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# The European Union's Response to the Refugee Movements from Ukraine: The End of the Solidarity Crisis?

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*This article explores whether triggering the 'Temporary Protection' Directive (TPD) to deal with the refugee movements from Ukraine has heralded the end of the solidarity crisis in the European Union's asylum policy. It makes two major contributions to the literature: first, it shows how the mode of responsibility allocation in the Common European Asylum System by a costs-by-cause principle violates the EU's solidarity principle, creating a continuous solidarity crisis that was exacerbated after the refugee influx of 2015/2016. Second, it demonstrates how, by invoking the TPD, the EU exhibits continuity in both eroding asylum cooperation and putting increasing emphasis on border controls focusing primarily on the externalisation and deflection of unwanted migration. The EU evades the dysfunctionalities in its asylum system by employing the temporary protection scheme, continuing a policy approach of more national discretion in terms of refugee protection while, at the same time, Member States' policy preferences vis-à-vis non-Ukrainian protection-seekers have not changed. Taking into account the disproportionate distribution of responsibilities it has created among the Member States, the TPD decision has not ended the solidarity crisis in Europe's asylum policy.*

**Keywords:** European Union, asylum, solidarity, crisis, Ukraine, temporary protection

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## Introduction

The number of people seeking refuge has been steadily increasing worldwide for a decade, more than doubling during this period (UNHCR 2023). It is fair to say that the planet is facing an exacerbating forced displacement crisis that is, for the most part, shouldered by middle- and low-income countries. In contrast, there still seems to be a commonly held presumption that the EU faced an extraordinary refugee crisis in 2015/2016. In actual fact, in those years Europe only accounted for about 5 per cent of the global number of displaced people (UNHCR 2018). Considering the political impact which their movements had, it is important to realise that the then EU-28 only received 12 per cent of all Syrian refugees (Eurostat 2019). Against this backdrop, it seems beside the point to frame the political crisis of 2015/2016 as a ‘European refugee crisis’.<sup>1</sup> In addition, this terminology invokes the notion that the crisis might somehow be the fault of people seeking protection and not, as shown in this paper, the failure of Europe’s asylum governance.

This failure was widely exhibited when some EU Member States went so far as to openly revolt against the common asylum policy, following a 2015 Council decision aimed at exercising solidarity and the fair sharing of responsibility by relocating asylum-seekers from Italy and Greece (Council Decision 2015/1601). This conflict was never resolved, not even after the Court of Justice of the European Union (CJEU) had confirmed the lawfulness of the relocation scheme in 2017 and found Poland, Hungary and the Czech Republic guilty of continued breach of Union law (CJEU 2020a). This contentious episode was a salient example of an apparent solidarity deficit in Europe’s asylum policy. Ever since this symptomatic asylum policy failure to find a joint solution based on solidarity, it seems like the EU has retreated to finding solutions mainly in the area of border controls, focusing on an overarching objective of preventing unauthorised migration in order to keep asylum applications to a minimum.

Solidarity is invoked even more prominently than usual in times of crisis, be it in 2015/2016 or in the Ukraine crisis following the unprovoked Russian invasion on 24 February 2022. While the former has revealed deep rifts in EU asylum cooperation that are evidently closely connected to the question of solidarity, the latter has launched a departure from the usual *modus operandi*. Following the refugee influx from Ukraine and in an unprecedented move, the Council has activated the ‘Temporary Protection’ Directive (TPD) (Council Directive 2001/55/EC). Devised in 2001 as a measure to manage refugee flows from the war-torn Balkans, it was never triggered until 4 March 2022. Expecting up to 4 million refugees from Ukraine after Russia’s attack, the Commission quickly proposed to invoke the TPD. The Member States swiftly agreed and implemented the measure only 9 days after the invasion. Consequently, questions arise as to why the TPD was activated in 2022 and not in 2015. This article will address the following questions: Why is there variation in the assessment which the EU has made regarding the influxes in 2015 and in 2022? Wherein lie the differences in the respective policy solutions that have been applied? Does the response to the refugee movements from Ukraine mean the end of the solidarity deficit in the European Union’s asylum policy?

In what follows, the case will be made for an understanding of Europe’s asylum policy as being characterised by an underlying, continuous solidarity crisis that has been in existence since its very beginnings (Saracino 2018). The root of the problem lies in its centrepiece, which allocates the responsibilities for asylum claims between the Member States – the Dublin system.<sup>2</sup> Its logic of responsibility allocation violates the Union’s constitutive solidarity principle, making the emergence of a crisis like that of 2015/2016 the bloc’s own responsibility. Accordingly, this contribution will first clarify the role, shape, scope and content of the solidarity principle in the EU in general, as well as its specification in the Common European Asylum System (CEAS). To this end, an analytical framework based on a conceptual history approach and extensive content, legal and document analysis will be presented to provide an accurate understanding of solidarity in the EU and its specification in its asylum policy. The paper will continue to explicate why the CEAS is characterised by a constant

solidarity crisis, of which the political crises are just prominently observable symptoms. The subsequent discussion of the rationale behind the activation of the TPD reveals that bypassing the European asylum system has not led to a mitigation of its inherent solidarity deficit. The analysis will demonstrate that, due to observable continuities in its overall policy approach *vis-à-vis* non-Ukrainian protection-seekers and the failure of the TPD decision to create a fair sharing of responsibilities between the Member States, the European Union's response to the refugee movements from Ukraine has not heralded the end to the solidarity crisis.

### The solidarity principle in the EU and its asylum policy

Policy outputs in the European Union are cast into law to ensure the adherence to and consistency of the common political will. Compliance with Union law is a prerequisite if the European Union is to function as a community based on the rule of law (Zuleeg 2010). European Union politics and law, therefore, are inextricably linked, which is why a sustained violation of Union law by its members can amount to a *de facto* withdrawal from the scope of the Union's functioning since it implies abandoning the rule of law and the commonly agreed policy objectives. When acknowledging that the common political will of its members is being cast into law so that it can be effectively implemented, it is only consequential that a prominent EU objective like solidarity must be anchored in Union law too. Since a legal definition of solidarity is nowhere to be found in the *acquis communautaire*, it can be assumed that there is an underlying understanding of solidarity in the EU that is embedded in the specific historical context of the concept (Müller 2010).

