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Reform scenarios for EU migration and asylum policy in light of new refugee movements

Peter R. Rodrigues¹

Introduction

In judgments given by the Court of Justice of the European Union in joined migration cases of the European Commission against Poland, Hungarian and the Czech Republic in 2020,² the Court found that the burden of receiving migrants must be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States. This principle is contained in Article 80 of the Treaty on the Functioning of the European Union (TFEU) and it governs the Union's policy on asylum. But does the principle of solidarity still prevail in 2022? Or is political power play occurring when it comes the question of what constitutes the fair sharing of responsibility?

This contribution first considers the New Pact on Migration and Asylum of the European Commission (section I). The next topic is the proposed revision of the Schengen Borders Code that regulates the crossing of internal borders within the EU (section II). A current issue to be discussed is the so-called instrumentalization of migrants for political goals which involves diverting migratory flows in order to destabilize other countries (section III). One possible win-win situation with respect to the influx of migrants is linked to the increasing shortage of workers in the Member States of the EU. The question whether the European Commission's policy on labour migration will contribute to both migration and labour policy will also be discussed (section IV). As a result of the war in Ukraine, the Temporary Protection Directive is now in force. Does this Directive allow for the preferential treatment of people fleeing from Ukraine (section V)? The contribution closes with conclusions and recommendations (section VI).

I. New Pact on Migration and Asylum

The refugee crisis of 2015-2016 demonstrated major shortcomings in European asylum law, as well as the complexity of managing a situation which affects different Member States in different ways. At that time, around one million people had fled the war in Syria and applied for international protection in the EU.³ Those countries that fulfilled their legal and moral duties, or were exposed more than others, looked to rely on the solidarity of the EU Member States. However, that proved to be lacking. For that reason, the European Commission published the New Pact on Migration and Asylum (hereafter the Pact) on 23 September 2020.⁴

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² CJEU, Judgment of 2 April 2020, *European Commission v. Republic of Poland and Others*, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

³ UNHCR, Most common nationalities of Mediterranean sea and land arrivals from January 2021, available at: <https://data2.unhcr.org/en/situations/mediterranean>.

⁴ Communication from the Commission on a New Pact on Migration and Asylum, 23 September 2020, COM(2020) 609 final.

The most important issues covered in the Pact are:

1. Robust and fair management of external borders

Pre-entry screening which includes identification, health and security checks, fingerprinting and registration in an updated European Asylum Dactyloscopy Database (Eurodac). Special border procedures are required to keep the third-country national (TCN) outside the EU territory. Academics argue that the pre-entry screening and new border procedure in the Pact will lead to externalization of the asylum procedure.⁵ One example is the UK's plan to outsource asylum by deporting migrants to Rwanda who had crossed the Channel by boat.⁶

2. Fair and efficient asylum rules

This is intended to signal an important shift: the equal sharing of burden and responsibility and being able to effectively address the mixed arrival of persons who are in need of international protection, and those who are not. In my opinion, if the rule that asylum seekers should start their asylum application procedure in the first country of entry (the Dublin Regulation) remains unchanged, and in view of the lack of concrete measures, this appears to be wishful thinking.

3. Effective return policies

A common EU system for returns is needed which combines stronger structures inside the EU with more effective cooperation with third countries concerning return and readmission. This should be developed building on the recast of the Return Directive and effective operational support, including via Frontex (the European border and coast guard agency). However, one of the most important problems is undocumented TCNs who cannot return to their country of origin.

4. Better implementation of migration and asylum policies

The idea is that total harmonization will lead to fair sharing of responsibility. Therefore, the directives should be changed into regulations. But do regulations, such as the Dublin Regulation, really avoid differences in practice? My answer is no. Besides this caveat, transmitting directives into revised regulations takes a lot of time, and because political consensus in the Member States is still pending.

