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, European University Institute, 2021, pp. 180-194.

10 and 11) to ensure that they do not pose a threat to public security (art. 13). The screening procedure is aimed at ensuring that the third country national is then referred to a dedicated procedure based on their situations at the earliest stage possible: either a request for international protection if the person wishes to seek asylum, laid down in the Asylum Procedures Regulation,¹⁰⁷ or a return procedure per the Return Directive, or to relocate the third country national (art. 14). Pieces of information that might be useful for the following procedures and which were collected during the screening are to be transmitted to the relevant authorities through a screening form (art. 14(1)). Like with the hotspot approach, screening procedures shall be carried at or in proximity to the external borders (art. 6), with the idea that the person concerned is authorized to formally ‘enter the territory’ only after the screening (art. 4) unless the third-country national is intercepted within the EU territory. This non-entry fiction already exists in several national legislations,¹⁰⁸ it puts the third-country nationals who have not entered the territory, and those who have but have not been admitted by the competent authorities in the same category.¹⁰⁹ Although migrants are present on the territory, they do not have access to their full rights, such as those laid down in the Reception Conditions Directive until they are officially admitted, meaning, as long as they are going through the screening border procedure, and possibly after if they are not referred to an international protection procedure.¹¹⁰ Through the Screening Regulation, the Commission suggests applying it throughout the EU territory.

The screening shall be conducted within a 5-day limit of time and seems undoable without de-facto detention. The Screening Regulation requires Member States to adopt a fundamental right monitoring mechanism to ensure compliance with EU law and international obligations in situations of detention and during the screening procedure and access to the relevant procedures (art. 7). As the procedure requires verifications against IT databases, the Regulation proposal also includes the relevant articles amended in the related databases legislations.

Several organisations underlined the ongoing experience of the hotspot approach in Greece and Italy to raise concerns regarding the Screening Regulation.¹¹¹ The generalisation of the fiction of non-entry, which is already implemented in some Member States in transit zones is deemed worrying because it could potentially undermine

¹⁰⁷ Commission Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, 23.09.2020, COM(2020) 611 final (2020).

¹⁰⁸ F. RONDINE, *Between physical and legal borders: the fiction of non-entry and its impact on fundamental rights of migrants at the borders between EU law and the ECHR*, in *Cahiers de l'EDM*, 2022, 8.

¹⁰⁹ M. MOUZOURAKIS, *More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status*, in *European Law Journal*, 2021, pp. 1-10.

¹¹⁰ C. MOLINARI, *The Borders of the Law: Legal Fictions, Elusive Borders, Migrants' Rights*, in *Politics and Governance*, 2022, n. 2, pp. 239-245 ; V. MITSILEGAS, *The EU external border as a site of preventive (in)justice*, in *European Law Journal*, 2022, n. 4-6, pp. 263-280.

¹¹¹ ASGI, *The New Proposal for a Screening Procedure at the External Borders*, Comments and Suggestions, November 2021.

Member States' compliance with obligations regarding fundamental rights¹¹² and Reception conditions, such as living conditions and mandatory vulnerability assessment which are left to the discretion of the competent authorities.¹¹³ The generalisation of anomalous zones where derogatory measures and sub-standard living conditions are normalized raises concerns.¹¹⁴ The screening and the other border procedures cannot be conducted without a restriction of the freedom of movement, and will likely require de-facto detention, and lead to a violation of the right to liberty (art. 6 CFR).¹¹⁵ The Screening procedure eliminates the distinction between asylum seekers, who are, in international and EU law a category subject to a specific treatment regarding conditions of entry and stay, and other migrants, who are all submitted to the same procedure. The Screening and the New Pact in general consider asylum seekers as irregular migrants until proven otherwise, inevitably leading to the reinforcement of harmful stereotypes.¹¹⁶ The information included in the Screening form for the referral to the following procedures will be determinant.¹¹⁷ As such, there is a risk of discrimination and exclusion based on them, such as nationality, to access the right to asylum (art. 21 CFR), as it has been seen in the hotspots, which could result in push-backs (art. 19 CFR).¹¹⁸ Specifically, border procedures rely on faster, ad-hoc procedures which cannot fully guarantee the respect of procedural guarantees (art. 47 CFR), legal safeguards and fair and humane access to an asylum procedure.¹¹⁹ Besides the issues related to the screening at the borders, civil society organisations, as well as the Parliament, warned against the risk of racial profiling, and called for the elimination of Article 5 of the Screening Regulation which lays down the conditions for the screening of third-country nationals apprehended within the EU

¹¹² K. SODERSTROM, *An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation*. ECRE Commentary, 2022.