A theoretical framework to address this desideratum has been provided by Saracino (2019). The methodological approach in this work is based on Reinhart Koselleck's contribution to conceptual history – typically labelled under the German equivalent *Begriffsgeschichte* – that is further developed and adapted to the epistemic interest of building a research framework for solidarity in the European Union. Saracino (2019) demonstrates that the concept of solidarity comprises a descriptive as well as a normative dimension. The former establishes that solidarity has a strong propensity to be applied to non-universal, particular groups wherein actors commit themselves voluntarily to a bond and create interdependences. The European Union can be considered as one such group. Solidarity, moreover, is instrumental to objectives which the reference group seeks to achieve and whose legitimacy it accepts. These objectives are often connected to the common good, a key source of state legitimacy and arguably the most important duty of state action (Anzenbacher 2011). The EU Member States have voluntarily bound themselves together to ensure that their interests pertaining to the common good are being pursued – interests such as economic prosperity, peace-keeping or migration management (Wolfrum 2006). They confer the respective competences to the supranational level and the EU, therefore, becomes a reference sphere for solidarity. The involved parties act in enlightened self-interest – i.e., the notion that they will be able to achieve their objectives more successfully in cooperation with others (Hollerbach, Kerber and Schwan 1995). In European primary law, the collective Union objectives are codified in Art. 3 TEU and, in connection with the framework of basic principles and values in Art. 2 TEU, amount to the idea of a European common good (Hatje and Müller-Graff 2014). A readiness to act in solidarity in the EU must necessarily exist as a prerequisite, otherwise an effective and robust pursuance of the European common good is impossible. The Member States become liable for the consequences of their actions within the EU, whose obligations they must accept at their voluntary accession (Sangiovanni 2012). A duty to solidarity is created by the joint acknowledgement of the common good that to pursue is the primary goal of the EU (Bieber and Kotzur 2016). It becomes the Member States' responsibility to contribute to the shape and production of solidarity in the integration process in order to safeguard their own interests.

The solidarity principle suggests that the reference groups' participants commit themselves to a mutual dependency, thus creating a specific connectedness due to the voluntary agreement to pursue the common

objectives mandatorily. The normative dimension of EU solidarity establishes mutual obligations that stem from the specific bond between the actors; this includes the expectation of reciprocity to achieve the collectively agreed objectives. These obligations take form through concrete actions of support and assistance. Hence, solidarity is not merely appellative. Actors try to safeguard the attainment of their common objectives by vouching for each other and creating mutual obligations. The creation and substantiation of obligations as well as the mutual bond of reference groups take place in the political sphere.

There are procedural duties that regulate how to act, assist and desist, aimed at ensuring the reliability of common good pursuance by all EU Member States and institutions by means of a solidarity principle cast into law. The CJEU (1969) confirmed the existence of a solidarity principle as early as 1969. In 1973, the Court ascertained the vital role and significance of the solidarity principle for the integration project by codifying that the Member States must subscribe to a duty to solidarity when entering the Community (CJEU 1973: para. 24 et seq.). In that seminal ruling, the judges made 2 fundamental determinations: on the one hand, the nation states' readiness to act in mutual solidarity is the necessary condition to be bound together under the rule of law. They should be aware of this obligation before entering the Community. On the other hand, by violating the solidarity principle, the whole legal order is shaken to its core, which amounts to endangering the whole integration project. Violating the solidarity principle means to actively locate oneself outside of the Union's legal order, hence outside of the Union's purview. This judgment provides an authoritative legal answer to the question as to *why* a solidarity principle exists in the European Union.

Since the readiness to act in solidarity can vary, casting obligations into law is all the more important. Political will for solidarity is needed to create and accept the Union law, whereas the law provides the standardisation of solidarity obligations to ensure adherence to the common objectives. It becomes clear that solidarity is the basis of the European edifice, without which it cannot stand. The solidarity principle, hence, is a *sine qua non* of the European Union, which permeates its whole scope. This finding is further corroborated by key documents which accompanied European integration as well as CJEU case law (Saracino 2019). In current EU primary law, Article 3 TEU formulates the general objectives of the Union, of which one is very distinctly the facilitation of solidarity between the Member States: 'It shall promote (...) solidarity among Member States' (para. 3). This passage anchors the solidarity principle as a fundamental principle of Union law (Ohler 2018; Petrus and Rosenau 2018). Furthermore, the article substantiates solidarity objectives in other policy areas (Saracino 2017). Recently, the CJEU has confirmed both the interpretation of the solidarity principle as a fundamental principle of Union law and that all Member States and Union organs must adhere to the solidarity principle in policy-making and legislation, as well as in the implementation and application of all Union provisions (CJEU 2019, 2021).

In Art. 4(3) TEU we find the duty to maintain sincere cooperation that is aimed at adherence to the common objectives (Bieber 2013). It permeates all policy areas of the Union, is aimed at the relationship among the Member States as well as between the Union and the Member States and, in conjunction with Art. 13(2) TEU, among the institutions (Blanke 2013). It comprises the duty to uphold coherent, unrestricted and uniform application and implementation as well the primacy of Union law, obliges the Member States to actively promote all Union activity and prohibits the addressees from undermining or even disabling the effectiveness of Union provisions (Klamert 2019). The principle of sincere cooperation is the necessary procedural specification of the independent solidarity principle. The two principles are not equivalent, as unmistakably evidenced by the clear distinction which Art. 24(3) TEU makes. The CJEU has substantiated the loyalty principle in multiple rulings that confirm the notion of a distinct separation of both principles (CJEU 1969, 1983, 2005).

These findings confirm the existence of an independent solidarity principle in the European Union and explain *why* solidarity must exist, both necessarily and from the outset. It has found a procedural expression

in the principle of sincere cooperation that determines *how* solidarity in EU law is shaped. In a nutshell, it can be ascertained that the European Union cannot exist without its specific solidarity principle. I have shown why the solidarity principle is a necessary condition for the functioning of the EU and how this reality manifests itself in Union law. Every violation of the commonly adopted law that prevents the achievement of the common objectives must be regarded as a violation of the solidarity principle. Sustained refusal to adhere to Union law deprives the integration project of its effectiveness and *raison d'être*, since the EU, by design, can only function on the basis of the rule of law.