5. Crises preparedness and response

A new legislative instrument should provide for temporary and extraordinary measures when needed in the face of a crisis. It should provide flexibility to Member States to respond to a crisis and situations of force majeure. In view of the COVID-19 pandemic and the war in Ukraine, this makes sense. However, flexibility should not be counterproductive to human rights protection. On the other hand, such an instrument already exists – the Temporary

⁵ *Cassarino, J-P. and Marin, L., The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?, European Journal of Migration and Law, 2022, pp. 1-26.*

⁶ *Kohnert, D., One-Way Ticket to Rwanda? Boris Johnson's Cruel Refugee Tactic Meets Kagame's Shady Immigration Handling, 18 May 2022, available at: <https://ssrn.com/abstract=4109330>.*

Protection Directive of 2001 – which was activated for the first time on 4 March 2022 due to the war in Ukraine.⁷

6. Mutually beneficial partnerships with key third countries of origin and transit

The Commission calls for the development and advancement of tailor-made comprehensive and balanced migration dialogue and partnerships with countries of origin and transit, complemented by engagement at the regional and global level. This is a start in tackling one of the root causes of irregular migration – too great inequality of opportunity.

At the time of writing, in the summer of 2022, the progress of the Pact remains limited. Many of the draft regulations are not yet in force because there is still debate about the content. There is strong disagreement about the key draft Regulation on Migration and Asylum Management.⁸ The proposal is unlikely to bring any substantial relief to countries of first entry. This is because it gives frontline countries no guarantee that others will offer enough relocation places to offset the additional burdens that other proposals in the Pact would place on their administrations.⁹

More generally, the principle of the Dublin Regulation that the asylum seeker must process his application in the first Member State of entry, seems to be the biggest bottleneck for equal burden sharing in EU migration policy. This principle remains (though the name disappears) and puts the pressure on border States such as Greece, Italy, Malta, and Spain.

All Member States are required to contribute to the Pact, but they are allowed to choose the form of their contribution. This can be relocation (physical transfer of asylum seekers and refugees), return sponsorship (taking care of the return of a rejected asylum seeker from the territory of another Member State), and capacity building (this option can take many forms, like funds and human resources). The consequences, since the Regulation on Migration and Asylum Management allows Member States not to contribute with relocation, are that frontline States will be left with an increasing number of asylum seekers and returnees on their territory.

The Visegrád countries (Czech Republic, Hungary, Poland, and Slovakia), who have traditionally taken a hard line on migration in the EU, rejected the Commission's proposal immediately after its presentation.¹⁰ The proposal does not satisfy the border States either. In a joint statement in March 2021, the interior ministers of the so-called MED5 (Cyprus, Greece,

⁷ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212, 7 August 2001, pp. 12-23.

⁸ European Parliament, Draft Report on the 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], 11 October 2021, 2020/0279(COD), available at: https://www.europarl.europa.eu/doceo/document/LIBE-PR-698950_EN.pdf.

⁹ *Movileanu, D.*, Regulation on Asylum and Migration Management, The Right Formula to end the EU's Longstanding Controversies?, 89 Initiative, 2021, available at: <https://89initiative.com/wp-content/uploads/2021/06/D.-Movileanu-The-Regulation-on-Asylum-and-Migration-Management.pdf>.

¹⁰ *Zalan, E.*, Visegrad countries immediately push back on new migration pact, 2020, available at: <https://euobserver.com/justice/149537>.

Italy, Malta, and Spain) insisted that solidarity should be mandatory and called for compulsory relocation.¹¹

In August 2021, the European Parliamentary Research Service (EPRS) published an Impact Assessment on the New Pact on Migration and Asylum.¹² The Assessment concludes that all of the assessed dimensions will be influenced by the proposed new pact. Although interviewed stakeholders indicate that, in certain cases, the Pact stands to have a positive impact on various aspects of migration and asylum in the EU, the overall consensus is that the Pact, as currently presented by the Commission, will have significant negative consequences for Member States, local communities, and migrants. Such potential negative effects have been found in all four dimensions covered by the Assessment: territorial, economic, social, and fundamental rights.

II. Schengen Borders Code

The reintroduction of intra-Schengen State border controls has been a recurring phenomenon since the abolition of these controls in 1995. The past decade saw three different regimes of temporarily reintroduced border controls: to prevent secondary movements of people seeking international protection (Syria crisis), to counter terrorism (e.g. the state of emergency in France) and to counter the spread of COVID-19.¹³

The Schengen area consists of 26 European States, most of which are EU Member States, though some are not.¹⁴ In the State of Schengen Report of 24 May 2022, the European Commission recommends admitting Croatia, Romania, and Bulgaria to the Schengen area, and after completing the evaluation process, also Cyprus.¹⁵

In December 2021, the European Commission launched its proposal to amend the Schengen Borders Code.¹⁶ The proposal flows from the Roadmap for a New Pact on Migration and Asylum, more specifically the Commission's "Schengen Strategy", published in June 2021. The proposal expands the possibilities for Member States to reintroduce internal border controls and travel restrictions when faced with health emergencies. That is the lesson learned from COVID-19.