¹¹³ L. JAKULEVIČIENĖ, *Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?*, in D. THYM, ODYSSEUS NETWORK (eds.), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Nomos Verlagsgesellschaft mbH & Co. KG, 2022, pp. 81-97; T. GAZI, *The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups*, in *European Papers*, 2021, n. 6, pp. 167-185.

¹¹⁴ G. CAMPESI, *The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" for Migration Management*, cit.

¹¹⁵ G. CORNELISSE, *Border Control and the Rights to Liberty in the Pact: A False Promise of 'Certainty, Clarity and Decent Conditions'*, in D. THYM, ODYSSEUS NETWORK (eds.), *Reforming the Common European Asylum System*, op. cit., pp. 61-79.

¹¹⁶ L. JAKULEVIČIENĖ, *Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?*, cit.

¹¹⁷ J. VEDSTED-HANSEN, *Admissibility, Border Procedures and Safe Country Notions*, in S. CARRERA, A. GEDDES (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, op. cit., pp. 170-177.

¹¹⁸ S. DRÄGER, *The EU Screening Regulation Proposal and the Right to Asylum - Cementing Fortress Europe?*, in *Refugee Law Initiative Paper*, Working Paper, 2022, n. 64.

¹¹⁹ European Council on Refugees and Exiles, *Border Procedures: Not a Panacea. ECRE's Assessment of Proposals for Increasing or Mandatory Use of Border Procedures*.

territory.¹²⁰ While the establishment of fundamental rights monitoring was praised, the Commission missed the opportunity to apply it to all border procedures and not just the pre-screening phase, and to ensure its independence.¹²¹ It is however a positive development of the New Pact of Migration and Asylum.

The Screening Regulation is part of the ongoing negotiations of the New Pact. At the time of writing this article, the Parliament and the Council reached a political agreement, which will be submitted to the Parliament's plenary before the 2024 European elections. The text includes mandatory vulnerability and health checks, based on the Parliament's report.¹²² Despite the attempts by Parliament Rapporteur, Birgit Sippel (S&D) to have a less restrictive text, article 5 of the Regulation on the apprehension within the EU territory, has been confirmed in the final text. In the final text, an article lists the requirements during the screening, including the necessity for Member States to ensure effective access to organisations and persons providing counselling, and to ensure standards of living respectful of their physical and mental health in line with the Charter. The text also includes an article on special safeguards for minors. The text is however in line with the Council's mandate for negotiations,¹²³ which didn't extensively modify the Commission's proposal. The agreement on the New Pact is a political victory for the von der Leyen Commission, and, if adopted by the Parliament, will end a 10-year-long deadlock.

5. Conclusion

Although crises can come from concrete events, they are, in part, constructed and reinforced by a narrative, and social and political dynamics. At the EU level, crises regard irregular migration flows, whereas humanitarians and civil society organisations attempt to alarm the institutions and bring them to act about the deaths in the Mediterranean. The 2015 migration crisis scarred the European Union, exposed its failures at a political level, and enabled the reinforcement of an already existing Fortress Europe and restricted migration policy. If adopted, the New Pact on Migration and Asylum will generalise the

¹²⁰ *Despite Widespread Racial Profiling in the EU, Legislators Are Considering Measures That Would Increase It. Joint Civil Society Statement on Article 5 of the EU Screening Regulation*, November 2023, https://borderviolence.eu/app/uploads/Joint-Statement_Art5-Screening.pdf.