The specific significance of the solidarity principle for EU asylum policy is established in Art. 67 TFEU which highlights that it must be 'based on solidarity between Member States'. This observation is undergirded by the addition of a specific solidarity clause for the areas of asylum, border controls and immigration in Art. 80 TFEU:

*The policies of the Union set out in this Chapter [asylum, border controls, immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.*

This solidarity clause is extraordinarily positioned within the Union Treaties. The signatories acknowledge and address the notion of an outstanding necessity for solidarity in the area of asylum. As will be demonstrated later, this awareness is the result of a fundamental lack of fair sharing of responsibility that is brought about by the specific responsibility allocation mechanism in the CEAS. Art. 80 TFEU explicitly reiterates the validity of the solidarity principle and connects it with the fair sharing of responsibility between the Member States. For the CEAS to adhere to the solidarity principle, compensatory policy measures – which include assistance and support provisions – must be put in place. Only financial assistance is explicitly stated although information exchange, technical assistance and training measures also fall under the scope of Art. 80 TFEU (Rossi 2016).

To summarise, the EU is a specific reference group to which the concept of solidarity and its particular, non-universal nature can be applied and where the group members act in enlightened self-interest. Solidarity is instrumental to achieve the common objectives which the EU has agreed upon and which are required both as a prerequisite and a vehicle with which to maintain its *raison d'être*. Furthermore, solidarity creates a mutual connectedness and demands a reciprocal commitment, evidenced by the Member States committing to a community or union of law with regards to the objectives that they agreed upon voluntarily in the political sphere. The rule of law provides the involved actors with legal reassurance that agreed policy measures aimed at attaining the common objectives will be adhered to. The solidarity principle, on the one hand, aims at ensuring that all involved actors fulfil their duties; on the other hand, through the principle of sincere cooperation, it brings to bear how the procedures for achieving the common objectives must be shaped. Finally, solidarity manifests itself through the members of the reference group vouching for each other in terms of the common objectives. In the EU, this mutual responsibility is expressed by concrete measures of support and assistance that can vary between the policy fields.

All in all, there is a fundamental solidarity principle in the EU that can be specified in form and content. It is inherent to the system of the EU and a necessary condition for achieving its objectives. In EU asylum policy, solidarity is expressed not only through the correct implementation of measures but also in supporting each other to develop national asylum systems that work for the good of the whole Union (Boswell, Vanheule and van Selm 2011). All asylum policy measures and their formulation, implementation and realisation must be compatible with the solidarity principle specified by Art. 80 TFEU, meaning the common objectives cannot

be achieved without the fair sharing of responsibility between the Member States. However, as will be demonstrated in the next section, an adherence to the solidarity principle in the field of asylum is foiled by the logic of responsibility allocation in the CEAS.

### How the Dublin system evokes a continuous solidarity crisis

The Dublin Regulation No. 604/2013 allocates the responsibilities for asylum claims in the Common European Asylum System. The ‘Dublin system’ refers to this responsibility allocation mechanism in conjunction with the Eurodac database, which records the fingerprints and personal data of asylum-seekers (Regulation 603/2013).

As such, ‘Dublin’ was not devised as a burden-sharing instrument (European Commission 2007). The criteria for determining responsibility for asylum claims in the EU were developed in the Schengen Convention (1990: Art. 28–38)<sup>3</sup> and then carried over into the Dublin Convention (1990)<sup>4</sup> that bears no reference to a fair sharing of responsibilities or to solidarity. From the outset, these measures implemented an overall objective of preventing unauthorised immigration into the EU’s asylum governance, which became its unmistakable hallmark (Lavenex 1999). Long before the Dublin Convention was fully implemented in 1997, it became apparent that the omission of a fair responsibility sharing element was highly problematic. The German government, in particular, tried to add provisions to the Dublin Convention to correct this flaw in as early as 1991 (Hailbronner 2000). After this endeavour failed, Germany and other main destination countries for asylum-seekers tried to disincentivise unauthorised entry even more – a policy objective that was copied by almost all other Member States (Noll 2000).

Instead of requiring participants to share responsibilities fairly with each other, the Dublin system’s allocation mechanism is governed by a costs-by-cause principle. A Member State which is not able to prevent a claimant’s entry into the EU must, in turn, admit the asylum-seeker to the procedure. The rationale behind this allocation mode is to punish Member States that do not comply with the objective to prevent unauthorised entry by placing the responsibility – and thus the cost or ‘burden’ for the claim – on to them: ‘The main criteria for allocating responsibility (...), reflect this general approach by placing the burden of responsibility on the Member State which, by (...) being negligent in border control or admitting him without a visa, played the greatest part in the applicant’s entry into or residence on the territories of the Member States’ (European Commission 2001: 3). Furthermore:

*A second group of criteria is designed to deal with the consequences of a Member State failing to meet its obligations in the fight against illegal immigration [emphasis added]. (...) a Member State which does not take effective action against the illegal presence of third-country nationals on its territory has an equivalent responsibility vis-à-vis its partners to that of a Member State which fails to control its borders properly [emphasis added]. The proposal extends this approach to several situations (Ibidem).*

In these explanations, added to the legislative proposal that eventually replaced the Dublin Convention, the Commission underlines in a very explicit way why the logic behind responsibility allocation in the asylum system should be labelled ‘costs-by-cause principle’ and not, as it is almost always denoted, ‘principle of first entry’ or ‘responsibility principle’. Strictly speaking, these are not misnomers but they are incomplete and obfuscate the true impetus behind the Dublin system. It is evident that the system of responsibility allocation in the CEAS necessarily penalises Member States at the southern and eastern periphery since they bear the brunt of migratory movements into the EU. What is more, Italy and Greece, for example, simply cannot control their borders in the Mediterranean in the same way that Member States without external borders or with just

land borders are able to. The costs-by-cause principle is indifferent towards geographical location as well as regarding the economic strength, legal framework or historical genesis of the national asylum system. Hence, the Dublin system disproportionally allocates responsibility between the Member States (Saracino 2019).