It also establishes a new procedure for transferring persons apprehended in the vicinity of an internal border in the EU to the Member State from which the person entered. This procedure enables Member States to immediately transfer a person, thus circumventing the

¹¹ *Tagaris, K.*, Europe's south calls for more solidarity in new EU migration pact, 2021, available at: <https://www.reuters.com/article/us-europe-migrants-idUSKBN2BCOJY>.

¹² European Parliamentary Research Service, The European Commission's New Pact on Migration and Asylum, Horizontal substitute impact assessment, August 2021, available at: https://www.europeanmigrationlaw.eu/documents/EPRS_The%20European%20Commission%E2%80%99s%20New%20Pact%20on%20Migration%20and%20Asylum.pdf.

¹³ *Guild, E.*, Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19, *European Journal of Migration and Law*, 2021, pp. 385-404.

¹⁴ Iceland, Lichtenstein, Norway and Switzerland.

¹⁵ Communication from the Commission, State of Schengen Report 2022, 24 May 2022, COM(2022) 301 final/2.

¹⁶ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021, COM(2021) 891 final.

Dublin procedure. The decision to refuse entry can be appealed, but the appeal has no suspensive effect and can therefore not stop the transfer. In this light, the proposal also contains an amendment to the Return Directive, requiring the receiving Member State to issue a return decision to the transferred person.

This border procedure seems to me to indicate a lack of mutual trust and it should be made clear that this may never result in a situation of refoulement that would be in breach of its prohibition in Article 19(2) of the EU Charter of Fundamental Rights. In addition, one precondition is good and fair cooperation between Member States (solidarity) and a significant improvement in the diplomatic relations with the third countries of return.¹⁷

The proposal introduces a list of grounds that may give rise to a “serious threat to public policy or internal security” and would justify temporary border controls. This list introduces new grounds, including “large scale health emergencies”, as well as “large scale unauthorized movements”. “Large scale health emergencies” is related to COVID-19 and other pandemics.

The proposed definition of “large scale unauthorized movements” seems to be too vague and leaves Member States with too much discretion to maintain controls at their internal borders based on so-called secondary movements.¹⁸ In this way, the right to asylum, as included in Article 18 of the EU Charter, can easily be frustrated. Article 4 of the Schengen Borders Code obliges Member States to apply the Code in full compliance with Union Law, including the EU Charter of Fundamental Rights.

III. Instrumentalization of migrants

In 2021, Latvia, Lithuania, and Poland were confronted with an emergency situation characterized by a sudden inflow of nationals of third countries which was instrumentalized by Belarus for political purposes. The government of President Lukashenko facilitated asylum seekers from third countries, like Iraq, Syria, and Afghanistan, being able to cross the borders of the EU. The response was to refuse reception to the migrants in the Member States and to send them back. Human rights concerns grew because of pushbacks by the Polish military. Pushbacks are unlawful under EU law, since a migrant’s application for asylum should always take place before forced return is allowed. The European Court of Human Rights ruled that the collective expulsion of Chechen families at the Poland-Belarus border was in violation of the European Convention on Human Rights.¹⁹ In 2022, pushbacks were also used by Croatia (back to Bosnia), Greece (back to Turkey) and France (back to the UK). In 2021, the European Commission published a proposal to prevent the abuse of migration law for geopolitical purposes.²⁰

¹⁷ Heijer, *Den M.*, The Pitfalls of Border Procedures, *Common Market Law Review* 2022, pp. 641-672.

¹⁸ Meijers Commission, *Commentary on the Commission Proposal Amending the Schengen Borders Code (COM(2021) 891)*, CM2205.

¹⁹ Articles 3 and 13 of the Convention and Article 4 of Protocol No. 4 to the Convention; see, ECHR, *Judgment of 30 June 2022, A.B. and Others v. Poland*, Application no. 42907/17, and *A.I. and Others v. Poland*, Application no. 39028/17.