¹²¹ M. STEFAN, R. CORTINOVIS, *Setting The Right Priorities: Is The New Pact on Migration and Asylum Addressing the Issue of Pushbacks at EU External Borders?*, in S. CARRERA, A. GEDDES (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, op. cit., pp. 180-194.

¹²² Parliament Report on the *Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third-Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM(2020)0612 – C9-0307/2020 – 2020/0278(COD))*, A9-0149/2023, 14.04.2023.

¹²³ Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 – Mandate for Negotiations with the European Parliament*, 1706.2022.

use of detention, reinforce external borders and the dependence on third countries to manage the EU's external borders and migration policy, at the expense of the rights of migrants, who will have to rely on judicial control to monitor potential violations.¹²⁴ Given the amount of evidence regarding the lack of efficiency of the EU migration policies and their impact on the fundamental rights of migrants, collected by NGOs, institutions and researchers, the Commission could easily address the existing shortcomings and implementation deficiencies. However, in the absence of impact assessments justifying the adoption of the proposed measures, it is unclear how they would increase efficiency in returns and migration management.¹²⁵

Although this paper focuses on two pieces of legislation proposals, the derogation from institutional procedures and the normalization of exceptionality is an established practice at the Commission's level, particularly in the DG Home Affairs. The crisis governance that is being implemented in the migration and asylum policy area justifies the perpetuation of an undisputed securitised policy, not based on facts and evidence, but on short-term political victory, such as the adoption of legislative reform. It ignores the real needs of the EU and the positive effects of migration to focus on furthering the EU migration and asylum policy integration. The consequence of this crisis governance is the shrinking of the space dedicated to debates, deliberations and agency. In this context, the Commission is relegated to an administrative role, where politics, supported by evidence are ignored, to sustain an ideological discourse. The Commission does not act as the guardian of the treaties and of the Charter, and as a neutral policy-maker relying on its technocratic expertise, but as a secretariat of the Member States, legitimising intergovernmental dynamics, and far-right narratives. Instead, of leaning into short-term political interests and crisis prevention strategies, the Commission could promote a rational and evidence-based discourse on migration over the existing securitised approach. Migration is not only beneficial to the EU, it is greatly needed with the current demographic challenge. Sustainable and ambitious legal migration policies safeguarding the fundamental and social rights of third-country nationals need to become a priority in the upcoming years.

ABSTRACT: This article aims to explore the impact that policy-making in times of crisis can have on the fundamental rights of migrants. In times of emergency and crisis situations, European institutions tend to bypass fundamental steps of the policy-making procedures, including the collection of evidence on which the legislative proposal will be developed. The permanent crisis situation in asylum and migration

¹²⁴ G. CORNELISSE, M. RENEMAN, *Border procedures in the Commission's New Pact on Migration and Asylum: A case of Politics outplaying rationality?*

¹²⁵ M. MORARU, *The Future Architecture of the EU's Return System Following the Pact on Asylum and Migration: Added Value and Shortcomings*, in D. THYM, ODYSSEUS NETWORK (eds.), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Nomos Verlagsgesellschaft mbH & Co. KG, 2022, pp. 187-206.

has led the EU institutions, particularly the European Commission to work in crisis mode since 2015. The Recast Return Directive Proposal was presented in 2018, and the Screening Regulation Proposal was presented in 2020 as part of the New Pact on Migration and Asylum. They were both presented during political crises and are currently under negotiation. Those texts did not go through evidence-based preparatory work within the Commission (such as impact assessments and stakeholders' consultations), and their contents are emblematic of the securitised and restrictive approach at the EU level, thus making them very symbolic and political policy proposals. This restrictive trend goes against the existing fact-based need, acknowledged by the Commission, to attract migrants to address demographic challenges. This contribution seeks to analyse, through an interdisciplinary approach based on qualitative research methods, the impact that crises have on the EU decision-making, and their consequences for the human rights of migrants, based on two case studies of two legislative proposals currently under negotiation: the Recast Return Directive Proposal and the Screening Regulation Proposal.

KEYWORDS: EU migration policy – crisis – security – returns – evidence-based policy-making.