The intention to sanction Member States for not preventing unauthorised immigration is not in line with the aim to achieve a CEAS that works for the benefit of the Union as whole – which, as has been shown, can be interpreted as a breach of the solidarity principle. To accuse a Member State of being solely responsible for immigration is illogical. Motives for migration are highly individual and complex and have little to do with how well borders are controlled (Baumann, Lorenz and Rosenow 2011). No less perfidious is an understanding of having to process a claim to asylum – a human right – as punishment. The rationale behind this mode of responsibility allocation stems from the clearly identifiable tenet of the European asylum system to prevent unauthorised immigration. Even if disagreeing with this view, one would inevitably have to assume that responsibility is deliberately allocated through geography (Küçük 2016). Both instances would constitute a violation of the solidarity principle, especially after the introduction of Art. 80 TFEU by the Lisbon Treaty.

Serious doubts about the effectiveness of the Dublin system existed early on. When evaluating it in 2000, the Commission admitted that the Convention had not met its objectives, hence justifying its continuation would be questionable (European Commission 2000). In multiple reform attempts, the Commission has reiterated that the Dublin system's inability to meet its objectives is closely connected to the deficiencies in the CEAS (European Commission 2015a, 2016). Despite these admissions of failure, the costs-by-cause principle has not been seriously put into question, not even in the latest reform proposal package (European Commission 2020a). Hence, the fundamental problem is not being addressed: the Dublin system has proved to be completely dysfunctional in terms of its objectives (Fröhlich 2016; Hruschka and Maiani 2022: Art. 1). It incentivises the secondary movements of asylum-seekers and Member States' deliberate or involuntary non-adherence to their obligations (Chetail 2016).<sup>5</sup> Both instances would constitute a violation of the solidarity principle. Not even its most basic objective – to register all asylum-seekers at the external borders – is being met, which underlines its dysfunctionality (Costello and Mouzourakis 2017).

Adding a case-law perspective to corroborate the argument, the CJEU (2011) has ruled that Member States, in specific instances, are not obligated to process an asylum claim even if mandated by the Dublin system. These instances arise in situations where Member States are confronted with a disproportionate burden that violates Art. 80 TFEU (*Ibidem*: para. 87). The judgment confirms not only the Dublin regulations' inability to ensure a fair sharing of responsibility; it also underlines that the provision creates situations in which Member States are unable to fulfil their legal obligations and that the authoritative jurisdiction views such a violation as lawful. Given that the CJEU decided on a case from 2009 where no significant increase in asylum numbers existed, this ruling is substantial evidence of the assertion that the Dublin system's allocation mechanism violates the solidarity principle, irrespective of the number of people seeking asylum in the EU.

In light of these violations of what Art. 80 TFEU entails, some scholars argue that a case against the Dublin system could be brought before the CJEU (Bast 2016; Moreno-Lax 2017). On the other hand, more sceptical views highlight doubts about the justiciability of Art. 80 TFEU (Thym 2022). This uncertainty highlights the need to establish enforceability for solidarity and responsibility sharing in the EU legal order (Milazzo 2023). Although many Member States disproportionally suffer from the failures of the Dublin system and although its ineffectiveness is widely accepted, thus far no legal challenge has been brought forward. However, without discarding the costs-by-cause principle, the pathologies it creates will remain in the form of a lack of responsibility sharing, the failing achievement of common objectives and Union law violations that breach the solidarity principle. Hence, the costs-by-cause principle evokes a permanent solidarity crisis in the European asylum system that has existed since its origins in the Schengen and Dublin Conventions, thus constituting a 'birth defect' of the CEAS.

### **The 2015/2016 asylum governance crisis as a(nother) symptom of the solidarity crisis**

The identified continuous solidarity crisis in Europe's asylum policy occasionally shows symptoms in the form of certain special events. One of those symptoms was the 'Franco-Italian affair' in 2011 (Saracino 2014). Four years later, a sustained and veritable political crisis arose as a result of the increased migratory movements to Europe. On 13 May 2015, faced with continuing migrant shipwrecks in the Mediterranean, an exacerbating situation on the Balkan route and an ever-increasing number of asylum applications, the European Commission (2015a) presented an extensive plan to tackle the challenge with both short-term and long-term measures. The plan included a proposal for a temporary emergency relocation mechanism on the basis of Art. 78(3) TEU 'for persons in clear need of international protection to ensure a fair and balanced participation of all Member States to this common effort' (European Commission 2015b). In so doing, the Commission opted against proposing to use the TPD which the EP had suggested as an alternative (European Parliament 2015).

On 9 September 2015, the Commission proposed to relocate 120,000 people in need of protection from Italy, Greece and Hungary (European Commission 2015c). On 22 September, the Council adopted the proposal determining mandatory Member State contingents, excluding Hungary as a beneficiary of the scheme (Council Decision 2015/1601). Apparently, the Hungarian government had insisted on being exempt due to its general opposition to the measure and disagreement with the notion of being a Member State with an external border (CJEU 2017a: para. 14). Hungary, alongside Slovakia, Romania and the Czech Republic, voted against the proposal (Council of the EU 2015). Accounting for the offsetting from the EU-Turkey Statement's relocation contingent and a separate voluntary relocation contingent of 40,000, the number of persons to relocate ended up being 98,000 (Council Decision 2016/1754).

The Commission proposal, as well as the Council decision, bore direct references to bringing to bear Art. 80 TFEU. However, none of the countries opposing the Council decision mentioned Art. 80 TFEU in their statements or agreed to the intended goal of creating fairer responsibility sharing (Council of the EU 2015). In any case, the unofficial Council norm of seeking unanimity could not be met, highlighting the controversies in the decision-making process (Trauner 2016). The political prudence of making an exception to the informal unanimity rule in this highly contested decision should be put into question, especially considering that the European Council (2015) had demanded an agreement by consensus. The decision to put forward a mandatory relocation mechanism was legal beyond any doubt but questions about its legitimacy remain.

Hungary and Slovakia decided to bring legal actions against the Council decision before the CJEU, claiming procedural errors as well as a lack of proportionality and of a legal basis (Case C-643/15; Case-647/15).<sup>6</sup> After the Polish elections brought the PiS into government, the country joined in on the actions (CJEU 2017a: para 30). In its 2017 decision, the Court rejected the actions on all accounts, confirming that asylum policy measures must adhere to Art. 80 TFEU and interpreting the Council decision as a necessary expression of it (CJEU 2017b).