²⁰ Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, 1 December 2021, COM(2021) 752 final.

The proposal enables Member States, when faced with the “instrumentalization of migrants”, to limit the number of border crossing points and intensify border surveillance. This proposal must be read together with the draft recast of the Schengen Borders Code, which provides a definition of instrumentalization of migrants.²¹ Instrumentalization of migrants refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement to the external borders to destabilize the Union or a Member State.

To counterbalance, the European Commission proposed an emergency procedure with the possibility to make use of the so-called border procedure, where the asylum seeker is treated as if he is not on EU territory, and to extend the time period for processing the asylum application. This is processed at the external EU borders. The proposal follows from the triggering of Article 78(3) TFEU in response to the instrumentalization of migrants at the external border. It is presented as a response to a “hybrid attack on the EU as a whole”.

The European Council for Refugees and Exiles states in their comments that the measures would have an adverse effect on the right to asylum by creating a parallel system of managing borders and asylum for situations of “instrumentalization”, based on derogations from the standards in the asylum acquis.²²

Although the proposed regulation does mention the principles of non-refoulement, best interests of the child, and the right to family life, it does not include the necessary guarantees to ensure that the rights are accessible in practice. There is also concern about the broad and unclear definition of “instrumentalization” which covers too many situations at the EU’s external borders and can be applied too easily. In the summer of 2022, Poland built a fence that is five-metres high and more than 185 kilometres long, along the border with Belarus.

In the case *N.D and N.T versus Spain*, the European Court of Human Rights made it clear that the border States must keep a door in their fences to offer asylum seekers an opportunity to apply for international protection.²³ In this case, migrants climbed over the fences at the border of Melilla, a Spanish enclave in Morocco, and were directly deported by Spain. States should offer “appropriate arrangements”, but the Court did not formulate concrete criteria. Fencing and pushbacks make the need for clarity more urgent.²⁴

IV. Labour migration

²¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021, COM(2021) 891 final , see Article 2 point 27.

²² ECRE, Comments on the Commission proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalization in the field of migration and asylum, COM(2021) 890 final, January 2022, available at: <https://ecre.org/wp-content/uploads/2022/01/ECRE-Comments-Instrumentalisation-January-2022.pdf>.

²³ ECHR, Judgment of 13 February 2020, *N.D. and N.T. v. Spain*, Application nos. 8675/15 and 8697/15.

²⁴ *Strik, T.*, Fundamental Rights as the Cornerstone of Schengen, *European Journal of Migration and Law* 2021, pp. 508-534, p. 513.

On 27 April 2022, the European Commission proposed a so-called ambitious and sustainable legal migration policy. It is intended to solve current labour shortages and needs, for example in the long-term care sector. It should also provide a legal entry for third-country workers to the EU.

This idea had already been mentioned in the Pact.²⁵ The proposal consists of legal, operational and policy initiatives that should benefit the EU's economy, strengthen cooperation with third countries and improve overall migration management in the long run. Attention has also been given to the influx of those fleeing Russia's invasion of Ukraine and how they should be integrated in the EU's labour market.

With this initiative the European Commission recognizes that legal migration has a positive impact all round: It gives those who want to migrate an opportunity to improve their circumstances, while providing more skilled workers for host countries, who in turn boost the economy for all. For that reason, the Commission proposed revising the Single Permit Directive and streamlining the procedure for a combined work and residence permit. It will ensure equal treatment of workers from non-EU countries and those of Member States and will prevent labour exploitation. This is important because during the COVID-19 pandemic, the poor labour conditions of migrant workers in the EU were more visible than ever, attracting attention from the Fundamental Rights Agency of the EU.²⁶

The Long-term Residence Directive should also be revised and the admission conditions for the EU long-term residence status should be simplified. Family reunification and intra EU-mobility will be enhanced. The Commission sees the potential for focusing on forward-looking policies around three areas of action: care, youth and innovation.