When Hungary, Poland and the Czech Republic continued to refuse to implement the provision, the Commission (2017) started infringement proceedings in December of 2017. In its judgment, the Court found that the defending Member States had violated Union law by not complying with the relocation mechanism (CJEU 2020a). The judges again confirmed that all asylum measures must adhere to Art. 80 TFEU and that all Member States must abide by the principle of solidarity and fair sharing of responsibility (CJEU 2020b).

In the aftermath of the failed mandatory relocation experiment, the mutual ground for common asylum policy had been considerably eroded, especially in terms of the fair sharing of responsibility. Even after the 2020 CJEU judgment, the transgressing Member States did not experience any negative repercussions – in fact, quite the opposite. More Member States pivoted towards their positions. The Commission did not seek any punitive action but, rather, incorporated the underlying political stances in their policy-making approach,

detectable in its asylum governance package published later in the year (European Commission 2020a). These policy proposals turned out to be somewhat inadequate with regards to the necessary substantial reforms, particularly those pertaining to responsibility allocation (Maiani 2020; Thym 2020). The costs-by-cause principle remains alive and well regardless of the ostensible farewell to the Dublin regulation (European Commission 2020b). Signs of path-dependency are clearly identifiable.

The Council decision's objective to bring to bear the principle of solidarity during the 2015/2016 crisis by invoking Art. 80 TFEU in order to mitigate the pathologies within the CEAS has failed. The fact that Member States continue to defy their duty to implement common policy measures, even after the CJEU has deemed this course of action to be unlawful, constitutes a new dimension of the solidarity crisis in Europe's asylum system. By placing themselves outside of the EU legal order, the respective Member States are openly revolting against the common asylum policy, arguably creating a rule of law crisis of its own kind. This episode represents a salient symptom of the underlying and continuous solidarity crisis in the CEAS brought about and perpetuated by the logic of responsibility allocation based on the costs-by-cause principle. A *sine qua non* of the European Union is being violated, which puts into question the way forward, not only in asylum policy but also for the whole integration project.

### **The activation of the 'Temporary Protection' Directive in light of the 2022 refugee movements from Ukraine**

After Russia's unprovoked attack on Ukraine on 24 February 2022, the European Union and its partners gave a united and strong diplomatic response. On the basis of an estimated number of over 3 million refugees seeking protection in Europe, the Commission declared a 'mass influx' and proposed the activation of the 'Temporary Protection' Directive (European Commission 2022a) – an unprecedented move since the Directive had never been used and had lain dormant for more than two decades. Originally, the TPD was devised 'on the basis of solidarity' (Council Directive 2001/55/EC: Art. 16):

*[T]o establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons (Ibidem: Art. 1).*

Generally, the TPD's protection scheme envisages fewer rights for beneficiaries than international asylum law would provide (Peers 2015). It was designed as an instrument aimed at deterrence, with a stringent focus on returns (van Selm 2022). The Directive must be activated by the Council upon proposal from the Commission by qualified majority vote (Council Directive 2001/55/EC: Art. 5). The provision does not clarify what constitutes a 'mass influx' – it only delineates it as Union-wide, substantial in numbers and coming from one single country or region only (*Ibidem*: Art. 2). One of its key objectives is ensuring that national asylum systems will not malfunction when faced with a mass influx. The insufficiency of a Member State's ability to absorb an influx, though, is not a sufficient indicator for activation. Neither is an increased influx to a single Member State unless the reason for that increase is its proximity to the main region of displacement (Skordas 2022).

The objectives of the Commission's proposal of 2 March 2022 were fourfold. First, harmonised rights that displaced persons seeking refuge in the EU from the war should enjoy across the Union to be offered an adequate level of protection. Second, asylum provisions should be bypassed to prevent national asylum systems from becoming overwhelmed. Third, the expected influx should be managed in a controlled and

effective manner, respecting fundamental rights and international obligations. Finally – and maybe the most astonishingly – was the objective to promote balanced efforts between Member States by free choice of host country for the beneficiaries of temporary protection and the right to free movement in the EU (European Commission 2022b). In the proposal, solidarity was only mentioned in connection with a ‘solidarity platform’ from which to exchange information that was to be implemented and coordinated by the Commission.

The Council convened only two days after the proposal was published to adopt its decision unanimously (Council of the EU 2022). Notably, the Council decision differs from the Commission proposal in that it gives Member States more discretion to exclude non-Ukrainian nationals (*Ibidem*: Art 2 and 3; European Commission 2022b: Art. 2). Ultimately, the decision covers Ukrainian nationals residing in Ukraine before 24 February 2022 and their family members. In terms of other third-country nationals and stateless persons, it covers those who enjoyed international or equivalent protection in Ukraine before 24 February 2022 as well as their family members. Stateless persons and other third-country nationals with no such protection and only proven legal residence in Ukraine must return to their country or region of origin when they can do so in safe and durable conditions. In cases where those conditions are not met, the Member States must extend temporary protection to this group (Council of the EU 2022: Art. 2). The general objectives remained the same between proposal and decision. The standards offered to Ukrainian refugees by the TPD are considered the minimum that the Member States have the discretion to extend. The scheme has recently been extended to its third and final year within the scope of the existing decision (Council of the EU 2023a). The Member States must issue residence permits, allow beneficiaries to take up employment, provide suitable accommodation, social welfare, medical care and education for minors and guarantee free movement for selecting the Member State in which the displaced person would like to take residence under the TPD.

The decision to depart from the ‘forum shopping’ precept of the CEAS is hard not to overstate. What is often missed in the debate on the ostensible paradigm shift, however, is that the Commission had reflected a free-choice model for the responsibility allocation mechanism in the CEAS very early on. When evaluating the Dublin Convention three years after its implementation, the Commission seriously considered a free-choice model as an alternative to the dysfunctional costs-by-cause principle (European Commission 2000). This consideration was picked up again in the Commission’s proposal for the Dublin II regulation (European Commission 2001). However, the documents mention that, for the free-choice model to be effective, national asylum systems would have to be harmonised to a higher degree to prevent diverging standards becoming the key criterion for asylum-seekers’ decisions on where to apply.

The free-choice model in the TPD decision constitutes a notable shift towards the long-standing finding within migration research that determining the state responsible for the asylum procedure can only work when the applicants’ preferences are incorporated into the decision (Guild, Costello, Garlick and Moreno-Lax 2015; Wagner, Baumgartner, Dimitriadi, O’Donnell, Kraler, Perumadan, Schlotzhauer, Simic and Yabasun 2016). Positive experiences with guaranteeing free choice and free movement to beneficiaries of the TPD might be viewed as a best-practice example for future implementation: it could serve as a feasible alternative to the hitherto existing paradigms of responsibility-sharing by physical distribution, the restriction of movement rights or the use of coercion (Vitiello 2022). Steve Peers (2022) has commented that the Council decision shows the better side of the EU after its asylum law took a turn to a ‘moral abyss’.

### **Why was the TPD activated now?**

One of the key questions in the discussion about the activation of the TPD revolves around why it has been activated now and not during previous crises. A first insight to a plausible answer might be that there was simply no political will to utilise the TPD before. In 2011, during movements from North Africa to Italy in the

wake of the Arab Spring, the Italian government considered to put triggering the TPD on the European agenda but prescinded from a formal request due to apparent dismissive reactions from other Member States (Beirens, Maas, Petronella and van der Velden 2016). During the asylum governance crisis in 2015, the TPD arguably could have been triggered but its activation was never seriously considered (Ineli Ciger 2016). Due to the continued disregard even in face of apparent crises and mass influxes, the TPD has been called a ‘waste of paper’ (Gluns and Wessels 2017: 83).

A thorough review of the TPD in 2016, which included interviews with Member States’ representatives, revealed that the main objections to applying the measure were concerns about national sovereignty, the consideration that the protection period was too long, the fear of creating a pull effect, not wanting to reward Member States for not equipping their asylum systems adequately for the CEAS to work properly and the overall endowment of rights for beneficiaries that was perceived as a higher standard than some Member States were granting or ready to grant (Beirens *et al.* 2016).

Other aspects explaining why the TPD was triggered now rather than over previous crises include geographical proximity, time pressure, expected quantity, Ukrainian visa freedom and the uniqueness of the event causing the mass influx. During the Syrian civil war, the neighbouring countries bore the brunt of responsibility for Syrian refugees. After the full-scale invasion of Ukraine, most refugees were expected to seek protection in neighbouring EU countries. Besides the geographical circumstances, timeframe is another valid argument for triggering the TPD now instead of in 2015, since the displacement was sudden and expected to overwhelm the receiving EU Member States in a very short period of time. In terms of quantity, the estimated numbers of displaced persons seeking refuge in the EU from Ukraine were much higher than the actual numbers in 2015/2016. The decision to activate the TPD, moreover, is a political statement as part of the comprehensive set of countermeasures against the Russian aggression (European Council 2022). Initial findings suggest that the decision was based on a sense of common identity, with the emphasis on the need to show unity (Bosse 2022). Neither of the two aspects were part of the decision-making in 2015. In this exceptional circumstance of hot war returning to European soil, it is very much an extraordinary reaction to this historical watershed moment. On a more administrative note, the existing visa freedom for Ukrainian nationals made it much easier to implement the TPD (Ineli Ciger 2022). Without the temporary protection scheme, Ukrainians would still have had free choice of the Member State in which to seek protection, although the differing standards within the national asylum systems might have had a stronger influence on their selection of destination country. Nonetheless, the rationale behind utilising the TPD seems to differ distinctly from the original objectives of the provision, aiming now at welcoming refugees and equipping them with a wide array of rights, as opposed to focusing on lower fundamental rights standards and returns.

Pragmatism is another aspect that should be considered when trying to explain the unprecedented activation of the TPD. First, relations between the EU and Ukraine in 2022 were much closer than between the EU and most asylum-seekers’ countries of origin in 2015/2016, making the use seem even more appropriate and justified. Second, faced with a dysfunctional CEAS and having unsuccessfully attempted the temporary relocation route in 2015, what alternatives would there have been for the EU to tackle this challenge in a unified and practicable manner? The TPD might have been the only viable option left that offered the possibility of a common EU response to the expected mass influx and which would facilitate a fair sharing of responsibility between the Member States.

Moreover, it is instructive to view the decision to opt for the temporary protection scheme in 2022 in the broader context of ongoing developments in EU asylum and border control policies. The TPD presents an instrument to the EU and its Member States with which to circumvent the CEAS – and its logic of responsibility allocation in particular – when dealing with protection-seekers. A successful implementation could provide evidence for a policy stance held by Member States opposing the current asylum regime. A framework of

border control policies – with a primary focus on preventing unwanted entry on the one hand and temporary protection for those who manage to reach EU territory on the other – could be viewed as sufficient. It would feed into the narrative and policy approach that seeks to equip the Member States with more sovereignty and leeway to manage migration on their own. A *common* European asylum policy could become further sidelined.

### The end of the solidarity crisis?

Against the backdrop of the unprecedented response to dealing with refugee movements from Ukraine, the question arises as to whether this could constitute a paradigm shift for Europe's asylum policy – one that might end the solidarity crisis. A cogent answer should, firstly, acknowledge that there are discriminatory practices applied at EU borders *vis-à-vis* the different groups of displaced people. Cooperation continues with the Libyan 'coastguards' to pull back migrants departing from Africa on their way to Europe (Amnesty International 2021). Illegal pushbacks on the eastern and southern external borders, under the passive involvement of Frontex, are common practice (Euractiv 2022a; Fallon 2022). The inflow of persons seeking asylum primarily from the Middle East, trying to enter the EU through its eastern Member States, has been framed as a 'hybrid attack' since the protection-seekers were used as political pawns by Belarus' authoritarian leader (Euronews 2021; Kochenov and Grabowska-Moroz 2021). The fact that a negligible number of non-white, Muslim persons seeking refuge in Europe is being labelled as an 'attack' reveals the underlying view that this group of immigrants is unwelcome in the EU as opposed to Ukrainian refugees. Europe's response to the people persevering under the most precarious of circumstances at the borders between Belarus, Poland and the Baltic countries has been ruthless, unrelenting and arguably illegal. In the wake of these developments, Poland and Lithuania have built border fences with Belarus (Deutsche Welle 2022a, 2022b). Latvia has suspended the right to seek asylum and legalised pushbacks in addition to building a border fence of its own (Jolkina 2022). Similarities with what has been exercised in the Spanish exclaves of Ceuta and Melilla are evident. Above all, there is ample evidence that non-white people fleeing the war in Ukraine are being treated in a clearly discriminatory manner (Betts 2022; Howden 2022; Pop 2022). Overall, what these practices have in common is that they are directed at non-white, non-Christian refugees who are simply not welcome in the EU. This discriminatory and nativist approach is historically well documented, especially in the European Union's visa policy (Bueno-Lacy and von Houtum 2022). Irrespective of the human right to apply for asylum, a right that is prominently emphasised in the *acquis communautaire*, the EU continues to deter and criminalise unwanted entry; thus there are calls for a more protection-driven approach with non-discrimination standards as the default (Carrera, Ineli Ciger, Vosyliute and Brumat 2022).