Following a pilot, the Commission is now committed to partnerships with Morocco, Tunisia and Egypt. Labour exploitation and brain drain are to be mitigated. The Commission also wants to create a "talent pool" for the millions of Ukrainian refugees who are expected to stay in the EU for a longer period of time; employers can then see who they can use from that pool. Labour participation of people from Ukraine is higher in most Member States than that of asylum seekers, because the Temporary Protection Directive facilitates their access to the labour market.²⁷

Although labour shortages are a serious issue in the Netherlands and in other Member States, the Dutch Government was not pleased with the proposal. There is currently a shortage of housing in the Netherlands and the country is hardly capable of providing accommodation to asylum seekers and people fleeing from Ukraine. One other problem is that migration is strongly politicized and most political parties will be keeping an eye on their voters when migration policy is under discussion. More migration is not always what the voters want.

²⁵ Communication from the Commission on a New Pact on Migration and Asylum, 23 September 2020, COM(2020) 609 final, chapter 7.

²⁶ FRA, Stop labour exploitation and protect workers from COVID-19, 13 July 2020, available at: <https://fra.europa.eu/en/news/2020/stop-labour-exploitation-and-protect-workers-covid-19>.

²⁷ OECD, The potential contribution of Ukrainian refugees to the labour force in European host countries, 27 July 2022, available at: <https://www.oecd.org/ukraine-hub/policy-responses/the-potential-contribution-of-ukrainian-refugees-to-the-labour-force-in-european-host-countries-e88a6a55/>.

V. Preferential treatment for people fleeing from Ukraine?

Since Russia's attack on Ukraine, 6.3 million people have fled the country due to the disruption and destruction of their surroundings and the danger to their lives.²⁸ Most people fled to neighbouring Poland – more than 1.3 million people are still there – but also to other EU Member States.²⁹ According to certain Member States, the negative consequences of the war in Ukraine are asymmetrical and several, especially humanitarian consequences, are disproportionately serious. As such, ten Member States (Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia) have signed a joint statement asking the European Commission for more resources to manage the refugee flow of Ukrainian citizens.³⁰ This is a humanitarian emergency, and the Member States are generously trying to provide reception. Their hospitality is highly praised, but it is in stark contrast to the reception of asylum seekers from Syria, Afghanistan and Eritrea for example.³¹

As mentioned before, on 4 March 2022, the EU's Temporary Protection Directive of 2001 was activated in order to provide a special form of protection to people fleeing from Ukraine.³² This Directive has never been used before, even the so-called Migration Crisis in 2015, when 1 million asylum seekers from Syria came to the EU, appears not to have been perceived as a reason to activate the Directive. The Directive was activated because it should allow people fleeing from Ukraine to enjoy harmonized rights across the Union that offer an adequate level of protection. It is also expected to benefit the Member States, as the rights accompanying temporary protection limit the need for displaced persons to immediately seek international protection and thus help avoid the risk of overwhelming their asylum systems. The Directive reduces formalities to a minimum because of the urgency of the situation.

This warm welcome raises the question of whether the reception of people from Ukraine does not constitute unequal treatment of those from the Middle East or Africa. Is there an objective justification for the differentiation in legal approach?

Ukrainian nationals are visa-free travellers and have the right to move freely within the Union after being admitted to the territory for a 90-day period.³³ The Temporary Protection Directive grants migrants from Ukraine, among other things, the right to a residence permit

²⁸ This section is adapted from my contribution with *Christa Tobler*, Reception of people from Ukraine: Discrimination in international protection? Leiden Law Blog, 17 May 2022, available at: <https://www.leidenlawblog.nl/articles/reception-of-people-from-ukraine-discrimination-in-international-protection>.

²⁹ UNHCR, Ukraine Refugee Situation, available at: <https://data.unhcr.org/en/situations/ukraine>.

³⁰ See: https://www.politico.eu/wp-content/uploads/2022/05/02/Joint-statement-on-the-needs-and-challenges-regarding-the-unprecedented-humanitarian-migration-to-the-European-Union.pdf?utm_source=POLITICO.EU&utm_campaign=d351aa7783-MAIL_CAMPAIGN_2022_05_03_04_33&utm_medium=email&utm_term=0_10959edeb5-d351aa7783-190899872.

³¹ *Peers, S.*, Temporary Protection for Ukrainians in the EU? Q and A, EU Analysis, 27 February 2022, available at: <https://free-group.eu/2022/03/02/eu-law-analysis-temporary-protection-for-ukrainians-in-the-eu-q-and-a/>.

³² Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Official Journal L 71/1, 4 March 2022, pp. 1-6.

³³ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, Official Journal L 303, 28 November 2018, pp. 39–58.