In sharp contrast to the refugee movements in 2015/2016, purported threats to public order and internal security – as put forward in the CJEU cases against the mandatory temporary relocation mechanism – do not seem to play a role in terms of the people fleeing the war in Ukraine. Similarly waived seem to be Member States' concerns regarding national sovereignty or the ability to integrate the protection-seekers. Suddenly, secondary movements no longer seem to be a problem when they pertain to Ukrainian refugees. The rhetoric of invasion which we have witnessed in previous refugee influxes is also astoundingly absent. Above all, there does not seem to be a single Member State government objecting outright to the application of the TPD. All in all, none of the former demurs against the TPD seem to be prevalent in this crisis. At the same time, nothing seems to have changed in the treatment of all other larger groups of people seeking protection in the EU. Europe's double standard in treating refugees is, thus, hard to deny. The change of scope with which the temporary protection scheme has been equipped – between Commission proposal and Council decision – giving more discretion to Member States to exclude non-Ukrainians, speaks volumes in this regard.

As a matter of fact, there seems to be no indication that the general preferences of those opposing the current European asylum regime have changed. Poland, for example, shows continuity in its refusal to adequately apply asylum standards and has now built a border fence with Belarus to fend off unwanted asylum-seekers whilst maintaining a positive stance towards the treatment of Ukrainian refugees. To contextualise, the country has long been welcoming Ukrainians who fill a significant workforce need in Poland's economy (Strzelecki, Growiec and Wyszynski 2022). There are well-developed transport routes and migrant networks between the two countries. In 2017, approximately 900,000 Ukrainians were living in Poland (Jaroszewicz 2018). Prior to the Russian full-scale invasion, around 1.35 million Ukrainians were estimated to reside in the country (Duszczyk and Kaczmarczyk 2022). Furthermore, as a country facing profound demographic change, Poland will need millions of immigrants in the coming decades (Duszczyk and Matuszczyk 2018). Other countries facing labour shortages, like Germany, might have similar interests when it comes to welcoming Ukrainian refugees (Euractiv 2022b).

When investigating a potential end to the solidarity crisis through the analytical lens of the fair sharing of responsibility among the Member States, a closer look at the numbers is helpful. As of September 2022, some 3.9 million people fleeing the Russian invasion benefited from temporary protection in the EU. Of the EU-27, Poland (1.37 million) and Germany (813,000) accounted for about 2.4 million permits granted – or roughly 61.5 per cent (Eurostat 2022). In absolute terms, it demonstrates how only two Member States are bearing the brunt of refugee protection in the case of Ukraine. Regarding admission per thousand inhabitants, Estonia, Czechia (both 41.1), Poland (36.1), Lithuania (23.2), Latvia (20.2) and Slovakia (17.2) had higher rates than Germany (12.1). However, other Member States like Spain (3.0), Italy (2.7), the Netherlands (4.4) or France (1.5) showed much lower rates (OECD 2022: 99). These numbers demonstrate an unequal distribution of responsibilities in the EU in terms of providing protection for refugees from Ukraine after the TPD decision was implemented. The fact that those Member States with the highest *per capita* admission rate are concentrated on or close to the border with Ukraine offers one obvious explanation as to why people fleeing the war have chosen those countries, in addition to existing migrant networks and the proximities in culture and language. This is a pattern observed all over the world and, more specifically, during the Syrian civil war in 2015/2016, when by far the greatest number of people seeking protection were either IDPs or were harboured in neighbouring countries (UNHCR 2018). However, from an EU solidarity perspective, this unequal distribution of the beneficiaries of temporary protection between the Member States does raise serious doubts as to whether the implementation of the TPD has provided the fair sharing of responsibility demanded by Art. 80 TFEU. It seems that a similar pattern can be observed that torments the CEAS: a few countries bear the brunt whilst most other Member States take on little to no responsibility. The implementation of the TPD highlights that the fair sharing of responsibility does not happen on its own, be it in the asylum regime or the temporary protection regime. Giving free choice to protection-seekers under the TPD might even counteract the objective of fairly sharing responsibilities between the Member States, since people on the move tend to settle in areas with pre-existing networks, ideally in geographical proximity, where strong cultural ties and sufficient infrastructure as well as resources to accommodate their needs already exist, as evidenced by the numbers in Poland and Germany.

Assessing the TPD application through the lens of the EU's solidarity principle, at the time of writing only a preliminary and tentative assessment can be carried out. In procedural terms, it is safe to say that the process of activating the TPD has been in accordance with the solidarity principle since it has found a unanimous vote, going beyond the necessary QMV. This demonstrates a stark contrast with the mandatory relocation decision in 2015, for example. In terms of implementation, it does not seem that a fair distribution of responsibilities has been achieved. On the other hand, the provisions of the TPD decision have, by and large, been adhered to, unlike in the cases of the Dublin Regulation or the mandatory relocation mechanism of 2015. Furthermore,

there does not seem to be much division among the EU and its Member States about the nature and real-life ramifications of the chosen TPD regime. No Member State seems to be undercutting the aims of the TPD decision to the extent to which either EU institutions or other Member States would disapprove. Temporary protection seems to work fine for all parties involved – at least in its first phase. Member States bearing the brunt are not yet vehemently demanding more assistance from their EU partners. That might be because the physical distribution of beneficiaries is out of the equation anyway. The key question could turn out to be how Member States deal with the long-term challenges of the protection scheme, like the financial burden or dwindling support from the population. Perhaps the most important issue will be the EU's approach to offering protection to Ukrainian refugees after the TPD expires in March 2025 if the war in Ukraine is still raging.

Considering the above findings, a solidarity crisis in Europe's asylum policy can still be diagnosed. Little has changed in terms of practices at the external borders *vis-à-vis* non-beneficiaries of the TPD Council decision – and even then, discriminatory practices are well-documented. The CEAS' birth defect – its costs-by-cause principle to allocate responsibility for asylum claims – is still in place and it is not envisaged for it to be substituted by the now-agreed reform package (Council of the EU 2023b). This fundamental tarnish still breeds the pathologies observable in the dysfunctionality of Europe's asylum and border control policies. In the case of refugees from the war in Ukraine, not even circumventing the CEAS by implementing a temporary protection regime was sufficient to create a fair sharing of responsibilities between the Member States and mitigate the collective action problem. Even if it might be too soon to diagnose a breach of the solidarity principle by the TPD decision, some of the same pathologies that haunt the CEAS can be observed. The European Union's response to the refugee movements from Ukraine has not ended the solidarity crisis.

## Conclusion

Understood as encompassing the whole scope of the EU, it turns out that solidarity is a necessary condition for the European Union to maintain its *raison d'être*. In this paper I have demonstrated that, in the area of asylum (and border controls), there is a specific expression of solidarity, characterised by the fair sharing of responsibility between the Member States. All asylum policy measures must adhere to this solidarity principle. However, the bedrock of the CEAS, the Dublin system, violates the solidarity principle on account of its logic of responsibility allocation: a costs-by-cause principle that was implemented in the very beginning of integrated asylum cooperation in Europe. The dysfunctional Dublin system evokes Union law violations and challenges to effective collective action that are in clear breach of the EU's solidarity principle, thus creating a permanent solidarity crisis. This 'birth defect' in the CEAS has been passed on over and over, showing not only pathologies like the 2015/2016 asylum governance crisis but also deeply entrenched path-dependency in this policy area. The adherence to the logic of responsibility allocation in the recent CEAS reform package serves as further confirmation of this article's findings. When taking into account the practices at the Union's external borders that range from the politically imprudent to the outright illegal, the ramifications of this defining flaw in the CEAS show signs of a rule of law crisis.

Examining the developments in European asylum policy since the outbreak of the war in Ukraine we can conclude that, at the time of writing, there is no end to the solidarity crisis in sight. All constitutive elements that have led to the diagnosis are still intact. In fact, some of those factors have been exacerbated since then. Illegal pushbacks have become common practice – and evidence for discriminatory border (and visa) practices has become even more prevalent. The EU and its Member States have found a way to circumvent the birth defect in the Dublin system and prevent the pathologies it creates by activating the 'Temporary Protection' Directive. However, it should be noted that this almost exclusively refers to the treatment of displaced Ukrainians. Generally, unwanted migrants – whether they might have a legitimate protection claim or not – are still

being deflected, pushed back or even left to die at Europe's external borders, sometimes even at the very borders which Ukrainian refugees are crossing, revealing a double standard in treating displaced people detrimental to European laws, values and political credibility.

The unprecedented application of the TPD rather reinforces the notion that the existing asylum governance is increasingly being eroded. The extraordinary nature and cause of the influx, the aspects of (perceived) cultural as well as geographical vicinity, the quite close political ties between the EU and Ukraine, combined with a lack of other viable options, make the application of the TPD seem like an exception to the overall trend. At the same time, there is no identifiable change of policy or preferences in the area of asylum, neither at Union level nor among the Member States – nor towards the treatment of refugees outside of the beneficiaries of the TPD Council decision. This could mean that a successful outcome of the temporary protection scheme further weakens the asylum regime in the EU. When the prevention of entry becomes the sole focus, more effective, domestic temporary protection measures instead of international asylum provisions could become a more appealing way to deal with protection-seekers. Especially when the TPD is being viewed as a last-resort instrument in cases where the EU is faced with mass inflows and refugee protection is being further deprioritised. It is plausible that granting asylum procedures could become the exception to the treatment of refugees in the EU and it would be in line with a growing number of Member States' preferences *vis-à-vis* asylum cooperation.

A key corollary of this contribution's main findings is that, without a revocation of the birth defect of the CEAS – i.e. the costs-by-cause principle in allocating responsibility for asylum claims – the pathologies will not stop appearing. This is further corroborated by the fact that even the free choice model in the temporary protection scheme for Ukrainian refugees, at the time of writing, has not been able to create a fair sharing of responsibilities between the Member States. Only an overhaul of the system of responsibility allocation to one that is in line with the solidarity principle could potentially end the solidarity crisis. Every reform that does not factor in this precondition is doomed to fail in attempting to eradicate the core problems of Europe's asylum governance. The question remains whether this is a common objective of the EU Member States at all. The latest CEAS reform has demonstrated that it is not. The task of shaping a better-functioning European asylum system that honours the solidarity principle will, thus, remain a pressing policy issue in the EU.

## Notes

1. A crisis is a period of disturbance that requires a response to reinstate a notion of order (Freedden 2017; Koselleck 2006). A commonly accepted interpretation by Rosenthal *et al.* (1989) asserting that crises must constitute a threat to the basic structures or the fundamental values and norms of a system adds explanatory power to this contribution.
2. Even though the 'Dublin' regulation will be replaced by the reform agreed on 20 December 2023, the validity of this study remains unaffected since the core logic of responsibility allocation in the Common European Asylum System via a costs-by-cause principle will continue to be in effect.
3. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders [Schengen Convention].
4. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities [Dublin Convention].
5. Philipp de Bruycker and Evangelia Tsourdi (2016) suggest objective criteria to assess whether a Member State is either *incapable* or *unwilling* to fulfil its duties.
6. Action Brought on 2 December 2015 – Slovak Republic v Council of the European Union (Case C-643/15). Action Brought on 3 December 2015 – Hungary v Council of the European Union (Case C-647/15).

## Conflict of interest statement

No conflict of interest was reported by the author.

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