(Article 8), work (Article 12), housing (Article 13), education for young persons (Article 14), family reunification (Article 15) and access to the asylum procedure; in case no decision about asylum is taken during the temporary protection period, the Member State must do so thereafter (Article 17). Compared to the rights of regular asylum seekers under EU law, the position of persons falling under the Temporary Protection Directive is more beneficial.

On the other hand, the Temporary Protection Directive has always been perceived as an instrument of interstate solidarity. In the concrete emergency situation of Ukraine, Member States should act in accordance with Article 80 of the TFEU, the principle of solidarity and fair sharing of responsibility between the Member States, which governs the Union's asylum policy. In its case law, the Court of Justice of the European Union has emphasized the importance of this principle in migration affairs.³⁴ Considering the influx in Poland of people from Ukraine, the other Member States must help based on the EU principle of solidarity.

However, in my opinion, this preferential treatment is only justified on a temporary basis and unequal treatment of migrants depending on their home country should be prevented.³⁵ In the Netherlands, the differentiation in reception facilities of the municipalities has been qualified as unequal treatment by the Dutch Human Rights Commission.³⁶

VI. Final remarks

From a human rights perspective, the plans for change as discussed above do mention the guarantee of fundamental rights but seem to miss the operational tools to enforce these rights. It is time to summarize the findings.

EU migration and asylum policy should adapt to new refugee movements. One of the main issues is how to achieve equal sharing of the burden and respect of solidarity. Solutions should be based on mutual trust and a common approach by all the Member States of the EU. To tackle the problems, the European Commission has proposed the New Pact on Migration and Asylum. Although this attempt is commendable, the solutions are based mainly on the same concepts from the past. It seems to me that measures to actually assist the border States are still lacking and the unfair rule of the Dublin Regulation has not been amended. The preservation of the first country of entry criterion of the Dublin Regulation in the New Pact on Migration and Asylum coupled with the newly introduced border procedure, will increase rather than lower the pressure on border States. The best way to relieve the burden on border States is the introduction of a system of solidarity. The Pact, however, provides too much flexibility to the Member States.

The new border procedure as proposed in the draft of the reviewed Schengen Borders Code seems to be more focused on the interest of the host Member State, instead of on the human rights of the migrants. One worrying aspect is the discretionary power of the Member

³⁴ CJEU, Judgment of 2 April 2020, *European Commission v. Republic of Poland and Others*, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

³⁵ See Article 1(3) International Convention to Eradicate all forms of Racial Discrimination.

³⁶ <https://www.mensenrechten.nl/actueel/nieuws/2022/07/29/oproep-aan-de-staatssecretaris-van-asiel--migratie-legitimeer-geen-discriminerend-opvangbeleid-van-gemeenten>.

States to introduce internal border controls. The right to asylum and the prohibition of refoulement are fundamental and should not be in conflict with border management. The proposed Schengen Borders Code provides too many vague exceptions for Member States to reintroduce border controls and therefore undermines the legal protection of migrants.

The extent to which the migration debate has become politicized is illustrated by the theme of instrumentalization of migrants. Just to frustrate certain Member States of the EU, desperate asylum seekers were transported to Belarus and dumped at the border with Poland. As difficult as it is to stop this new phenomenon, it is inhumane and contrary to fundamental rights to push back asylum seekers. Diplomatic or economic sanctions seem to be a more appropriate answer. If a fence is chosen as a solution, there must always be a door in the fence where migrants can apply for international protection.

The plans related to labour migration are a good step towards facilitating a legal route to the EU for third-country nationals. In view of labour shortages in many EU Member States, labour migration can offer a solid solution. The European Commission's plans, however, seem to lack sufficient support for the Member States concerned. Currently, in these politically polarized times in society, it seems to be difficult for governments to embrace labour migration.

Managing asylum is complex because unexpected events, climate change, economic disasters and repressive governments can change the situation. The war in Ukraine has demonstrated the impact of such an event on the Member States of the EU. The assistance provided in the EU to Ukrainians is commendable, but this should not lead to other asylum seekers, who also deserve international protection, being left behind. Temporary support for people fleeing from Ukraine is necessary and justified. Yet, care must be taken to ensure that this preferential treatment does not lead to the unequal treatment of other asylum seekers.